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COMMENTARIES  
ON THE  
LAW OF NEGLIGENCE  
IN ALL RELATIONS

[INCLUDING A COMPLETE REVISION OF THE AUTHOR'S  
PREVIOUS WORKS ON THE SAME SUBJECT]

BY  
SEYMOUR D. THOMPSON, LL. D.

IN SIX VOLUMES  
VOLUME II

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## NOTE TO VOLUME TWO

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This volume embraces the subject of Railway Negligence in all relations except that of Carriers of Passengers and that of Master and Servant. The subject of Carriers of Passengers is treated in Volume Three, and the subject of Master and Servant in Volume Four. This volume also embraces the subject of the liability of Telegraph Companies for negligence in failing to transmit and deliver messages promptly and correctly.







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TITLE TEN.



STREET RAILWAY NEGLIGENCE.







# COMMENTARIES

ON THE

## LAW OF NEGLIGENCE.

### TITLE TEN.

#### STREET RAILWAY NEGLIGENCE.

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<sup>1</sup> Some matters relating to the obstruction of the highway by steam railways, depending upon the same principles, have been considered in

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§ 1345. **Necessity of Obtaining Consent of Local Authorities to the Construction of Street Railways.**—Constitutional provisions exist in many of the States to the effect that no street railway shall be constructed, within the limits of any city or town, without the consent of its local authorities.<sup>2</sup> Some of these constitutional provisions also provide that no such franchises shall be *transferred* unless the like consent is first obtained.<sup>3</sup> Such a provision was embodied in an amendment to the Constitution of New York, adopted in 1874, as follows: "No law shall authorize the construction or operation of a street railroad, except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad, be first ob-

<sup>2</sup> Ala. Const. of 1875, art. 14, § 24; Const. Idaho, 1889, art. 11, § 11; Ill. Const. of 1870, art. 11, § 4; Mo. Const. of 1875, art. 12, § 20 [see *Atlantic & C. R. Co. v. St. Louis*, 3 Mo. App. 315]; Const. Mont., 1889, art.

15, § 12; Neb. Const. of 1875, art. 11, § 2; Pa. Const. of 1873, art. 17, § 9; Tex. Const. of 1876, art. 10, § 7; W. Va. Const. of 1872, art. 11, § 5.

<sup>3</sup> Mo. Const. of 1875, art. 12, § 20.



tained. Or in case the consent of such property owners can not be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.”<sup>4</sup> A railway lying wholly within the limits of a city, and running exclusively *beneath its streets*, is a “street railroad,” within the meaning of the above constitutional provision; and therefore the New York statute of 1880, commonly called the “Tunneling Act,”<sup>5</sup> which provided that the determination of the commissioners, confirmed by the court, may be taken in lieu of the consent of the city authorities, was unconstitutional.<sup>6</sup> Independently of constitutional provisions, statutes have been enacted in affirmation of this principle in particular cases, and these have sometimes been the subject of judicial interpretation. A proviso to a section of the general railroad act of 1872, of Illinois, recited “that, in case of the constructing of said railway *along highways* \* \* \* such railway shall either first obtain the consent of the lawful authorities \* \* \* or condemn the same,” etc.<sup>7</sup> Under this statute, the consent of the lawful authorities was necessary only in case the railroad was to be constructed *along* or *lengthwise* of a highway: it was not necessary where the road was to be constructed *across* a highway, but in the latter case the grant of power contained in the statute was absolute.<sup>8</sup>

**§ 1346. Obstructions of Public Streets and Highways by Railroads.**—It must be kept in view, at the outset of this inquiry, that a railroad in a public street or highway is, like any other obstruction or *purpresture*, a *public nuisance*, unless laid there under a valid public authorization, which must proceed either from the legislature of the State in a special charter or in a general law, or from a municipal corporation acting under a power conferred upon it by the legislature.<sup>9</sup> If the obstruction is not permanent in its nature, it is sometimes de-

<sup>4</sup> N. Y. Const. 1894, art. 3, § 18. Effect of granting such consent with a qualification upon the validity of the organization of the corporation: *Matter of Kings County Elevated R. Co.*, 105 N. Y. 97; s. c. 13 N. E. Rep. 18; 7 Cent. Rep. 232; 7 N. Y. St. Rep. 186. Condition that the company shall not carry freight is void: *State v. Dayton Traction Co.*, 18 Ohio Cir. Ct. R. 490; s. c. 10 C. D. 212.

<sup>5</sup> N. Y. Laws 1880, ch. 582.

<sup>6</sup> *Matter of New York District R. Co.*, 107 N. Y. 42; s. c. 32 Am. & Eng. Rail. Cas. 202; 14 N. E. Rep. 187; 9 Cent. Rep. 824; 11 N. Y. St. Rep. 753.

<sup>7</sup> Rev. Stat. Ill., ch. 114, § 20, par. 5.

<sup>8</sup> *Cook v. Great Western R. Co.*, 119 Ill. 218; s. c. 10 N. E. Rep. 564; 8 West. Rep. 361.

<sup>9</sup> *Philadelphia v. Citizens' Pass. R. Co.*, 151 Pa. St. 128; s. c. 24 Atl. Rep. 1099; 48 Phila. Leg. Int. 220; 10 Pa. Co. Ct. 16.



scribed in the books as *negligence per se*,—as where a street which is crossed at grade by a railway is obstructed for an unreasonable length of time by standing cars.<sup>10</sup> On the other hand, a railway constructed in the streets of a town or city under a valid legislative or municipal authorization is not a nuisance when constructed, kept in repair, and operated without negligence.<sup>11</sup> This emphasizes the importance of the inquiry which must be made at the very outset, whether the railroad in the street is there under a valid legislative or municipal authorization. As this inquiry lies outside the scope of this work, and as its solution would involve an amount of detail for which there is no space here, the author will content himself by referring to a number of modern cases which have come under his eye, speaking both ways upon the question, under particular facts and circumstances.<sup>12</sup>

<sup>10</sup> Central R. Co. v. Curtis, 87 Ga. 416; s. c. 13 S. E. Rep. 757.

<sup>11</sup> Louisville & C. R. Co. v. Orr, 91 Ky. 109; s. c. 15 S. W. Rep. 8; 12 Ky. L. Rep. 756; 9 Rail. & Corp. L. J. 189.

<sup>12</sup> Under the circumstances described in the following cases, and under the operation of constitutional provisions, statutes, and municipal ordinances there construed, railroad companies have been held to be *rightfully in the occupation of the public streets*: Yates v. West Grafton, 34 West Va. 783; s. c. 12 S. E. Rep. 1075; Tudor v. Chicago & C. R. Co. (Ill.), 27 N. E. Rep. 915 (no off. rep.); Glick v. Baltimore & C. R. Co., 19 D. C. 412; s. c. 19 Wash. L. Rep. 2; Henderson v. Ogden City R. Co., 7 Utah 199; s. c. 26 Pac. Rep. 286; 46 Am. & Eng. Rail. Cas. 95 (right may be granted to individuals as well as to corporations); State v. Camden, 53 N. J. L. 322; s. c. 21 Atl. Rep. 565. Under the circumstances described in the following cases, and under the operation of constitutional provisions, statutes, and municipal ordinances there construed, railroad companies have been held to be *not rightfully in the occupation of the public streets*: Gates v. Chicago & C. R. Co., 82 Iowa 518; s. c. 48 N. W. Rep. 1040; Fitzgerald v. Baltimore & C. R. Co., 19 D. C. 513; s. c. 19 Wash. L. Rep. 137; Methodist Church v. Pennsylvania R. Co., 48 N. J. Eq. 452; s. c. 22 Atl. Rep. 183; Chicago & C. R. Co. v. People, 134 Ill. 323; s. c. 27 N. E. Rep. 192 (time expired); Taylor v. Dunn, 80 Tex. 652; s. c. 16 S. W. Rep. 732 (road built to transport

materials to build State capitol); Cincinnati & C. R. Co. v. Chattanooga & C. R. Co., 44 Fed. Rep. 470 (condemning crossing over another road without compensation); Re Rochester Elec. R. Co., 123 N. Y. 351; s. c. 25 N. E. Rep. 381; 46 Am. & Eng. Rail. Cas. 157; 33 N. Y. St. Rep. 695; aff'g 57 Hun (N. Y.) 56; s. c. 32 N. Y. St. Rep. 1; 10 N. Y. Supp. 379; People's Pass. R. Co. v. Memphis (Tenn.), 16 S. W. Rep. 973 (no off. rep.) (city under no obligation to give consent authorized by legislature); Larimer & C. R. Co.'s Appeal, 137 Pa. St. 533; s. c. 20 Atl. Rep. 570; 21 Pitts. L. J. (N. S.) 95; 27 W. N. C. 113; 47 Phila. Leg. Int. 515 (consent of city a condition precedent to exercise rights under a street railway charter); St. Louis R. Co. v. Southern R. Co., 105 Mo. 577; s. c. 15 S. W. Rep. 1013; 46 Am. & Eng. Rail. Cas. 1; Union Depot R. Co. v. Southern R. Co., 105 Mo. 562; s. c. 15 S. W. Rep. 1023; aff'd on rehearing in 16 S. W. Rep. 920; Union R. Co. v. Southern R. Co., 105 Mo. 602; s. c. 15 S. W. Rep. 1023; aff'd on rehearing in 16 S. W. Rep. 923 (right of street railway to occupy streets not grantable unless on grounds of public utility,—power of City of St. Louis to withhold license to street railway companies to occupy its streets); Chicago & C. R. Co. v. Chicago, 121 Ill. 176; s. c. 9 West. Rep. 493; 11 N. E. Rep. 907. Other decisions relating to this subject are to the effect that a city ordinance forbidding the digging up of the surface of the street except by permission of the selectmen, is, when applied to the laying



§ 1347. **Street Railway Companies can not Exclude the Public from the Streets.**—Outside of this it is to be kept in mind that, in dealing with this subject, the courts pursue the general principle that a right given to a railroad company to lay its tracks upon a public street is to be so far exercised in subordination to the general right of the public to use the street, that the railroad company can not make its right exclusive.<sup>13</sup> For example, a street railroad company can not, in the exercise of a statutory right to lay its track upon the street of a city, occupy a street which is too narrow to admit of the passage of cars and other vehicles at the same time, nor construct it so as to interfere with the rights of the general public in the street; nor in a

by a railway company of its track across the street under a valid authorization, an unreasonable interference with its franchises: *Allen v. Jersey City*, 53 N. J. L. 522; s. c. 22 Atl. Rep. 257. That a municipal corporation may pass reasonable ordinances prescribing the manner in which a railroad company shall enjoy its franchise of occupying the public streets: *Allen v. Jersey City*, 53 N. J. L. 522; s. c. 22 Atl. Rep. 257. That, under circumstances named, it is for the railway company, and not for the highway commissioner, to determine the manner and place of restoring a public highway disrupted by the company: *Post v. West Shore & C. R. Co.*, 123 N. Y. 580; s. c. 34 N. Y. St. Rep. 484; 26 N. E. Rep. 7; aff'g 50 Hun (N. Y.) 301; s. c. 20 N. Y. St. Rep. 180; 3 N. Y. Supp. 172. That a city has no power to grant to a street railway company the *exclusive* right of way upon its streets: *Henderson v. Ogden City R. Co.*, 7 Utah 199; s. c. 26 Pac. Rep. 286; 46 Am. & Eng. Rail. Cas. 95; *People's Pass. R. Co. v. Memphis* (Tenn.), 16 S. W. Rep. 973 (no off. rep.). Construction of a city ordinance held to render a railway company liable in damages to adjacent property owner for constructing a viaduct in a street: *Chicago & C. R. Co. v. Chicago*, 134 Ill. 323; s. c. 25 N. E. Rep. 514; aff'g s. c. 35 Ill. App. 206. What street is deemed public within the meaning of a statute relating to this subject: *Chester v. Baltimore & C. R. Co.*, 140 Pa. St. 275; s. c. 21 Atl. Rep. 320. That the right to construct a tunnel includes the right to make suitable grade approaches: *O'Brien v. Baltimore Belt R. Co.*, 74 Md. 363; s. c. 22 Atl. Rep.

141; 13 L. R. A. 126. That the general right to grade, improve, and use certain streets allows a partial obstruction of the highway, but not to the extent of preventing vehicles from crossing: *Chicago & C. R. Co. v. Quincy*, 136 Ill. 489; s. c. 27 N. E. Rep. 232; rev'g 32 Ill. App. 377. That a municipal authorization to a railroad company to use a street gives it authority to lay *additional tracks* if its business requires it: *Chicago & C. R. Co. v. Eisert*, 127 Ind. 156; s. c. 26 N. E. Rep. 759. That authority to extend a railroad from Maryland into the District of Columbia includes authority to *lay a double track* where the road to be extended has already a double track: *Glick v. Baltimore & C. R. Co.* 19 D. C. 413; s. c. 19 Wash. L. Rep. 2. Construction of the English Tramway Act of 1870, § 33, with reference to submitting differences to *arbitration*, the difference being as to the right of municipal corporation to take up a granite pavement and lay down a wood pavement over the whole of the roadway: *Bristol Trams & C. Co. v. Bristol*, 25 Q. B. Div. 427. Interpretation of the words "*line of railroad*" in a city ordinance authorizing the construction of a railroad in a street: *Chicago & C. R. Co. v. Eisert*, 127 Ind. 156; s. c. 26 N. E. Rep. 759. Want of power in the president of a street railroad company to suspend the running of its cars, and to cut its wires to enable another party to move a large building across the street: *Millville Traction Co. v. Goodwin*, 53 N. J. Eq. 448; s. c. 32 Atl. Rep. 263.

<sup>13</sup> *Post*, § 1374.



street, though of sufficient width, the condition of which is such that the operation of the railway will result in the practical exclusion of the general public from the use of it. A railway so constructed and operated would be a *public nuisance* which the courts would abate.<sup>14</sup> Assuming that a street railway company has the right temporarily to obstruct the public street, as by laying a hose across it from the hydrant on one side of a street to a tank car on the company's track, for the purpose of filling the tank on the car with water to be used in sprinkling the company's track,—it is under the obligation of giving the public such reasonable notice of the obstruction as will enable them to protect themselves from injury thereby; and whether a warning given in such a case was reasonably sufficient, presents a question of fact for a jury.<sup>15</sup> Nor is it competent for a *municipal corporation*, in the exercise of a general power on this subject, to multiply licenses to street railroad companies to occupy streets to such an extent as to interfere with the rights of the general public in the use of them.<sup>16</sup> But where the injury inflicted by the railroad company, in thus unlawfully appropriating a public street, results merely in depriving an individual of the use of the street, then, whether he will have a right of action for damages depends upon the inquiry whether his damages are deemed to be *special damages*, within a rule already considered. If he merely suffers in common with the rest of the public, though in a greater degree than others, then he can not maintain an action, because this would lead to such a multiplicity of suits as would be an intolerable evil.<sup>17</sup>

§ 1348. **Rights of Abutting Property Owners Owning the Fee in the Street.**<sup>18</sup>—It is not intended to go into this subject, it being not germane to this work, further than to say that there are two opposing

<sup>14</sup> *Detroit City R. Co. v. Mills*, 85 Mich. 634; s. c. 43 N. W. Rep. 1007; 10 Rail. & Corp. L. J. 104; 46 Am. & Eng. Rail. Cas. 608. See also *Street R. Co. v. West Side St. R. Co.*, 48 Mich. 433.

<sup>15</sup> *North Jersey St. R. Co. v. Morhart* (N. J. L.), 45 Atl. Rep. 812.

<sup>16</sup> *Street R. Co. v. West Side St. R. Co.*, 48 Mich. 433.

<sup>17</sup> *Shaw v. Boston & C. R. Co.*, 159 Mass. 597; s. c. 35 N. E. Rep. 92. Lathrop, J., in giving the opinion in this case cites the following Massachusetts cases in support of the doctrine: *Shaw, C. J.*, in *Quincy Canal Co. v. Newcomb*, 7 Met.

(Mass.) 276, 283. See also *Smith v. Boston*, 7 Cush. (Mass.) 254; *Brainard v. Connecticut & C. R. Co.*, 7 Cush. (Mass.) 506, 510; *Blood v. Nashua & C. R. Corp.*, 2 Gray (Mass.) 137, 140; *Castle v. Berkshire*, 11 Gray (Mass.) 26; *Harvard College v. Stearns*, 15 Gray (Mass.) 1; *Hartshorn v. South Reading*, 3 Allen (Mass.) 501; *Willard v. Cambridge*, 3 Allen (Mass.) 574; *Blackwell v. Old Colony R. Co.*, 122 Mass. 1; *Davis v. County Commissioners*, 153 Mass. 218; *Hammond v. County Commissioners*, 154 Mass. 509.

<sup>18</sup> Compare §§ 1349, 1351, 1353, where this section is referred to.



theories on this question. One is that the State has the power to transfer the use of all or a portion of a public street or highway to a railroad company, without making compensation to the owners of the fee for the additional servitude imposed upon it, and without making compensation to adjacent property owners. The theory is that this is not a taking of property for public uses within the meaning of a constitutional prohibition.<sup>19</sup> The other and far more preferable theory is, that an act of the legislature or a municipal ordinance which authorizes a railroad company thus to occupy a public street or highway, has merely the effect of giving the public consent as against the rights of the public,—that is to say, of surrendering the public easement to that extent, leaving the railroad company liable to pay the owners of the fee and abutting property owners the just compensation and the damages which right and justice require.<sup>20</sup> A different inquiry, and one more pertinent to the present work is, what rights of action the abutting property owners, being the owners of the fee, will have against the railroad company, growing out of the manner in which it exercises its license thus to occupy the public street. Here it is plain that a right of action will not arise, on the theory of negligence or nuisance, from the fact that it is doing what is necessary to enjoy its license. This is a necessary deduction from the principle that an act which is authorized by a valid statute or municipal ordinance, and which is consequently in itself not unlawful, can not be made the foundation of an action, unless done with negligence.<sup>21</sup> So, also, if the railroad does not occupy the highway, but adjoins it, the railroad company may do anything upon the highway in the operations of building its road which any other abutting land-owner might do. We have seen that abutting property owners are accorded the right to occupy the highway temporarily for the purpose of excavating for their buildings, and storing building materials thereon.<sup>22</sup> An analogous right is accorded to a railway company under the circumstances above supposed. If, for example, it becomes necessary, in excavating for its road-bed, or in building a bridge, to throw dirt temporarily upon the highway, or to occupy it temporarily with its structures, materials, or machines, this will give no right of action on the theory of trespass to the owner of the fee in the street.<sup>23</sup> It enjoys the same immunity

<sup>19</sup> *Yates v. West Grafton*, 34 W. Va. 783; s. c. 12 S. E. Rep. 1075.

<sup>20</sup> *Lamm v. Chicago &c. R. Co.*, 45 Minn. 71; s. c. 47 N. W. Rep. 455; 10 L. R. A. 268; 9 Rail. & Corp. L. J. 222; 43 Alb. L. J. 71; 46 Am. & Eng. Rail. Cas. 42; *Gray v. First Division*

&c. R. Co., 13 Minn. 315; *Kaiser v. St. Paul &c. R. Co.*, 22 Minn. 149.

<sup>21</sup> *Kellinger v. Forty-second St. R. Co.*, 50 N. Y. 206.

<sup>22</sup> Vol. I., § 1222, *et seq.*

<sup>23</sup> *Fitch v. New York &c. R. Co.*, 59 Conn. 414; s. c. 20 Atl. Rep. 345; 10 L. R. A. 888.



from actions on the part of persons making use of the street as a public highway. If, for instance, it becomes necessary, in order to lay its tracks in the street, to do which it has a valid public authorization, to throw quantities of dirt and rubbish upon the street, a traveller injured by coming upon the obstruction will not have a right of action against it, without averring and proving that the obstruction was made negligently, or continued for an unreasonable length of time.<sup>24</sup> In such cases, as elsewhere seen, a railroad company is under the public duty, even where there is no statute so commanding, to restore the highway to its original condition as nearly as may be, and within a reasonable time, the failure to perform which duty may give a right of action against it.<sup>25</sup> We conclude by saying that the mere fact that a railroad company lays its track *near* a public highway does not make it *per se* a nuisance, and does not constitute negligence as matter of law,—provided, of course, it lays it there under a valid public authorization; so that if a traveller is killed or injured by reason of his horse taking fright at a passing train while passing along the highway in proximity to the railroad, no action for damages will thereby accrue.<sup>26</sup> Where a railroad company proceeds to lay its track in the public street under the latter of the foregoing rules without first instituting a statutory proceeding to assess the damages done to adjoining owners, they are entitled to maintain actions for the damages, and to have their damages assessed in such actions from the date of the laying of the track to the institution of the suit.<sup>27</sup> In such a case it has been held that a street railway company will be liable for all damages which result to abutting owners from the construction and use of its railway in the street above the pavement thereof, although the grade of the track was established by the city authorities.<sup>28</sup>

<sup>24</sup> *Cowan v. Muskegon R. Co.*, 84 Mich. 583; s. c. 48 N. W. Rep. 166.

<sup>25</sup> *Post*, § 1475.

<sup>26</sup> *Beatty v. Central Iowa R. Co.*, 58 Iowa 242.

<sup>27</sup> *Mulholland v. Des Moines & C. R. Co.*, 60 Iowa 740; *Mollandin v. Union & C. R. Co.*, 14 Fed. Rep. 394; *Taylor v. Bay City St. R. Co.*, 101 Mich. 140; s. c. 59 N. W. Rep. 447.

<sup>28</sup> *Taylor v. Bay City St. R. Co.*, 101 Mich. 140; s. c. 59 N. W. Rep. 447. Not error to allow plaintiffs to introduce evidence that drays and teams could not stand at right angles with their track by reason of the existence of the defendant's

track: *Taylor v. Bay City Street R. Co.*, *supra*. Not error to instruct the jury to add interest by way of damages: *Taylor v. Bay City Street R. Co.*, *supra*. As to interest by way of damages, see note 18 L. R. A. 449. That the fact of petitioning a street railroad company to grade the street through which its tracks run, to "established grade," will deprive abutting property owners of the right to recover for the injuries to their property by being left below the street grade, if the established grade is followed: *Pratt v. Holmes St. R. Co.*, 49 Mo. App. 63.



§ 1349. **Further of this Subject.**—The principle already considered,<sup>29</sup> that a railroad company can not be liable in damages for occupying a public street or highway, under a valid public authorization, provided it proceeds without negligence, has been so far disregarded in a case in Indiana, that where the plaintiffs horse was injured by an alleged defect in a *railway crossing*, it was no defense on the part of the company that the crossing was made in conformity with specifications contained in an ordinance of the city in which it was located and that the work was done to the satisfaction of the city engineer.<sup>30</sup> Neither was it a defense to an action for damages occasioned by striking, in the night-time, against a platform erected upon a sidewalk, that the street commissioner had given a permit for its erection; for, conceding that he had the authority to give such a permit, it could not absolve the defendant from responsibility for its improper or negligent construction.<sup>31</sup> The fact that a railway company is empowered by its charter to make an excavation across a highway, for the purpose of establishing its road-bed, does not justify it in obstructing the highway unnecessarily, or in neglecting proper precautions for the safety of the public. It must erect and maintain suitable guards or barriers to protect travellers from the danger, or pay damages happening to any one in consequence of its failing to do so.<sup>32</sup> But such a corporation is not bound to remove from the highway obstructions placed on the crossing by a *stranger*, if the material constituting the obstructions is neither the property nor under the care and control of the corporation, although the existence of the obstructions is brought to the knowledge of its agents. Nor does such obligation exist although the person so placing the obstructions be a *brakeman* on the company's road, and the material constituting the obstructions be waste manure from the stock-cars of the company, if the brakeman so placed the manure for his own use, without the authority of the company, and at the time was not acting within the scope of his employment and duty as brakeman.<sup>33</sup> Where a corporation constructed a *tunnel* under a street in a populous city, leaving at the mouth of it an unguarded perpendicular wall fourteen feet in depth, and within the line of the highway, into which a child, playing there without negligence of his parents, fell and was injured, receivers in charge of the tunnel were held liable to pay the damage out of the

<sup>29</sup> *Ante*, § 1348. Compare *post*, §§ 49 Me. 119; *Potter v. Bunnell*, 20 Ohio St. 150; *Lowell v. Boston & R. Co.*, 23 Pick. (Mass.) 24.

<sup>30</sup> *Delzell v. Indianapolis & C. R. Co.*, 32 Ind. 45.

<sup>31</sup> *Kessel v. Butler*, 53 N. Y. 612.

<sup>32</sup> *Veazie v. Penobscot & C. R. Co.*,

<sup>33</sup> *Pittsburgh & C. R. Co. v. Maurer*, 21 Ohio St. 421.



fund in their possession.<sup>34</sup> A railway company which has, under authority of its charter or governing statute, obstructed a highway in the necessary building of its road, is bound, in some cases by the terms of the charter or statute itself,<sup>35</sup> but also where the charter or statute is silent, to restore the highway to a reasonably safe condition for travel. In other words, where the charter or statute authorizes the company to create what would otherwise be an indictable nuisance, they are bound, without any express statutory enactment, to provide and maintain, for the benefit of the public, a proper substitute for the way thus obstructed.<sup>36</sup> In the discharge of this duty the railway company must, at all points where their road intersects public highways, construct safe crossings and maintain them in suitable repair, or answer in damages for any injury flowing from a neglect of this duty.<sup>37</sup> A statute requiring such a company to *construct* safe crossings carries with it the continuing obligation of keeping them in *repair*,<sup>38</sup> just as a statute requiring such a company to build fences charges it with the duty of keeping such fences in repair.<sup>39</sup> It has been held that where the municipality has licensed the construction of a railway in a street

<sup>34</sup> Hagan's Petition, 5 Dill. (U. S.) 96; s. c. 7 Cent. L. J. 311. There is a doubtful holding to the effect that a railroad company which maintains an open culvert over a deep ditch on a street in a place frequented by *children* and used as a playground is not guilty of negligence in failing to fill in spaces between broad cross-ties, where such culvert is not in the travelled street, nor in the crossing or footpath at the side of the street, but is between the two, and does not impede the use of either in any manner, and there is a good crossing over the gutter within a few feet of the track-crossing: *Fredricks v. Illinois & C. R. Co.*, 46 La. An. 1180; s. c. 15 South. Rep. 413.

<sup>35</sup> *Farley v. Chicago & C. R. Co.*, 42 Iowa 234; *Wellcome v. Leeds*, 51 Me. 313; *Duffy v. Chicago & C. R. Co.*, 32 Wis. 269; *Roberts v. Chicago & C. R. Co.*, 35 Wis. 679. Such a statute has been construed as a condition precedent to the right of the railroad company to enjoy its license or franchise of occupying the highway. The court will therefore *enjoin* the railway company from proceeding with its work unless it complies with such orders with reference to the doing of the same as the court shall prescribe: *State v. Dayton & C. R. Co.*, 36 Ohio St. 434.

<sup>36</sup> *Rex v. Kerrison*, 3 Mau. & Sel. 527; *Regina v. Ely*, 15 Q. B. 827; 19 L. J. (M. C.) 223; *Rex v. Lindsey*, 14 East 317; *Leech v. North Staffordshire R. Co.*, 29 L. J. (M. C.) 150; *Gillett v. Western R. Corp.*, 8 Allen (Mass.) 563; *Lowrey v. Brooklyn City R. Co.*, 4 Abb. N. C. 32; *Hurley v. Jeffersonville & C. R. Co.*, 1 Wils. (Indianapolis) 295; *People v. Chicago & C. R. Co.*, 2 Am. Ry. Rep. 66. It has been held, under a statute, that a railway company had no right to construct their road across a highway until the conditions and manner of crossing had been determined, as pointed out in the act. If they attempted it, they might be enjoined or indicted: *Commonwealth v. Nashua & C. R. Co.*, 2 Gray (Mass.) 54; *Commonwealth v. Vermont & C. R. Co.*, 4 Gray (Mass.) 22.

<sup>37</sup> *Farley v. Chicago & C. R. Co.*, 42 Iowa 234; *People v. Chicago & C. R. Co.*, 2 Am. Ry. Rep. 66; *Oliver v. North-Eastern R. Co.*, L. R. 9 Q. B. 409; *Hays v. Gallagher*, 72 Pa. St. 136.

<sup>38</sup> *Farley v. Chicago & C. R. Co.*, 42 Iowa 234; *Wellcome v. Leeds*, 51 Me. 313.

<sup>39</sup> *Farley v. Chicago & C. R. Co.*, 42 Iowa 234.



without the previous ascertainment, in the prescribed manner, of compensation for injuries to abutting lands, the licensee, and not the municipality, is liable for the injuries resulting from the construction of the railway.<sup>40</sup>

§ 1350. **Liability for Obstructing Streets and Highways by Railway Trains.**<sup>41</sup>—The privilege is usually extended to railroad companies of running their tracks across public roads, but this does not give them the right unnecessarily to obstruct these roads, either by the standing of their cars upon the highway or in any other manner. The right of the public in the highway for the purpose of travel is paramount to the right and convenience of the companies for any other purpose than that of transit.<sup>42</sup> The duty of leaving the crossings of highways unobstructed, beyond a reasonable use of the same, incident to the right of crossing them, must be observed at the peril of taking the consequences that may ensue from its violation. Therefore, in a case where it was shown that a horse had broken loose from its fastenings, and had pursued its course along a highway towards its owner's house, until it came to a railroad crossing, and then, on account of a train of freight-cars which had remained standing upon the crossing since early in the evening, and which prevented the horse from passing, it wandered along the track of the railroad until about eleven o'clock P. M., when the night passenger-train came up and killed it, it was held that the obstruction of the public road was a wrong done by the company, which, under the circumstances, would have justly entitled the plaintiff to a recovery, even if the killing by the passenger-train had been shown to be, so far as that train was concerned, wholly accidental and blameless.<sup>43</sup> In New Jersey, a railroad company was *indicted for nuisance*. The nuisance complained of was charged to have arisen from an obstruction to the public highway by improperly placing and continuing cars upon it. The defendants urged that there had been no obstruction of the highway except what was necessary for the transaction of their lawful business, and for this purpose and to this extent they had the right to obstruct it: The obstruction complained of was caused by cars standing upon the

<sup>40</sup> *Hatch v. Tacoma &c. R. Co.*, 6 Wash. 1; s. c. 32 Pac. Rep. 1063. Street railway laid upon a railway bridge is an additional servitude under North Carolina statute requiring street railway companies to unite in maintenance of bridge: *Carolina &c. R. Co. v. Wilmington St. R. Co.*, 120 N. C. 520; s. c. 26 S. E. Rep. 913.

<sup>41</sup> Compare § 1381, where this section is referred to.

<sup>42</sup> *State v. Morris &c. R. Co.*, 25 N. J. L. 437; *Peoria &c. R. Co. v. Lyons*, 9 Ill. App. 350. For a note on this subject, see 18 L. R. A. 154.

<sup>43</sup> *Murray v. South Carolina R. Co.*, 10 Rich. L. (S. C.) 227.



track, where it crossed the highway, while receiving and discharging freight at the company's depot, which was situated at the intersection of the railroad and highway. It was admitted that the freight could not be received and discharged at this depot without to some extent impeding the public travel, and that the defendants had not willfully caused any obstruction beyond what their business at this depot required. On appeal it was held that a railroad company are not justified in building a depot upon a highway, or so near to it that their trains must injuriously obstruct the public travel; the company can not, by their own imprudence, create a necessity for the obstruction, and then justify the nuisance on the ground of the necessity which they have created. Whether, in point of fact, the public highway is injuriously obstructed, and a nuisance thereby created, is a question for the jury.<sup>44</sup> It has also been held, in Maine, that an *indictment* will lie against a railroad company for "unreasonably and negligently obstructing by engines, tenders, and cars," "any way."<sup>45</sup> It has been held that a street railway company may, in operating a single track line, having turnout switches for the passage of its cars, stop a car on such a switch for a reasonable time to enable another car to pass, without rendering the stationary car such obstruction to travel as to constitute a *nuisance*.<sup>46</sup> The fact that a dummy engine has been left standing in one place on a public street for half an hour, has been held not of itself negligence or any improper or negligent use of the street.<sup>47</sup> But it has been held that a railway company whose tracks cross a public street, and whose cars stand disconnected upon the street, with a space between them sufficiently large to permit persons to pass through, is guilty of negligence if it closes this space suddenly and without warning approaching footmen; so that it becomes liable for an injury thereby caused to a person who, proceeding in the exercise of ordinary care, climbs over the drawhead of the car instead of passing through the open space.<sup>48</sup>

<sup>44</sup> State v. Morris &c. R. Co., 25 N. J. L. 437.

<sup>45</sup> State v. Grand Trunk R. Co., 59 Me. 189.

<sup>46</sup> Ford v. Charles Warner Co., 1 Marv. (Del.) 88; s. c. 37 Atl. Rep. 39.

<sup>47</sup> Howard v. Union Freight R. Co., 156 Mass. 159; s. c. 30 N. E. Rep. 479.

<sup>48</sup> Schmitz v. St. Louis &c. R. Co., 46 Mo. App. 380. *Contra*, Hudson v. Wabash &c. R. Co., 101 Mo. 13. That the *penalty* prescribed by Ill. Rev. Stat., ch. 114, §§ 63 and 64, for obstructing highway crossings by railway cars, can be recovered of

the corporation for every violation of the statute: Indianapolis &c. R. Co. v. People, 32 Ill. App. 286. Instructions sufficiently favorable to the defendants in an action for damages for negligence in not seasonably removing a car which encumbered a highway crossing: Paine v. Grand Trunk R. Co., 58 N. H. 611. Construction of the phrase "at each end of the lines" in the clause of a charter forbidding cars to remain standing more than ten minutes, etc.: Wilson v. Duluth St. R. Co., 64 Minn. 363; s. c. 67 N. W. Rep. 82; 4 Am. & Eng. Rail. Cas. (N. S.) 53.



§ 1351. **Consequential Damages Arising from Laying Railroads in Streets.**—Recurring to the principle that the doing of an act authorized by law can not *per se* be the ground of an action,<sup>49</sup> we find that it has been held that where a railway company has been authorized by law to lay its tracks in the streets of a city, an abutting owner can not maintain an action against such company upon an allegation that its track was laid so near his premises as not to leave sufficient space for a vehicle to stand; that he and his family are thereby incommoded in leaving their residence and returning to it; and that the rental value of his property is thereby greatly depreciated.<sup>50</sup> This, of course, does not exclude the right of recovery for damages accruing by reason of the work having been negligently or wantonly done; for “all the authorities concur that an injury to private rights or property, committed through negligence or willful misconduct, even though in pursuit of a lawful purpose, may be redressed by an action.”<sup>51</sup> Thus, where a corporation, authorized to build a railway upon a line selected by themselves, and to cross public highways, restoring them to their original usefulness, in crossing a highway near the plaintiff's premises, raised an embankment which obstructed free access to and otherwise injured his property, they were held liable for the damages.<sup>52</sup>

§ 1352. **When Corporation Bound to Repair or Restore Highway.**<sup>53</sup>—Whenever a private person or corporation, in prosecuting any work for his or its private gain, obstructs a public highway, such private person or corporation is bound to restore the same, so that the public easement shall not be substantially impaired or endangered.<sup>54</sup> Thus, a person or corporation cuts a *canal* or *millrace* across a highway. He or it must bridge the same in a substantial manner, and keep the bridge in safe repair,<sup>55</sup> and is liable to pay any *special damages* happening through a failure to perform this duty.<sup>56</sup> So, the owner of a *railway crossing a highway* must restore the highway, by

<sup>49</sup> *Ante*, §§ 1348, 1349.

<sup>50</sup> *Kellinger v. Forty-second St. R. Co.*, 50 N. Y. 206 (distinguishing *People v. Kerr*, 27 N. Y. 188, and explaining *Drake v. Hudson River R. Co.*, 7 Barb. (N. Y.) 508).

<sup>51</sup> *Kellinger v. Forty-second St. R. Co.*, 50 N. Y. 212, *per* Church, C. J.; *Tate v. Missouri &c. R. Co.*, 64 Mo. 149.

<sup>52</sup> *Fletcher v. Auburn &c. R. Co.*, 25 Wend. 462.

<sup>53</sup> Compare § 1359, where this section is referred to.

<sup>54</sup> *Post*, § 1475; *Dygart v. Schenck*, 23 Wend. (N. Y.) 446; s. c. 35 Am. Dec. 575; *Hays v. Gallagher*, 72 Pa.

St. 136; *Duffy v. Chicago &c. R. Co.*, 32 Wis. 269; *Roberts v. Chicago &c. R. Co.*, 35 Wis. 679.

<sup>55</sup> *Dygart v. Schenck*, 23 Wend. (N. Y.) 446; *Rex v. Kent*, 13 East 220; *Rex v. Lindsey*, 14 East 317. Compare *Meadville v. Erie Canal Co.*, 18 Pa. St. 66.

<sup>56</sup> *Bow-Bridge v. Le Prior*, 1 Roll. Abr. 368, tit. “Bridges,” pl. 2; *Dygart v. Schenck*, 23 Wend. (N. Y.) 446; *Phoenixville v. Phoenix Iron Co.*, 45 Pa. St. 135; *Perley v. Chandler*, 6 Mass. 454; s. c. 4 Am. Dec. 159; *Woodring v. Forks Township*, 28 Pa. St. 355; s. c. 70 Am. Dec. 134.



a bridge or otherwise; and, if he has restored it by a bridge, he must keep the bridge in repair, or pay to any person any *special damages* flowing from this neglect.<sup>57</sup> So, if a corporation, whose canal has cut off a highway, restores the public easement by means of a *swivel bridge*, it must keep it guarded or lighted, so that a traveller shall not walk into the canal at night, when it is turned to admit the passage of boats.<sup>58</sup> But a person or corporation thus obstructing a highway is under no greater duty than to keep in repair a *sufficient way*, as it existed before it was obstructed. If the public authorities afterward lay out a *broadway*, and build a *larger bridge* over it, the private person or corporation will not be liable for not keeping such larger bridge in repair.<sup>59</sup> So, where a corporation, established with power to erect a bridge across a river, and take toll of passengers, adopted as part of their bridge a way made by individuals, of a few rods extent, being the only entrance from the public highway to the bridge, and a traveller, passing over this way to the bridge, where he had paid toll, had his horses injured from a defect in such way,—it was held that the traveller was entitled to recover of the corporation the damages thereby sustained, including not only the value of his horses but prudent expenditures made in his endeavors to cure them of their injuries.<sup>60</sup>

**§ 1353. Liability of Railway Companies for Injuries from Tracks Laid in Streets.**—A railway company, having a right to lay its tracks in a public street, is bound, as a mere matter of law, and without any express undertaking on its part to that effect, to lay them in a proper manner,<sup>61</sup> and to keep them in a proper state of repair;<sup>62</sup> and if any

<sup>57</sup> Hays v. Gallagher, 72 Pa. St. 136; Duffy v. Chicago &c. R. Co., 32 Wis. 269; Roberts v. Chicago &c. R. Co., 35 Wis. 679.

<sup>58</sup> Manley v. St. Helens Canal Co., 2 Hurl. & N. 840. And see Wiggins v. Boddington, 3 Car. & P. 544.

<sup>59</sup> Phoenixville v. Phoenix Iron Co., 45 Pa. St. 135.

<sup>60</sup> Watson v. Lisbon Bridge, 14 Me. 201; s. c. 31 Am. Dec. 49. Where a street railway company was, under its governing statute, required to repair such portions of the streets as should be occupied by its tracks, and was made liable for any injury caused by defects in the portions of the street so occupied arising from the neglect of the company, and the company in building its track near a ditch which was separated from the travelled way by a fence, re-

moved the fence and did not replace it, and the ditch was within the limits of the highway,—it was liable to a person who fell into the ditch and was injured while attempting to board a car of the company in the dark: Call v. Portsmouth &c. St. Ry. (N. H.), 45 Atl. Rep. 405.

<sup>61</sup> Carpenter v. Central Park &c. R. Co., 11 Abb. Pr. (N. S.) (N. Y.) 416; s. c. 4 Daly (N. Y.) 550; Rockwell v. Third Avenue R. Co., 64 Barb. (N. Y.) 438; Fash v. Third Avenue R. Co., 1 Daly (N. Y.) 148; Wiley v. Smith, 25 App. Div. 351; s. c. 49 N. Y. Supp. 934.

<sup>62</sup> Lowrey v. Brooklyn &c. R. Co., 4 Abb. N. C. (N. Y.) 32; Rockwell v. Third Avenue R. Co., 64 Barb. (N. Y.) 438; Fash v. Third Avenue R. Co., 1 Daly (N. Y.) 148. Evidence on which it was held error to non-



injury occurs by reason of its neglect of this duty, it must pay damages therefor.<sup>63</sup> As this implies a continuing duty of inspection and care, it will be no defense that the defect consisted of a depression which has been caused by the gradual wearing away of the road in consequence of street travel.<sup>64</sup> On principles already considered,<sup>65</sup> if in the process of constructing or repairing its tracks it is obliged to make an excavation in the public highway, and to leave it unfilled over night, it rests under the duty of using reasonable care according to the amount of traffic and other circumstances, to light it, guard it, or otherwise to warn travellers of it; and whether it has used such care will ordinarily present a question of fact for a jury.<sup>66</sup> But it is not liable at all events, and without proof of negligence or want of skill or reasonable care, for *accidents* which may be caused thereby. Proof of such negligence, or want of skill or care, in the manner of constructing or maintaining its track, is necessary, as between it and persons exercising the common right of passing and repassing through or across the track.<sup>67</sup> Thus, it has been held that a street railway company, bound to keep its track in repair and on a level with the grade of the street, and so constructed as not to impede carriage travel, is not responsible for an accident caused by the unevenness of the surface of the street, where it has worn away below the established grade. It does not follow that carriage travel is impeded because carriages can not cross the track at all points with reasonable safety.<sup>68</sup> On the other hand, the fact that a street railroad company, in constructing their track through the streets of a city, have complied with all the requirements of an ordinance of the city, prescribing the manner in which the road shall be constructed and that the construction of the road has been examined and approved and accepted by an agent of the city, charged with the duty of such examination, is not a defense to an action by an individual crossing the track, for injuries received from defects in its construction;<sup>69</sup> nor to an action by a

suit the plaintiff whose horse caught its foot between the planking and one of the rails of the defendant's railway at a street crossing: *Payne v. Troy & C. R. Co.*, 83 N. Y. 572.

<sup>63</sup> *Oakland R. Co. v. Fielding*, 48 Pa. St. 320; *Fash v. Third Avenue R. Co.*, 1 Daly (N. Y.) 148; *Carpenter v. Central Park & C. R. Co.*, 11 Abb. Pr. (N. S.) (N. Y.) 416; *Delzell v. Indianapolis & C. R. Co.*, 32 Ind. 45; *Alton & C. R. Co. v. Deitz*, 50 Ill. 210; s. c. 99 Am. Dec. 509; *Louisville & C. R. Co. v. Phillips*, 112 Ind. 59; s. c. 2 Am. St. Rep. 155; 31 Am. & Eng. Rail. Cas. 432; 13 N. E. Rep. 132; 11 West. Rep. 119; Mc-

*Laughlin v. Philadelphia Traction Co.*, 175 Pa. St. 565; s. c. 34 Atl. Rep. 863 (*hole in street caused by one of its rails*).

<sup>64</sup> *Houston City & C. R. Co. v. Medlenka*, 17 Tex. Civ. App. 621; s. c. 43 S. W. 1028.

<sup>65</sup> Vol. I, § 1190, *et seq.*

<sup>66</sup> *Fox v. William Wharton Jr. & Co.* (N. J. L.), 45 Atl. Rep. 793.

<sup>67</sup> *Mazetti v. New York & C. R. Co.*, 3 E. D. Smith (N. Y.) 98.

<sup>68</sup> *Galveston City R. Co. v. Nolan*, 53 Tex. 139.

<sup>69</sup> *Delzell v. Indianapolis & C. R. Co.*, 32 Ind. 45.



land-owner for injuries to his land thereby sustained,—as where the railroad has been so constructed as to produce a *flowage* of adjacent land. Here, the fact that the railroad company has constructed its track in conformity with the requirements of valid city ordinances, and under the direction of city officers, does not exempt it from liability for such damage, for the reason that it takes its charter and exercises its franchises upon the condition of answering in damages to persons injured by the construction of its road, under principles already considered;<sup>70</sup> and if special requirements are imposed in the grant of its franchises, or in the grant of its license from the city, it is for it to elect whether it will build its road under those requirements, and subject to the general liability for injuries which may be thereby produced.<sup>71</sup> Nor does the fact that the municipal authorities were negligent in improperly *paving the streets*, and that their negligence may have contributed to the injury, relieve the railroad company from such liability.<sup>72</sup> A statute<sup>73</sup> providing that street railways “shall be constructed upon the most approved plan for such roads,” has been held merely *declaratory of the common law*,—the court adding that “there can be no question but that it is the duty of a street railway company to construct such roads, and all the conveniences thereof, and to maintain them, by the use of the common and approved means, and so as, at least, to be no obstruction to the use of the street by, or to the necessary convenience of, the travelling public thereon.”<sup>74</sup> Notwithstanding this *dictum* it is believed that such a statute carries the measure of duty beyond the principles of common law.<sup>75</sup> In all these cases the company, in like manner with other owners of property, hold it subject to the maxim *sic utere tuo ut alienum non laedas*,<sup>76</sup> and the obligation rests upon a street railway company to keep in repair a portion of the switch, which, being a part of its own track, connects it with that of another company, although as between the two corporations, the duty of repairing may rest upon the latter.<sup>77</sup>

§ 1354. **Further of Defective Construction and Repair.**—The governing principle of the preceding cases is that the street railway com-

<sup>70</sup> *Ante*, § 1348.

<sup>71</sup> *Alton &c. R. Co. v. Deitz*, 50 Ill. 210; s. c. 99 Am. Dec. 509.

<sup>72</sup> *Carpenter v. Central Park &c. R. Co.*, 11 Abb. Pr. (N. S.) (N. Y.) 416.

<sup>73</sup> Rev. Stat. Wis., § 1862.

<sup>74</sup> *Fitts v. Cream City R. Co.*, 59 Wis. 323, 326.

<sup>75</sup> See *Unger v. Forty-second Street R. Co.*, 51 N. Y. 497; but compare *Chicago &c. R. Co. v. Stumps*, 55 Ill. 367.

<sup>76</sup> As to this maxim, see Vol. I, § 694.

<sup>77</sup> *McKenna v. Metropolitan R. Co.*, 112 Mass. 55. That the notice of the time, place, and cause of injury prescribed by Mass. Pub. Stat., chap. 52, § 19, is necessary, where an injury is caused to a person driving on the highway by the neglect of a street railway company to repair its road, see *Mahoney v. Natick &c. St. R. Co.*, 173 Mass. 587; s. c. 54 N. E. Rep. 349.



pany is bound to exercise its franchise or license of using the public street with due regard to the rights of the travelling public; and that, like any other person or corporation licensed to break up the surface of the street, it is under an obligation to restore that surface to its former level condition as nearly as may be consistent with the due exercise of its own granted rights, in default of which it is liable as the author of a nuisance, or at least on the principle of negligence.<sup>78</sup> A further principle is that, assuming that there is evidence legally tending to show negligence, whether the railroad company has been negligent in so laying or maintaining its track as to endanger public travel within the foregoing principle, is a *question of fact* for a jury.<sup>79</sup> Nor will the fact that the *concurrent negligence* of another person or corporation,—for example, a *turnpike company*,—assists in producing the injury, exonerate the railway company.<sup>80</sup> The duty of care in *reparation* is the same as the duty of care in original construction. If, therefore, a *rail* of its track in the street protrudes above the surface of the street in consequence of the sinking of the pavement below it, it becomes the duty of the railway company to restore the street to its proper level, failing in which it is liable to a traveller damaged thereby.<sup>81</sup> The rule is the same where the duty is enjoined by statute or by the charter of the railroad company, except that in such cases the obligation is even clearer.<sup>82</sup>

§ 1355. **Still Further of this Subject.**—Cases are numerous where street railway companies have been held liable in damages to travellers

<sup>78</sup> *Rex v. Kerrison*, 3 Maule & S. 526; *Oliver v. Northeastern R. Co.*, L. R. 9 Q. B. 409; *Schild v. Central R. Co.*, 133 N. Y. 446; *Halifax Street R. Co. v. Joyce*, 22 Can. S. C. 258; affirming s. c. 24 Nov. Sco. 113; *Houston City Street R. Co. v. Delesdernier*, 84 Tex. 82; s. c. 19 S. W. Rep. 336. The principle has been said to be that “a railroad corporation having its rails in a public highway must lay and keep them so as to cause as little injury as possible. The highway or street used for the rails must be maintained, as nearly as possible, as fit for the use of the public who travel on foot or in vehicles, as it was before, having due regard to the necessity for the rails being there.” *Schild v. Central Park & R. Co.*, 133 N. Y. 446, 449, per Gray, J. For an instruction rather clumsily drawn embodying the above principle, which met with judicial approval, see *Houston City Street R. Co. v. Delesdernier*, 84 Tex. 82; s. c. 19 S. W. Rep. 336.

<sup>79</sup> *Schild v. Central Park & R. Co.*, 133 N. Y. 446.

<sup>80</sup> *Wagner v. Pittsburgh & C. R. Co.*, 158 Pa. St. 419; s. c. 27 Atl. Rep. 1008. So held where the repairs took place under the immediate charge of the officers of the railway company, although paid for by the turnpike company: *Wagner v. Pittsburgh & C. R. Co.*, *supra*.

<sup>81</sup> *Wooley v. Grand St. & C. R. Co.*, 83 N. Y. 121.

<sup>82</sup> Therefore, a street railway company, bound by its charter to keep the road between and for two feet outside its rails in good repair and level with the rails, is liable for an injury to a horse whose shoe catches in a groove of its rail, where the rail is above the road level; since such rail becomes a street obstruction unauthorized by statute, and a nuisance, and such obstruction causes the damage: *Halifax Street R. Co. v. Joyce*, 22 Can. S. C. 258; affirming s. c. 24 Nov. Sco. 113.



injured by the fact of their *rails projecting above the surface of the street*. It was so held where the railway company allowed its rails to project over two inches above the surface of the street, and a traveller caught his foot against one of them, fell, and was injured;<sup>83</sup> where the railroad company allowed its rails to project from one-fourth to three-fourths of an inch above the level of the pavement, and the plaintiff, driving a dog-cart at a moderate speed, turned to avoid vehicles ahead, and her wheels struck the rails, throwing her out and injuring her.<sup>84</sup> A railroad company thus breaking up the street for its own benefit and profit, stands under a primary obligation not to do it so as to constitute a nuisance dangerous to the public. It is, therefore, no defense to an action brought by a traveller who had been injured by it, that the work was delegated to an *independent contractor*.<sup>85</sup> Nor will it be any defense on the part of the railroad company that, by a *contract between it and the city*, the company was to be exonerated from liability; nor that the track had been laid as directed by the city authorities; since it is beyond the power of the city to contract for the creation of a nuisance in the public streets, or for the negligent exercise of a right to occupy the streets, such as will impair the safety of the public. On the other hand, if the city thus joins in the unlawful act, it becomes liable as a *joint tort-feasor*.<sup>86</sup> But, on the contrary, where the relation of the railway company to the city is such that it is subject to the control of the city in the manner of exercising its license to occupy the street, and as to the maintenance and repair of the street, it will not be chargeable with negligence in favor of a traveller, for maintaining a *drain* in the manner directed by the city authorities, as a means of draining the street.<sup>87</sup>

<sup>83</sup> Schild v. Central Park & C. R. Co., 133 N. Y. 446.

<sup>84</sup> Houston City Street R. Co. v. Delesdernier, 84 Tex. 82; s. c. 19 S. W. Rep. 336.

<sup>85</sup> Woodman v. Metropolitan R. Co., 149 Mass. 335; s. c. 21 N. E. Rep. 482; 4 L. R. A. 213; 6 Rail. & Corp. L. J. 72. In this case it was held that the fact that a person falls in a street at a point where rails project beyond a temporary barrier guarding an excavation, warrants a finding that he tripped over the end of a rail, in the absence of evidence of any other possible cause of the fall. - - - A case of injuries from up-turned rails, where the company was held liable: Bradwell v. Pittsburgh & C. R. Co., 153 Pa. St. 105; s. c. 25 Atl. Rep. 623. Case where the company was exonerated: Kelly

v. Metropolitan St. R. Co., 25 Misc. (N. Y.) 194; s. c. 54 N. Y. Supp. 173.

<sup>86</sup> Houston City Street R. Co. v. Delesdernier, 84 Tex. 82; s. c. 19 S. W. Rep. 336.

<sup>87</sup> Campbell v. Frankford & C. R. Co., 139 Pa. St. 522; s. c. 21 Atl. Rep. 92; 27 W. N. C. 274; 48 Phila. Leg. Int. 78. Nor was the alteration in the size of the drain after the accident deemed evidence of negligence to charge the railway company: Campbell v. Frankford & C. R. Co., *supra*. Liability on the ground of negligence has been predicated upon the displacement of the slot of a cable railway, where it crosses the track of another company: Minster v. Citizens' R. Co., 53 Mo. App. 276. Upon the breaking of a wire cable known by the officers of the company to be defective, and



§ 1356. **Liability of Street Railway Companies for Failing to Keep the Surface of the Street in Repair.**—This, it will be at once perceived, is a different question from the liability of such companies for failing to keep *their own tracks* in repair. The mere fact that a corporation has been vested with the franchise or license of using the public street, does not impose upon it a duty more onerous than that of restoring such portion of the street, to a reasonably safe condition, as it breaks up and makes use of in exercising its license or franchise; and it does not impose upon it any duty to keep the other portions of the street in repair. It is therefore not liable for the existence of a hole dangerous to travel *outside of its tracks* in the surface of the street, unless it has in some way assumed the special duty of preventing such nuisance.<sup>88</sup> In other words, they are bound, under the general principles of law, to keep *their tracks* in good repair; and, under municipal ordinances, the duty is frequently imposed upon them of keeping the pavement in repair *between their rails*, and for a certain space outside of them. Assuming the validity of the ordinance, for any neglect of this duty, whereby a traveller is injured without his own fault, they are liable to pay damages,—as where a traveller is injured by falling on a loose rail or protruding spike;<sup>89</sup> or where a footman in the night-time, stepping aside from the track to avoid a car, steps into a *hole* by the side of the track, in a portion of the street which it is the duty of the company to keep in repair.<sup>90</sup> The foregoing results from the proposition elsewhere stated,<sup>91</sup> that ordinary travellers on a public street have a right to make use of that portion of the street which is occupied by railway tracks, subject to the paramount right of passage enjoyed by the company over its own tracks, and are not trespassers in so doing.<sup>92</sup> In respect of a new class of injuries which have frequently arisen, consisting of the wheels of buggies catching in the slots of cable railways when such slots are expanded by the action of the elements, it has been said that “if the proprietors of this new mode of transit can not maintain their roadways without creating such

which had broken before on the morning of the accident: *Musser v. Lancaster & Co. St. R. Co.*, 176 Pa. St. 621; s. c. 13 *Lanc. L. Rev.* 369; 39 *W. N. C.* 37; 35 *Atl. Rep.* 206. If a railway track in such a defective condition as to be dangerous to persons crossing it, be purchased by a person with knowledge of the facts, who leases it to another, the lease containing no clause requiring the lessee to remedy the defects, and a person crossing such track, but having no connection with the lessee, is injured, such lessor is liable to

the injured party: *Schaefer v. Fond du Lac*, 99 *Wis.* 333; s. c. 41 *L. R. A.* 287; 11 *Am. & Eng. Rail. Cas.* (N. S.) 342; 74 *N. W. Rep.* 810.

<sup>88</sup> *Rockford City R. Co. v. Matthews*, 50 *Ill. App.* 267.

<sup>89</sup> *Cline v. Crescent City R. Co.*, 43 *La. An.* 327; s. c. 9 *South. Rep.* 122.

<sup>90</sup> *Kraut v. Frankford & Co. R. Co.*, 160 *Pa. St.* 327; s. c. 28 *Atl. Rep.* 783; 34 *W. N. C.* (Pa.) 116; 49 *Alb. L. J.* 425.

<sup>91</sup> *Post*, § 1374, *et seq.*

<sup>92</sup> *Cline v. Crescent City R. Co.*, 43 *La. An.* 327; s. c. 9 *South. Rep.* 122.



nuisances in the streets, they must answer for damages to travellers injured, or not maintain them at all."<sup>93</sup> If, as is frequently the case, in consideration of the grant of a license to construct and operate its road in a public street, the railroad company *agrees with the city* to keep a portion of the street in repair, it thereby becomes responsible to any person who suffers special damage in consequence of a breach of this contract, and a right of action enures to such person thereon;<sup>94</sup> or if the person injured has recovered damages from the city, the latter may recover them over against the railway company.<sup>95</sup> This is so, although the city may have reserved the power to revoke the license in case of a failure to comply with its terms.<sup>96</sup> An intermediate appellate court in New York has held a street railway company liable, independently of any contract with the city; so that, where a horse was injured by stepping into a hole *within* the rails, the company was compelled to pay damages.<sup>97</sup> Although the defect in the road-bed of such a company, on which a person sustained an injury, was not caused by any act of their own, yet if they knew of its existence, and that the street was made dangerous thereby, they were held bound to repair it, and liable for the consequent injury.<sup>98</sup> A boy, helping to run an engine to a fire, stepped into a hole in the road-bed of a street railway company, which hole the company was bound to repair, and in consequence fell, and the engine ran over him. The defect in the street was held the proximate cause of the injury, and the company was liable.<sup>99</sup>

### § 1357. Liability where there is an Express Covenant to Repair.—

Most of the charters granted by legislatures, and most of the licenses granted by municipal corporations, to *street railroad companies*, impose upon such companies the duty of keeping the streets in repair

<sup>93</sup> Keitel v. St. Louis Cable R. Co., 28 Mo. App. 665; reaffirmed and applied in Griveaud v. St. Louis Cable & C. R. Co., 33 Mo. App. 458. In applying this doctrine in the subsequent case it was said: "We can not see how we can recede from this position without a violation of fundamental rules, applicable to the streets of a city. We do not decide that the duty of the defendant is that of an insurer of the safety of its roadway. Unforeseen causes might arise, causing a temporary disarrangement, for which the defendant could not be held justly liable; but here, in any view of the evidence, the cause was one of constant occurrence, well known to the defendant, and against the effects

of which it was its duty to guard:" Griveaud v. St. Louis Cable & C. R. Co., 33 Mo. App. 458, 469.

<sup>94</sup> Jenkins v. Fahey, 11 Hun (N. Y.) 351. See, for applications of the same principle, Robinson v. Chamberlain, 34 N. Y. 389, and Ober v. Crescent City R. Co., 44 La. An. 1059; s. c. 52 Am. & Eng. Rail. Cas. 576; 11 South. Rep. 818.

<sup>95</sup> Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475; Troy v. Troy & C. R. Co., 49 N. Y. 657.

<sup>96</sup> Troy v. Troy & C. R. Co., *supra*.

<sup>97</sup> Conroy v. Twenty-third Street R. Co., 52 How. Pr. (N. Y.) 49.

<sup>98</sup> Oakland R. Co. v. Fielding, 48 Pa. St. 320.

<sup>99</sup> Oakland R. Co. v. Fielding, 48 Pa. St. 320.



*between the rails*, and in some cases for a given distance outside the rails, of their tracks. The acceptance of a charter or license containing this condition is, of course, an acceptance of the condition, and is tantamount to an express covenant on the part of the company so to keep its track and the adjacent portions of the street in repair for the benefit and protection of the travelling public. By entering into such a covenant, the company voluntarily assumes the obligation which the city owes to the public, as respects that portion of the street which is embraced within the terms of the covenant, and especially as respects that portion which is embraced between its tracks and over which it has absolute and exclusive control for the purpose of making repairs; and it is consequently liable for any injuries happening to travellers by reason of its failure to perform the duty so assumed.<sup>100</sup> If the company refuses to perform the duty which it has thus assumed, and the commissioner of highways, after notice, proceeds to repair the street, and, in so doing, necessarily stops the running of the cars, the company, being thus derelict, will not be entitled to an *injunction* to restrain the commissioner from *stopping the cars* while making the repairs.<sup>101</sup> If the company fails in the performance of this duty, and the city performs it, the company will be liable to the city in an action to recover the expense reasonably incurred in performing it.<sup>102</sup>

§ 1358. **Interpretations of such Covenants to Repair.**—Where, in accepting such a license, the street railway company covenanted that the street occupied by its track should be kept “in perpetual good order and repair, from curb to curb, its whole length,” for its ordinary use as a public thoroughfare,—it was held that this carried with it the duty of *cleansing the street* from dirt and filth casually accumulating thereon.<sup>103</sup> Where the company, in consideration of the grant of its license, covenanted to “put such highway, road, or street in such con-

<sup>100</sup> *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231; *aff'g s. c.* 11 Hun (N. Y.) 347. In this case it was held (three judges dissenting) that where a street railway company was under a contract with the city to pave the streets on which its tracks were laid “in and about the rails,” and to “keep same in repair,” and an adjoining land-owner had a license from the city to dig a trench across a part of the street under a track of the company, to connect his lot with a sewer, and he dug such trench, and the company failed to construct a safe bridge over it, the company became liable to the driver of a truck for an injury sustained

through such defect in the street: *McMahon v. Second Ave. R. Co.*, *supra*. A covenant to keep the pavement within the tracks and “three feet each side thereof” in repair,—has been construed as not requiring the covenantor to keep in repair a switch at a *cross-walk*: *Lowery v. Brooklyn & C. R. Co.*, 76 N. Y. 28.

<sup>101</sup> *Philadelphia & C. Pass. R. Co. v. Philadelphia*, 11 Phila. (Pa.) 358.

<sup>102</sup> *Columbus v. Street R. Co.*, 45 Ohio St. 98; *s. c.* 12 N. E. Rep. 651; 10 West. Rep. 436; *District of Columbia v. Washington & C. R. Co.*, 1 Mackey (D. C.) 361.

<sup>103</sup> *Pittsburgh & C. R. Co. v. Birmingham*, 51 Pa. St. 41.



dition and state of repair as not to impair or interfere with its free and proper use,"—it was held that the duty thus assumed was a continuing one, which required the company, from time to time, to put the street in such condition as changes in circumstances might render necessary,—as, for example, by carrying the street over or under the tracks in case a grade crossing should become dangerous in consequence of an increase of travel; and that the company must construct the necessary approaches to the bridge or viaduct, and pay damages to abutting owners; and that a *mandamus* would issue to compel it to perform this duty.<sup>104</sup> A covenant, by such a company, to have and keep in repair the pavement "in and about the rails" has been held to carry with it the obligation of repairing the space between two tracks, the laying of which disturbs the pavement between them.<sup>105</sup> On the other hand, a charter provision that such companies shall pay a *tax* in lieu of repairing the streets "*outside* of their tracks,"—does not impose upon such a company a liability for the expense of repairing the street *between* its tracks, where it has double tracks in a single street.<sup>106</sup> An obligation assumed by such a company by accepting its charter, of keeping the street within a certain space "at all times well paved and in good order," has been held to carry with it the obligation of paving, where no pavement previously existed, and of paying with the material ordered by the municipal authorities, and of conforming its track to a change of grade without being notified; so that, in case of default, the city might do the work and charge the reasonable expense of it against the company and recover from it such expense in an action of *assumpsit*,—and this, although the city had issued void *certificates of indebtedness* for the same.<sup>107</sup> On the other hand, a city ordinance conferring upon a street railroad company a license to occupy a street with its tracks, on the condition that it will "keep and maintain in good repair" the space between the rails of its tracks and a space of two feet on either side thereof, has been held not to extend so far as to impose on the company the obligation of *paving* the space thus designated; and this for the reason that the obligation to *repair* the street is one thing, and the obligation to *reconstruct* is another and different thing.<sup>108</sup> On the same principle, an ordinance

<sup>104</sup> *State v. St. Paul & C. R. Co.*, 35 Minn. 131; s. c. 59 Am. Rep. 313; 28 N. W. Rep. 3.

<sup>105</sup> *New York v. Second Avenue R. Co.*, 102 N. Y. 572; s. c. 55 Am. Rep. 839; aff'g s. c. 31 Hun (N. Y.) 241.

<sup>106</sup> *St. Louis v. St. Louis R. Co.*, 50 Mo. 94.

<sup>107</sup> *District of Columbia v. Washington & C. R. Co.*, 4 Mackey (D. C.)

214; s. c. 1 Mackey (D. C.) 361; 4 Am. & Eng. Rail. Cas. 174.

<sup>108</sup> *State v. Corrigan & C. St. R. Co.*, 85 Mo. 263; s. c. 55 Am. Rep. 361. That the construction of a *new pavement* upon a city street is not a mere *repairing* of the street, was judicially determined in Missouri in a struggle between the property owners and the city of St. Louis, in the



granting a license to a street railway company to construct its railway, upon condition that they shall, "as respects the *grading, paving, macadamizing, filling, or planking of the streets or parts of the streets*, upon which they shall construct their said railways or any of them, keep eight feet in width along the line of said railway on all the streets where one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, *in good repair and condition*," does not make the company liable for grading, curbing, and paving, with an entirely *new pavement*.<sup>109</sup>

§ 1359. **Notice to the Company of the Defect.**—Whether the duty of keeping its track in proper repair arises by implication of law<sup>110</sup> or has been voluntarily assumed by accepting a charter or license imposing the duty as a *condition* of the grant,—the obligation of performing the duty necessarily carries with it the obligation of making reasonable and *continuing inspections* for the purpose of discovering any defects which may arise in the tracks of the company or in adjacent portions of the street which it is under the duty of repairing. Being under this duty of continuing inspection, a *negligent ignorance* of the defect will leave the company liable in the same manner as though it had actual knowledge.<sup>111</sup> The courts sometimes reach the same result by *presuming* actual knowledge in the case of a patent defect which has continued for some time. But the least that can be said in favor of the company in this regard is, that if the defect be *visible*, and has not occurred within a very short space of time preceding the accident which has resulted from it, an omission to know its existence is *prima facie* evidence of negligence, as much as would be an omission to repair after notice. It must follow that, where it is shown that the defect was patent and not recent, and that the plaintiff was injured in consequence of it without negligence or failure on his part, a *prima facie* case for the recovery of damages is made out against the company.<sup>112</sup> The presumption of negligence is complete when it appears that the defect existed, and that an injury was caused thereby.<sup>113</sup> A statute providing that no action for an injury from a defect-

case of *Farrar v. St. Louis*, 80 Mo. 379; and the same was held in *Chicago v. Sheldon*, 9 Wall. (U. S.) 50. A city ordinance requiring a street railway company to keep sixteen feet in width of the street along its line in good repair and condition has been held admissible in evidence in an action against the company for damages alleged to have been caused by a *hole* in the street within the prescribed width: *West Chicago &c. R. Co. v. Dooley*, 76 Ill.

App. 424; s. c. 3 Chic. L. J. Wkly. 238.

<sup>109</sup> *Chicago v. Sheldon*, 9 Wall. (U. S.) 50.

<sup>110</sup> *Ante*, § 1352; *post*, § 1475.

<sup>111</sup> Vol. I, § 8.

<sup>112</sup> *Rockwell v. Third Avenue R. Co.*, 64 Barb. (N. Y.) 438.

<sup>113</sup> *Worster v. Forty-second Street R. Co.*, 50 N. Y. 203 (approving *Fash v. Third Avenue R. Co.*, 1 Daly (N. Y.) 148, which is to the same effect).



ive railway shall be maintained against any town, city, corporation, or borough, unless *written notice* of such injury, and of its nature, and the place of its occurrence, shall be given within sixty days,—has been held to extend to a street railway company, and to exonerate the company from liability in an action for damages, grounded upon its negligence in not keeping a part of its railway in a safe condition, as required by its charter, whereby the plaintiff, in traversing the highway, was injured.<sup>114</sup>

**§ 1360. Constitutional Validity of Laws and Ordinances Compelling such Companies to Repair the Streets.**—The power of establishing reasonable police regulations does not extend so far as to enable the legislature of a State to enact a law compelling a street railway company, whose charter requires it to pave the street between its rails, to pave the street *outside* its rails; but such a statute is *void* as impairing the obligation of the contract subsisting between the State and the corporation in the grant of its charter.<sup>115</sup> But where a street railway was operated under a general statute, exempting it from the duty of repairing that portion of the street lying outside of its tracks, and a city charter was subsequently enacted, requiring street railways to repair the streets for twelve inches outside of their tracks, and still later the city authorized the company to *extend* its tracks,—it was held that the extension was subject to the charter regulation, and that, in respect of the extension, the company was obliged to repair for twelve inches outside of its tracks.<sup>116</sup>

**§ 1361. Instances of Liability for Failing to Perform this Duty.**—Applying this doctrine, where a corporation, operating a railroad in a street of New York, allowed its rails to become worn and split, so that *splinters* projected therefrom, and one of these was thrust into the foot of a fireman while on duty, it was held a case for damages without other proof of negligence.<sup>117</sup> So, where by the sinking of the pavement, a *spike* in a rail was left exposed, with which the plaintiff's carriage came in contact and was overturned, injuring him, it was a case for damages; and it was no defense that the injury resulted from the failure of the municipal corporation to repair the street in the vicinity of the accident, nor that the plaintiff could have traversed another part of the street without danger.<sup>118</sup> So, where the municipi-

<sup>114</sup> *Fields v. Hartford &c. R. Co.*, 54 Conn. 9.

<sup>115</sup> *Coast-Line R. Co. v. Savannah*, 30 Fed. Rep. 646; s. c. 2 Rail. & Corp. L. J. 8.

<sup>116</sup> *St. Louis v. Missouri R. Co.*, 13 Mo. App. 524.

<sup>117</sup> *Rockwell v. Third Avenue R. Co.*, 64 Barb. (N. Y.) 438.

<sup>118</sup> *Fash v. Third Avenue R. Co.*, 1 Daly (N. Y.) 148. To the same effect, *Lowrey v. Brooklyn &c. R. Co.*, 4 Abb. N. C. (N. Y.) 32.



pal authorities failed to pave close up to the rail of a street railway, leaving a *crevice*, into which a horse stepped, and, in endeavoring to extricate itself, its hoof was torn partly off, by reason of the fact that the rail was so laid that the sharp edge of it projected half an inch over the strip on which it was laid, it was held a case to go to a jury.<sup>118a</sup> A railroad company which has taken up a cross-walk to construct a switch, used by it to connect its track with that of another company, is bound, not only to make, but to maintain, the surface of the pavement at a level suitable to prevent it from becoming a dangerous obstruction to foot-passengers. A traveller injured by its failure to perform this duty may recover damages.<sup>119</sup> A boy eight years of age was injured while walking along a railway track laid in a public street, by reason of his foot being caught in a space three or four inches wide, left between the guard rails and the rail of the track, and by being struck by a train while so caught, at a point twenty feet distant from a street crossing. It was held that he was not a *trespasser*; that the company had been guilty of negligence in the construction of its track, and was also negligent in failing to stop its train, and must consequently pay damages for the injury.<sup>120</sup> On the other hand, where the plaintiff broke his leg by stepping in a *hole* in the city street, between the rails of a horse-car track, it was held that he could not recover damages of the company, because it did not appear that it was the duty of the company to keep the *spaces between its tracks* in repair, and no defect in the construction and maintenance of the tracks contributing toward the injury was shown.<sup>121</sup>

§ 1362. **Not Liable for Obstructing the Street so as to Prevent the Adjacent Owners of Storehouses from Standing Vehicles Transversely on the Street in Loading and Unloading.**—It may be extracted from a decision in Wisconsin where the question is very well reasoned, that the owner of a building used as a mercantile establishment, where goods are loaded and unloaded from the street, can not by custom acquire the right to occupy the street in loading and unloading, by standing his teams transversely upon the street; but that, on the other hand, such a use of the street by a private owner, in so far as it obstructs longi-

<sup>118a</sup> *Carpenter v. Central Park & R. Co.*, 11 Abb. Pr. (N. S.) (N. Y.) 416; s. c. 4 Daly (N. Y.) 550.

<sup>119</sup> *Lowrey v. Brooklyn & C. R. Co.*, 4 Abb. N. C. (N. Y.) 32.

<sup>120</sup> *Louisville & C. R. Co. v. Phillips*,

112 Ind. 59; s. c. 2 Am. St. Rep. 155; 13 N. E. Rep. 132; 31 Am. & Eng. Rail. Cas. 432.

<sup>121</sup> *Egan v. Forty-second St. R. Co.*, 19 N. Y. St. Rep. 676; s. c. 4 N. Y. Supp. 530.



tudinal travel, is a *public nuisance* and in itself unlawful. A street railway company, therefore, incurs no liability, by reason of laying its tracks, under a valid license, so as to obstruct *such* a use of the street. On the one hand, the street railway company will not be *enjoined* from so laying its track, but it will be entitled to an injunction against the property owner from so using the street as to obstruct it in the laying of its track or the running of its cars thereon.<sup>122</sup>

**§ 1363. Liability where the Company Occupies the Street without Lawful Authority.**—There is a holding to the effect that, in an action for damages for a personal injury received by the plaintiff from a horse-car driven upon a street, an allegation in the complaint that the defendant company was operating a street railroad upon a street without lawful authority, is a material allegation;<sup>123</sup> but the opinion is weak, and does not direct the mind to any clear principle governing the question. The true principle is that the unlawful occupation of a public street of a city, by the tracks of a street railway and cars drawn thereon by horses, or otherwise propelled, which, from their very nature, can not yield any portion of the street to other passengers, is a *public nuisance*,<sup>124</sup> such as gives ground for an action to any person who has sustained *special damage*<sup>125</sup> in consequence of such nuisance.

**§ 1364. Liability where Construction or Maintenance is in Accordance with Municipal or Official Direction.**—If a street railway company constructs and maintains its tracks in accordance with the mode prescribed by the municipal corporation, and if, in consequence of such

<sup>122</sup> *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194; s. c. 9 Am. Rep. 461. If a railway track is laid on a bridge built without a proper public license or authority, then it is a public nuisance, and on stronger grounds the railway company will be liable to any one sustaining special damages from a defect therein, —as where a foot passenger is injured by a projecting planking: *Murphy v. Suburban & C. Transit Co.*, 40 N. Y. St. Rep. 228; s. c. 15 N. Y. Supp. 837. Nor will a street railway company be relieved from its obligation to keep its track in a reasonably safe condition for persons using the highway, because its road is being operated by another company; since the law does not allow

it voluntarily to cast off its public duties: *Houston City & C. R. Co. v. Medlenka*, 17 Tex. Civ. App. 621; s. c. 43 S. W. Rep. 1028. The fact that the street railway is laid outside of any city upon a country road by license from the county authorities, at a place where the injury occurs, does not, of course, relieve the company from the obligation of keeping its track in a condition of safety for those using the highway: *Houston City & C. R. Co. v. Medlenka*, 17 Tex. Civ. App. 621; s. c. 43 S. W. Rep. 1028.

<sup>123</sup> *Schierhold v. North Beach & C. R. Co.*, 40 Cal. 447.

<sup>124</sup> Vol. I, § 1188.

<sup>125</sup> Vol. I, § 1276, *et seq.*



method of construction or maintenance, an injury happens therefrom to an individual, then the question will arise whether the method of construction was within the limits of the powers conferred upon the municipal corporation by the legislature; and whether the legislature had the constitutional power to authorize the municipal corporation so to act. Where lawful power exists, and the power is exercised without negligence, the general rule is that there can be no liability for any resulting damage.<sup>126</sup> On the other hand, if the street railway company, without any direction from the municipal council, lays its track in accordance with the grade established for the proposed pavement of the street, thus rendering the street unsafe until paved, it will be liable on the footing of negligence to any one injured in consequence of such action.<sup>127</sup> The foregoing principle is qualified by the statement that the municipal corporation holds its streets in trust for the common use of the public, and has no power to authorize a dangerous nuisance therein; but, on the other hand, what it authorizes by direct sanction of the legislature is for that reason alone not a nuisance, provided the legislature acts within the scope of its constitutional powers. Another qualification is that although a street railway company may direct and maintain its track under the authority and in accordance with the general directions of the municipal corporation, this will not exempt it from liability for injuries caused by its negligence in such construction or maintenance.<sup>128</sup> If the governing statute makes the company liable for injuries resulting from its negligence, it will be so liable, although what it may have done was done with the approval of the proper municipal officials.<sup>129</sup>

**§ 1365. Liability of Municipal Corporations for Street Obstructions by Railway Companies.**—A municipal corporation is under a primary obligation to keep its highways in a safe condition for travel, and it is no answer to an action for damages resulting from a failure

<sup>126</sup> As in the case where damage has been occasioned by a street railway track being laid in a trench below the existing grade in pursuance of a direction of the township supervisors, made in view of a contemplated lowering of the grade: *Miller v. Lebanon & C. St. R. Co.*, 186 Pa. St. 190; s. c. 42 W. N. C. 274; 40 Atl. Rep. 413. See also to the principle of the text: *Casper v. Dry-Dock & C. R. Co.*, 23 App. Div. (N. Y.) 451; s. c. 48 N. Y. Supp. 352.

<sup>127</sup> *McKillop v. Duluth St. R. Co.*, 53 Minn. 532; s. c. 55 N. W. Rep. 739.

<sup>128</sup> *Houston & C. St. R. Co. v. Delesdernier*, 84 Tex. 82; s. c. 19 S. W. Rep. 306.

<sup>129</sup> *Osgood v. Lynn & C. R. Co.*, 130 Mass. 492. That a statute requiring a street railway company to keep the roadway level with the rails between them and two feet outside, under the supervision of the State engineer, is not complied with by the mere approval of the engineer of what has been done, where the roadway is not in fact level: *Joyce v. Halifax St. R. Co.*, 24 N. S. 113.



to perform this duty, that the defect or obstruction was the work of an *independent wrong-doer*.<sup>130</sup> This doctrine has been frequently applied in cases where *highways* have been rendered unsafe by being *crossed by railways*,<sup>131</sup> and where *sidewalks* and streets have been obstructed and endangered by the acts of *abutting proprietors*,<sup>132</sup> and generally where private persons or corporations, for their own profit or convenience, have created *dangerous excavations* in the streets, and the town or city has failed, either to abate the nuisance or to take the necessary measures to guard travellers from receiving injury therefrom.<sup>133</sup> For instance, a municipal corporation, being under the general duty of maintaining its streets in proper repair for the benefit of public travel, is liable to a passenger for an injury sustained by him, without negligence, through the negligence of a railway company in *excavating a street*, for the purpose of laying its track, under a license granted by the city.<sup>134</sup> The foregoing rule has been applied so as to charge the municipal corporation for damages, where the injury was occasioned by a ditch dug in the highway by an aqueduct

<sup>130</sup> Veazie v. Penobscot R. Co., 49 Me. 119; Hammond v. Mukwa, 40 Wis. 35; Willard v. Newbury, 22 Vt. 458; Batty v. Duxbury, 24 Vt. 155; Baltimore v. Pendleton, 15 Md. 12; Lowell v. Spaulding, 4 Cush. (Mass.) 277; s. c. 50 Am. Dec. 775; Morristown v. Moyer, 67 Pa. St. 355; Birmingham v. Dover, 3 Brewst. (Pa.) 69; Philadelphia v. Weller, 4 Brewst. (Pa.) 24; Wellcome v. Leeds, 51 Me. 313; State v. Gorham, 37 Me. 451; Currier v. Lowell, 16 Pick. (Mass.) 170; Bacon v. Boston, 3 Cush. (Mass.) 174; Merrill v. Wilbraham, 11 Gray (Mass.) 154; Prentiss v. Boston, 112 Mass. 43; Pollard v. Woburn, 104 Mass. 84; Burt v. Boston, 122 Mass. 223; Schweickhardt v. St. Louis, 2 Mo. App. 571; Elliot v. Concord, 27 N. H. 204; Hawks v. Northampton, 116 Mass. 420; Wilson v. Watertown, 5 N. Y. S. C. (T. & C.) 579; s. c. 3 Hun (N. Y.) 508; Centerville v. Woods, 57 Ind. 192. See also Barstow v. Augusta, 17 Me. 199; Chamberlain v. Enfield, 43 N. H. 356; Frost v. Portland, 11 Me. 271; Hardy v. Keene, 52 N. H. 370; Phillips v. Veazie, 40 Me. 96; Griffin v. New York, 9 N. Y. 456; s. c. 61 Am. Dec. 700; Seld. Notes, 223; West Chester v. Apple, 35 Pa. St. 284; s. c. 78 Am. Dec. 336; Howe v. New Orleans, 12 La. An. 481; Nevins v. Peoria, 41 Ill. 502; s. c. 89 Am. Dec. 392.

<sup>131</sup> Veazie v. Penobscot R. Co., 49 Me. 119; Hammond v. Mukwa, 40 Wis. 35; Wellcome v. Leeds, 51 Me. 313; Currier v. Lowell, 16 Pick. (Mass.) 170; Elliot v. Concord, 27 N. H. 204; State v. Dover, 46 N. H. 452; Wilson v. Watertown, 3 Hun (N. Y.) 508; s. c. 5 N. Y. S. C. (T. & C.) 579. But the railroad company may also be liable: Delzell v. Indianapolis & C. R. Co., 32 Ind. 45. See Troy v. Cheshire R. Co., 23 N. H. 83; s. c. 55 Am. Dec. 177; Hooksett v. Amoskeag Man. Co., 44 N. H. 105. And in Massachusetts, the railroad company is primarily liable: Wilson v. Boston, 117 Mass. 509; White v. Quincy, 97 Mass. 430; Cambridge v. Charlestown & C. R. Co., 7 Metc. (Mass.) 70; Sawyer v. Northfield, 7 Cush. (Mass.) 490; Vinal v. Dorchester, 7 Gray (Mass.) 421; Davis v. Leominster, 1 Allen (Mass.) 182; Pollard v. Woburn, 104 Mass. 84.

<sup>132</sup> Bacon v. Boston, 3 Cush. (Mass.) 174; Baltimore v. Pendleton, 15 Md. 12; Hawks v. Northampton, 116 Mass. 420; Chicago v. Robbins, 2 Black (U. S.) 418; s. c. 4 Wall. (U. S.) 659.

<sup>133</sup> Baltimore v. Pendleton, 15 Md. 12; Hawks v. Northampton, 116 Mass. 420. *Contra*, Masterton v. Mount Vernon, 58 N. Y. 391, a case wrongly decided.

<sup>134</sup> Pekin v. Brereton, 67 Ill. 477; s. c. 16 Am. Rep. 629.



company, under a license from the selectmen, pursuant to the statute, and left open for twenty-four hours; for it was the duty of the town to establish proper guards in case the company failed to do so.<sup>135</sup> Nor will the act of a private wrong-doer, in removing the barriers placed by the town around such excavation, exonerate it from liability, in case a traveller falls into the pit; for it is under a continuing duty of care to see that the excavation is properly guarded.<sup>136</sup> Neither can the town defend such an action by throwing the responsibility for the neglect of its duty upon its officers, although in some cases it may have a remedy against them.<sup>137</sup>

§ 1366. **Whether so Liable to Abutting Proprietors.**—It has been held that where the *fee of its streets* is in a city, if the city authorizes a *bridge* company to construct an *approach* to a bridge in a public street, whereby the same is obstructed in front of, and along a party's lot abutting on the same, rendering the street in front of the lot impassable and useless; and whereby egress and ingress to the lot from the street are prevented; and water is caused to drain and flow upon the lot, and to fill the cellars thereon; and, by reason of the noise, confusion, shaking, and falling of dirt and dust, caused by teams and wagons passing over the approach, the plaintiff's tenants occupying the houses on the lot are driven out, and the property injured and rendered less productive;—the city will be liable to such lot-owner, in an action on the case, for all the damage thus caused to his premises.<sup>138</sup> And there is sound reason in this; for a municipal corporation, especially where it holds the fee in its streets, holds control over those streets, as public easements, for the benefit of all entitled to an easement therein; and an adjacent property owner has a special easement in the street in front of his property along with the general easement of passage which the public have thereon; and any principle of law which will render the city liable to a member of the general public for an injury sustained by him through an obstruction of this general easement, will equally render it liable to an adjacent property owner for special damages sustained by him through an obstruction of his special easement in it, especially where the obstruction is affirmatively authorized by the city. Contrary to this, and in a decision where the question is inconclusively reasoned, it has been held that, although the constitution of the State extends to prohibiting the occupation by railway companies of the public highways with-

<sup>135</sup> Merrill v. Wilbraham, 11 Gray (Mass.) 154.

<sup>136</sup> Prentiss v. Boston, 112 Mass. 43.

<sup>137</sup> Kittredge v. Milwaukee, 26 Wis. 46.

<sup>138</sup> Stack v. East St. Louis, 85 Ill. 377; s. c. 28 Am. Rep. 619.



out paying damages to abutting property owners, yet where a municipal corporation grants a license to a railway company so to occupy one of its streets, the municipality does not thereby incur a liability for damages to abutting property owners.<sup>139</sup> But this conclusion is at once contrary to the best legal analogies, and is a conclusion which is liable to lead to great injustice. It is contrary to the principle that all who participate in a trespass upon property, or who participate in creating a nuisance injurious to the owners of property, are liable as principals. It is also a conclusion liable to lead to great injustice, where, as is not infrequently the case, the railroad company to which the license is granted is a "*dummy company*," created by some other company for the purpose of constructing its road, which dummy company is, in fact, insolvent, and passes out of view as soon as the work is accomplished.<sup>140</sup>

§ 1367. **Action by Municipal Corporation against Street Railway Company.**—Municipal corporations are under a primary duty to maintain their streets in a state of freedom from nuisance, and in a state of reasonable repair for the purpose of public travel; and if they fail in the performance of this duty they are, in most American jurisdictions, liable to pay damages to any traveller injured in consequence of such failure.<sup>141</sup> Nevertheless, the immediate author of the nuisance or obstruction, which has caused the damage in the given case, may be a private person or corporation; and if the city has, under the operation of the foregoing rule, been compelled to pay damages to the person injured, it may have an action over against the immediate author of the injury for its reimbursement.<sup>142</sup> Under the operation of this rule, if a judgment is recovered against a municipal corporation, for an injury received by a person in consequence of an obstruction of its streets caused by a street railway company, which obstruction has been produced by reason of the failure of the company to comply with the conditions of its license in respect of the reparation of the street, the city may maintain an action against the company for its reimbursement; and the *record* of the judgment against the city will be competent *evidence* to sustain the same, and conclusive of the liability of the defendant as to the *amount* which the city is entitled to recover, provided the defendant had *notice* of the action against the city and an opportunity to defend the same.<sup>143</sup>

<sup>139</sup> *Denver v. Bayer*, 7 Colo. 113; reaffirmed in *Sorensen v. Greeley*, 10 Colo. 369, 374; s. c. 15 Pac. Rep. 803.

<sup>140</sup> 4 Thomp. Corp., § 5846; 6 Id., § 8034.

<sup>141</sup> A subject considered in Volume III.

<sup>142</sup> See Volume III., title "Negligence of Municipal Corporations." The leading case is *Chicago v. Robbins*, 2 Black (U. S.) 418; s. c. 4 Wall. (U. S.) 657.

<sup>143</sup> *Troy v. Troy & C. R. Co.*, 49 N. Y. 657; *Lowell v. Boston & C. R. Co.*, 23 Pick. (Mass.) 24; s. c. 34 Am.



§ 1368. **Damages in Consequence of Obstructing the Street while Constructing Railway.**—A license to a railway company to lay its tracks in the street of a city necessarily carries with it the right temporarily to obstruct the ordinary use of the street, so far as necessary in the operation of laying its track, but no farther.<sup>144</sup> The right is strictly analogous to the right of an abutting property owner to obstruct the street partially and temporarily in the necessary operations of *building* upon his lot.<sup>145</sup> While the public right of transit is subject to these incidental, temporary, and partial obstructions, which are justified on a principle of necessity, it is nevertheless true that the principle will not be extended so as to allow a total obstruction, unless the total obstruction is necessary. A *plank-road company*, for instance, who have acquired a right to use a public highway for the location and construction of their road, have no right to exclude the public from it, or interrupt the enjoyment of their right of way, while making the change. They are bound, like town officers engaged in repairing roads, to carry on the work with as little inconvenience to the public as is reasonably practicable; and if, through their neglect, a person passing with ordinary care and prudence, suffers damage, the company are liable.<sup>146</sup> A statute enacting that every railroad company occupying a street or other public ground, under an agreement with the municipal or other authorities owning or having charge thereof, "shall be responsible for injuries done thereby to private or public property, lying upon or near to such ground," does not extend so far as to create a right of action for damages to an abutting or adjacent property owner for a diminution of his rents, in consequence of a temporary occupation of the street by a railroad company, in the laying of its road thereon.<sup>147</sup> A street railway company which has placed rails upon the street, temporarily, for its use in reconstruct-

Dec. 33; *Lowell v. Short*, 4 Cush. (Mass.) 275; *Milford v. Holbrook*, 9 Allen (Mass.) 17; s. c. 85 Am. Dec. 735; *Boston v. Worthington*, 10 Gray (Mass.) 496; s. c. 71 Am. Dec. 678; *Woburn v. Boston &c. R. Co.*, 109 Mass. 283; *Woburn v. Henshaw*, 101 Mass. 193; s. c. 3 Am. Rep. 333; *West Boylston v. Mason*, 102 Mass. 341; *Westfield v. Mayo*, 122 Mass. 100; s. c. 23 Am. Rep. 292; *Centerville v. Woods*, 57 Ind. 192; *Portland v. Richardson*, 54 Me. 46; s. c. 89 Am. Dec. 720; *Lowell v. Spaulding*, 4 Cush. (Mass.) 277; s. c. 50 Am. Dec. 775; *Littleton v. Richardson*, 34 N. H. 179; *Chicago v. Robbins*, 2 Black (U. S.) 418;

*Robbins v. Chicago*, 4 Wall. (U. S.) 657; *Rochester v. Montgomery*, 9 Hun (N. Y.) 394; s. c. aff'd 72 N. Y. 65; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; s. c. 7 Am. Rep. 469; *Independence v. Jekel*, 38 Iowa 427; *Severin v. Eddy*, 52 Ill. 189; *Norwich v. Breed*, 30 Conn. 535.

<sup>144</sup> *Shepherd v. Baltimore &c. R. Co.*, 130 U. S. 426, 433.

<sup>145</sup> As to which, see *Clark v. Fry*, 8 Ohio St. 358; s. c. 72 Am. Dec. 590.

<sup>146</sup> *Ireland v. Oswego &c. Plank Road Co.*, 13 N. Y. 526.

<sup>147</sup> *Shepherd v. Baltimore &c. R. Co.*, 130 U. S. 426.



ing or repairing its track, is bound to exercise reasonable care to guard the public using the street against the danger of accident to any one in the use of the street.<sup>148</sup>

§ 1369. **Liability for Injuries Caused by Ice and Snow on or near their Tracks.**—No liability rests on a street railway company for injuries to travellers sustained by *accumulations of ice and snow* on or near the tracks of such companies, unless such a liability has been imposed by charter, or by a valid statute or ordinance, or has been voluntarily assumed by the company in accepting its franchise or license of occupying the public street; or unless the accumulation of snow is due to the act of the company itself, as where, in shoveling away the snow to clear its tracks, it piles it up in other portions of the street.<sup>149</sup> On the other hand, in disposing of the ice and snow which accumulate upon its tracks through natural causes, a street railroad company must avoid, so far as it can in the exercise of reasonable care and diligence, the creation of nuisances or obstructions endangering the ordinary use of the streets.<sup>150</sup> If it deposits such ice and snow on the roadway of the street on the side of its track, it may become liable to a traveller whose vehicle is overturned in consequence of attempting to drive over it.<sup>151</sup> It may incur this liability where, by the use of a

<sup>148</sup> *Thomas v. Consolidated Traction Co.*, 62 N. J. L. 36; s. c. 6 Am. Neg. Rep. 122; 42 Atl. Rep. 1061.

<sup>149</sup> That a street railroad company is not liable for a personal injury resulting from a failure to keep the space between its tracks free from ice and snow,—see *Silberstein v. Houston &c. R. Co.*, 117 N. Y. 293; s. c. 22 N. E. Rep. 951; 27 N. Y. St. Rep. 330; 40 Am. & Eng. Rail. Cas. 268.

<sup>150</sup> *Laughlin v. Grand Rapids &c. St. R. Co.*, 62 Mich. 220; s. c. 28 N. W. Rep. 873; *Bowen v. Detroit &c. R. Co.*, 54 Mich. 496; *Wallace v. Detroit City R. Co.*, 58 Mich. 231. In one of these cases there is a very full and careful explanation of the relative rights of the street railway company and the general travelling public in this respect, in which the following language occurs: "It is the duty of the company, in removing snow from its tracks, to adopt such a mode as will not create obstructions in the streets, to the detriment or danger of the public in

the ordinary use thereof. If it can deposit the snow in the streets upon the sides of its tracks in such manner as not to interfere with the use of the street as a public highway, there appears to be no good reason why it may not adopt that mode of disposition; but, in doing so, it can not be permitted to leave it in ridges or piles which would obstruct the streets, and make them unsafe or dangerous for vehicles to pass along or across them. Its rights, in this respect, are subject and not paramount to, the rights of the public to use the streets for the ordinary purpose of passage, and all acts which create obstructions to the use of the street by the public are unlawful:" *Bowen v. Detroit City R. Co.*, 54 Mich. 496, 500.

<sup>151</sup> *McDonald v. Toledo &c. St. R. Co.*, 74 Fed. Rep. 104; s. c. 43 U. S. App. 79; 36 Ohio L. J. 49; 29 Chicago Leg. News 35. To the same effect, see *Markowitz v. Dry-Dock &c. R. Co.*, 12 Misc. (N. Y.) 412; s. c. 67 N. Y. St. Rep. 572; 33 N. Y. Supp.



*snow-plow* it throws up a ridge of snow upon the roadway outside of its tracks, and a traveller is injured by it.<sup>152</sup> In this connection it must be remembered that the courts are called upon to balance the right of the street railway company to open its track, and the right of the public to have the benefit of this mode of conveyance on the one hand, and the rights of the ordinary traveller upon the highway upon the other hand; and it may well be that the company ought to be exonerated where in opening its track it produces no *unnecessary* danger or inconvenience to public travel. We hence find a holding to the effect that where one driving in a sleigh has been overturned and injured in consequence of an embankment of snow, created by a street railway company in clearing its track after a heavy snow storm, he must, in order to a recovery, make it appear that the heaping up of the snow was unnecessary, or that the track could have been cleared in some other manner, or that the heaps were not removed within a reasonable time.<sup>153</sup> A frequent means of clearing street railway tracks of snow is the *scattering of salt* along the track, which has the effect of melting the snow and at the same time producing a liquid which does not freeze until thirty-two degrees of the Fahrenheit scale below the freezing point of fresh water, and which is very painful and even dangerous to horses. The use of this means of clearing a street railway track of snow is so injurious to public travel that city ordinances have been passed prohibiting it, and there is a manifest tendency on the part of the courts to sustain such ordinances as valid police regulations.<sup>154</sup> The British House of Lords has gone further

702. And so where the company had obstructed that part of the street outside of its tracks by snow pushed from its tracks, and had also obstructed one of its tracks with a repair wagon so that there remained only the other track upon which a person could drive, and a driver, while attempting to pass the repair wagon on such other track was injured by a collision with a passing car,—damages were recoverable: *West Chicago St. R. Co. v. O'Connor*, 85 Ill. App. 278.

<sup>152</sup> *Somerville v. Poughkeepsie City R. Co.*, 63 Hun 628; s. c. 43 N. Y. St. Rep. 425; 17 N. Y. Supp. 719. It has been held that a municipal ordinance providing that when snow falls of a sufficient depth for sleighing, *no snow-plows* shall be allowed to pass over the tracks of a street railway company, and that the company shall not cause snow to

be removed from its tracks without the consent of a certain officer, does not wholly prohibit the use of snow-plows; and such use may be authorized by the consent of one of such officers: *Ovington v. Lowell & Co. St. R. Co.*, 163 Mass. 440; s. c. 40 N. E. Rep. 767.

<sup>153</sup> *Ovington v. Lowell & Co. St. R. Co.*, 163 Mass. 440; s. c. 40 N. E. Rep. 767.

<sup>154</sup> For example, where such an ordinance existed, it was held that it could not be shown to be *unreasonable* and hence invalid by evidence that this means of clearing the track was necessary to enable the company to run its cars, where it did not appear that it could not at a reasonable expense have diverted from its tracks the water which accumulated by day and froze by night: *State v. Elizabeth*, 58 N. J. L. 619; s. c. 32 L. R. A. 170; 3 Am.



and held that a street railway company can not, even with the permission of the road authorities, create a nuisance by cleaning the snow from its track, and piling it at the side of the rails, and scattering salt to melt the snow in the grooves of the rails, so that the mixture flows into heaps of snow already collected at the sides, and forms a freezing mixture causing an injury to horses and inconvenience to traffic other than that of the railway itself.<sup>155</sup> On the other hand, a horse-railroad company, in removing snow from its track, must be careful not to interfere with the natural flow of water from the street, either by obstructing the gutter or otherwise, but it is not obliged to haul the snow away, and is liable only in case it has failed to exercise ordinary care.<sup>156</sup>

§ 1370. **Evidence in Such Actions.**—In actions by travellers upon the public highway for damages caused by the highway being obstructed by private persons or corporations, it has been held no error to confine the testimony of both parties as to the condition of the road, to the immediate vicinity of the accident, and not to extend it to other places in the same street or road.<sup>157</sup> It has also been held, against the able dissenting opinion of a single judge, that, in an action against a street railway company for obstructing the street by throwing up a dangerous ridge of snow in clearing its track, where the issue involves the question whether a street crossing had been thus rendered unsafe for the travelling public, it is competent to allow persons familiar with driving to give their *opinion as eye-witnesses* concerning the safety of the crossing.<sup>158</sup>

& Eng. Rail. Cas. (N. S.) 614; 34 Atl. Rep. 146. Nor was such an ordinance, which prohibited the use of salt on a street railway track except on curves at street crossings, invalid, as an impairment of the franchise of the company, or a restriction upon the operation of its road, merely because it would occasion some inconvenience to the company or involve some expense to it, or prevent it from operating its road as successfully as it otherwise might have done: State v. Elizabeth, 58 N. J. L. 619; s. c. 32 L. R. A. 170; 3 Am. & Eng. Rail. Cas. (N. S.) 614; 34 Atl. Rep. 146.

<sup>155</sup> Ogston v. Aberdeen & C. Tramways (H. L.), 66 L. J. P. C. (N. S.) 1; s. c. (1897) A. C. 111. Evidence under which a verdict could not be sustained in an action for injuries alleged to have been caused by snow

or ice thrown by a sweeper used by a street railway company to clear snow from its tracks: Connor v. Metropolitan St. R. Co., 63 N. Y. Supp. 509; s. c. 48 App. Div. 580.

<sup>156</sup> Short v. Baltimore City R. Co., 50 Md. 73 (Alvey, J., dissenting).

<sup>157</sup> Laughlin v. Street R. Co., 62 Mich. 220.

<sup>158</sup> Laughlin v. Street R. Co., 62 Mich. 220 (Morse, J., dissenting). In so holding the court, speaking through Campbell, C. J., said: "No amount of description can enable a jury to see the place as the witnesses saw it; and while witnesses must describe the place as well as they can, it is always competent for those who are familiar with the highways and their use, to give their impressions received at the time, concerning safety or convenience of passage, and other conditions of an



## § 1371. Injuries to Travellers from the Fall of Electric Wires.—

The fact that an electric wire operated by a street railway company has fallen upon the highway and has been allowed to remain there charged with electricity, is of itself *prima facie* evidence of negligence under the rule of *res ipsa loquitur*,<sup>159</sup> which evidence, unless rebutted or explained in a manner consistent with the conclusion of due care, entitles a traveller injured in consequence of such wire being down, to recover damages from the company. Nor is it necessary that the traveller come in actual contact with the fallen wire, but he may recover damages where, riding a bicycle along the street, and suddenly coming upon the highway, he is injured by a fall, produced by his attempting to turn suddenly so as to avoid it.<sup>160</sup> If the electric trolley leaves its wire, and strikes a span wire between two posts, and pulls it down upon a traveller on the street, injuring him, the circumstances obviously present a question of fact for a jury as to whether the accident was caused by the negligence of the railway company.<sup>161</sup>

analogous nature:" *Ibid.* 226. To this doctrine the court cited *Evans v. People*, 12 Mich. 27; *Beaubien v. Cicotte*, 12 Mich. 459; *Detroit & C. R. Co. v. Van Steinburg*, 17 Mich. 99; *Underwood v. Waldron*, 33 Mich. 232; *Elliott v. Van Buren*, 33 Mich. 49, and note; *Pettibone v. Smith*, 37 Mich. 579; *Huizega v. Cutler & Co.*, 51 Mich. 272. As opposed to this doctrine, *Morse, J.*, in his dissenting opinion cited *Crane v. Northfield*, 33 Vt. 124; *Lester v. Pittsford*, 7 Vt. 158; *Patterson v. Colebrook*,

29 N. H. 94; *Hutchinson v. Methuen*, 1 Allen (Mass.) 33; *Kelley v. Fond du Lac*, 31 Wis. 179; *Smead v. Lake Shore & C. R. Co.*, 58 Mich. 202, and authorities there cited.

<sup>159</sup> Vol. I., § 15.

<sup>160</sup> *Chattanooga & C. R. Co. v. Mingle*, 103 Tenn. 667; s. c. 58 S. W. Rep. 23.

<sup>161</sup> *Bamford v. Pittsburgh & C. Traction Co.*, 194 Pa. St. 17; s. c. 44 Atl. Rep. 1068. As to injuries to travellers on the street from falling wires, see Vol I., § 1238, *et seq.*



## CHAPTER XLII.

## COLLISIONS BETWEEN STREET CARS AND TRAVELLERS.

| SECTION  | SECTION   |
|--|---|
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### § 1374. Relative Rights of the Company and other Travellers.<sup>1</sup>—

In considering the question of the liability of street railway companies for injuries to persons or animals upon the street, through collisions with their horses or vehicles, the courts have frequently taken occasion to define the relative rights of such companies and of the rest of the travelling public, in the use of the streets. And first, it may be stated that, assuming that the street railway company is *lawfully* in the occupation of the street, neither it nor other persons occupying the street for the usual purposes of travel or passage, are *trespassers*, but both have, within reasonable limits, a right to occupy and use the street. As persons making ordinary use of the highway, either on foot or in vehicles drawn by horses or other draft animals, are not trespassers, although upon that portion of the street occupied by the tracks of the railway company, the company must run its cars or trains with reference to the rights of such persons.<sup>2</sup> While it is sometimes said that ordinary vehicles have *equal rights* in the use of the streets with railroad cars,<sup>3</sup>—yet this must necessarily be understood

<sup>1</sup> Compare §§ 1347, 1356, 1392, 1399, 1402, 1453, 1359, where this section is referred to.

<sup>2</sup> *Kansas &c. R. Co. v. Pointer*, 9 Kan. 620; *Kellinger v. Forty-second Street R. Co.*, 50 N. Y. 206; *Worster v. Forty-second Street &c. R. Co.*, 50 N. Y. 203. As to *right* of vehicles on street railway *track*,—see *Orange &c. R. Co. v. Ward*, 47 N. J. L. 560; *North Hudson &c. R. Co. v. Isley*, 49 N. J. L. 468; *Fleckenstein v. Dry Dock &c. R. Co.*, 105 N. Y. 655; *Mullen v. Central Park &c. R. Co.*, 49 N. Y. St. Rep. 80; *Will v. West Side R. Co.*, 84 Wis. 42; *Laethem v. Ft. Wayne &c. R. Co.*, 100 Mich. 297; *Omaha St. R. Co. v. Duvall*, 40 Neb. 29; *Arnesen v. Brooklyn &c. R. Co.*, 61 N. Y. St. Rep. 321; *Glazebrook v. West End St. R. Co.*, 160 Mass. 239; *Thomas v. Citizens' &c. R. Co.*,

132 Pa. St. 504; *Cline v. Crescent City R. Co.*, 43 La. An. 327; *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179; *Spurrier v. Front St. R. Co.*, 3 Wash. 659; *Rascher v. East Detroit &c. R. Co.*, 90 Mich. 413; *Central &c. R. Co. v. Chatterson*, 14 Ky. L. Rep. 663; *Bernhard v. Rochester R. Co.*, 68 Hun (N. Y.) 369; *O'Neill v. Third Ave. R. Co.*, 3 Misc. (N. Y.) 521; *Davidson v. Denver Tramway Co.*, 4 Colo. App. 283; *Winter v. Cross-town St. R. Co.*, 8 Misc. (N. Y.) 362; *Weiser v. Broadway &c. R. Co.*, 10 Ohio C. C. 14; *Lake Roland &c. R. Co. v. McKewen*, 80 Md. 593; *Cincinnati St. R. Co. v. Whitcomb*, 66 Fed. Rep. 915; *Kennedy v. Metropolitan St. R. Co.*, 11 Misc. (N. Y.) 320.

<sup>3</sup> *Adolph v. Central Park &c. R. Co.*, 43 N. Y. Superior Ct. 199.



with reference to the *difference* in construction and mobility between ordinary vehicles, which may move from side to side at pleasure, and railway cars, which can not leave their tracks. It is, therefore, a sound view that a railway company, which is permitted by law to lay its tracks through a public highway, is not subject, in the running of its cars, to the ordinary *law of the road*, but that it has the *exclusive right of way* upon that portion of the highway occupied by its tracks; so that an ordinary vehicle, passing along the highway, is under the duty of turning out to give way for its cars, and the drivers of such vehicles can not require the driver of the car to stop, or to do any other act to avoid a collision, where they can avoid the result by turning out.<sup>4</sup> But even this exclusive right to the use of those portions of the street covered by its tracks, does not exclude the public from using such portions, when to do so will not obstruct or impede the passage of its cars; and where it is necessary for an individual to make such a use of the highway, for a short space of time, as will necessarily impede the running of the cars of a street railway company,—as, for instance, in *moving a heavy steam boiler*,—the company will not be entitled to an *injunction* to restrain such use,—at least where the plan adopted by the person so attempting to use the street, involves less inconvenience to the public than any other which could be adopted for the purpose.<sup>5</sup> But ordinarily the street railway company has the exclusive right of way along that portion of the street covered by its own track, both as against other street passengers whom its cars may meet, and against those travelling in the same direction at a speed which would delay its cars.<sup>6</sup> On the one hand, a franchise to construct, maintain, and use a horse railroad over a highway, authorizes the grantees to drive their cars upon their track at the rate of speed used for vehicles drawn by horses for the carriage of passengers, so far as this right can be enjoyed without preventing other vehicles on the highway from moving at their usual rate of speed.<sup>7</sup> On the other hand, the driver of a vehicle, upon a street traversed by horse cars, must use all reasonable efforts to give the car a clear passage, and, in so doing, must act the part of a reasonably prudent man, making due allowance for the weight of his vehicle, the speed of the car, and other circumstances of the case.<sup>8</sup>

<sup>4</sup> *Barker v. Hudson River R. Co.*, 4 Daly (N. Y.) 274.

<sup>5</sup> *Second &c. Sts. R. Co. v. Morris*, 8 Phil. (Pa.) 304. The threatened interruption of the plaintiff's cars, which the court refused to enjoin, was for a period of two hours.

<sup>6</sup> *Jersey City &c. R. Co. v. Jersey City &c. R. Co.*, 20 N. J. Eq. 61.

<sup>7</sup> *Commonwealth v. Tempie*, 14 Gray (Mass.) 69.

<sup>8</sup> *North Hudson County R. Co. v. Isley*, 49 N. J. L. 468; s. c. 10 Atl. Rep. 665; 9 Cent. Rep. 122. One has the right to drive in street car tracks, subject only to the duty to exercise due care to avoid an undue interference with the rights of the



§ 1375. **Sense in which the Rights of the Street Railway Company are Paramount.**<sup>9</sup>—Decisions are met with to the effect that the rights of a street railway company, under its license or franchise, of occupying the public street with its track, are *paramount* to those of ordinary travellers thereon;<sup>10</sup> and it has been said that where the cars of a street railway company are running at a reasonable and lawful rate of speed, and with such care as can be reasonably used, they have *an exclusive right to the track*.<sup>11</sup> But while it is the duty of the traveller, as far as he reasonably can, to keep off the tracks of the street railway company, so as to permit the free and unobstructed passage of cars thereon,<sup>12</sup>—yet there is no rule of law obliging him, at all times, and under all circumstances, to refrain from *driving upon such track*,<sup>13</sup> and we shall see that the courts refuse to impute contributory negligence to such an act.<sup>14</sup> The better opinion is that the rights of the traveller and the railway company, in the use of the highway, are equal, but with this limitation, that, as a car of the railway company can not quit its tracks and turn out in order to pass the traveller, the traveller must turn out for it. In other words, the cars have the preference in the use of that portion of the surface of the highway which consists of the railway track.<sup>15</sup> Since ordinary travellers upon the street do not act unlawfully, or even negligently, in using that portion of the street covered by the railway track, the servants of the street railway company are not justified in treating them as *trespassers*, and running them down.<sup>16</sup>

street car company, and to avoid a collision. West Chicago St. R. Co. v. Levy, 82 Ill. App. 202.

<sup>9</sup> Compare §§ 1348, 1349, 1352, 1359, where this section is referred to.

<sup>10</sup> Government St. R. Co. v. Hanlon, 53 Ala. 70, 81. See also Meyer v. Lindell R. Co., 6 Mo. App. 27; Hot Springs St. R. Co. v. Johnson, 64 Ark. 420; s. c. 42 S. W. Rep. 833; Ehrisman v. East Harrisburg & c. R. Co., 150 Pa. St. 180; s. c. 17 L. R. A. 448; 24 Atl. Rep. 596; Kennedy v. Metropolitan St. R. Co., 11 Misc. (N. Y.) 320; s. c. 32 N. Y. Supp. 153; 65 N. Y. St. Rep. 300; Rosenblatt v. Brooklyn & c. R. Co., 26 App. Div. 600; s. c. 50 N. Y. Supp. 333; Maxwell v. Wilmington City R. Co., 1 Marv. (Del.) 199; s. c. 40 Atl. Rep. 945.

<sup>11</sup> Hegan v. Eighth Avenue R. Co., 15 N. Y. 380; Wilbrand v. Eighth Avenue R. Co., 3 Bosw. (N. Y.) 314; Barker v. Hudson & c. R. Co., 4 Daly (N. Y.) 274; and to the same effect,

see Central Pass. R. Co. v. Chatterson, 14 Ky. L. Rep. 663.

<sup>12</sup> O'Neill v. Third Avenue R. Co., 3 Misc. (N. Y.) 521; s. c. 52 N. Y. St. Rep. 486; 23 N. Y. Supp. 20.

<sup>13</sup> Adolph v. Central & c. R. Co., 1 Jones & Sp. 186, 188; Smith v. Philadelphia Traction Co., 3 Super. Ct. (Pa.) 129; s. c. 40 W. N. C. 501.

<sup>14</sup> Post, § 1453.

<sup>15</sup> Adolph v. Central & c. R. Co., 65 N. Y. 554; s. c. 11 Jones & Sp. (N. Y.) 199, 205. See also Shea v. Potrero & c. R. Co., 44 Cal. 414, 428; Cincinnati St. R. Co. v. Whitcomb, 66 Fed. Rep. 915; s. c. 1 Ohio Dec. Fed. 5.

<sup>16</sup> Albert v. Bleeker St. & c. R. Co., 2 Daly 389; Cohen v. Dry Dock & c. R. Co., 69 N. Y. 170; s. c. 8 Jones & Sp. (N. Y.) 368; Mentz v. Second Avenue R. Co., 3 Abb. App. Dec. 274; s. c. 2 Robt. 356; Barksdull v. New Orleans & c. R. Co., 23 La. An. 180; Railroad Co. v. Gladmon, 15 Wall. (U. S.) 401. That a railway



§ 1376. **Sense in which the Rights of the Company and the Public are Equal.**—Decisions are found which, in form of language at least, deny that a street car has a right of way over its tracks which is paramount to the rights of ordinary vehicles;<sup>17</sup> and cases are found containing expressions to the effect that street railway companies have no rights in the streets superior to those of the general public.<sup>18</sup> Notwithstanding these different forms of expression, it is believed that all the decisions unite and harmonize on the principle stated in the preceding paragraph. Street railway companies do not, by virtue of their franchises or licenses, acquire a *proprietary interest* in that portion of the public street upon which their tracks are laid, such as excludes the right of the general public to use the same as a part of the public highway.<sup>19</sup> The true view is that the travelling public, whether driving teams attached to vehicles, riding on horseback, or proceeding on foot, have a right to use every portion of the public street upon which the tracks of a street railway company are laid, but subject to a right of priority of passage in the company.<sup>20</sup> The only possible doctrine consistent with the operation of street cars, so as to make them a public benefit and utility, is that such cars have, in a qualified way at least, the right of way against teams and obstructions in much the same manner, though not to the same extent, as ordinary steam railroads have; and that other persons using the highway should carefully observe the movement of the street cars when likely to meet them, and should accord them an unobstructed passage, as nearly as they can.<sup>21</sup> On the other hand, having reference to the rights of the general travelling public, it is incumbent upon the street railway company, in the absence of any statute or municipal ordinance regulating the speed of its cars, to run them at such speed and to keep them under such control as not unreasonably to endanger the general travelling public, or interfere with their right freely to use the street or highway.<sup>22</sup> It is almost a meaningless platitude to reason, as one

company may recover damages from a driver unlawfully colliding with its car, whereby one of its passengers has been injured, to whom it has been compelled to pay damages,—see *Chicago & C. R. Co. v. Rend*, 6 Ill. App. 243.

<sup>17</sup> *Lake Roland & C. R. Co. v. McKewen*, 80 Md. 593; s. c. 31 Atl. Rep. 797.

<sup>18</sup> *Weiser v. Broadway & C. St. R. Co.*, 10 Ohio C. C. 14; s. c. 2 Ohio Dec. 463.

<sup>19</sup> One court in announcing this principle carries it so far as to hold that street railway companies ac-

quire no such right as to impose upon travellers the duty of keeping themselves and horses out of the way of cars upon street railway tracks: *Omaha St. R. Co. v. Duvall*, 40 Neb. 29; s. c. 58 N. W. Rep. 531. But this is absurd on its face.

<sup>20</sup> *De Lon v. Kokomo & C. St. R. Co.*, 22 Ind. App. 377; s. c. 53 N. E. Rep. 847.

<sup>21</sup> *Flewelling v. Lewiston & C. R. Co.*, 89 Me. 585; s. c. 36 Atl. Rep. 1056.

<sup>22</sup> *Lawler v. Hartford St. R. Co.* (Conn.), 43 Atl. Rep. 545.



court has done, that the right which an electric car has on its highway, is not in its nature higher than the right of other travellers, but is a right common with theirs, in the exercise of which the electric car and the traveller must so conduct themselves as not unreasonably to interfere with the just rights of the other.<sup>23</sup> A street car is a vehicle of public carriage. It is obliged to run on a fixed schedule with respect to time. The convenience and the safety of the public alike demand that it should have the fair and free exercise of this right. It runs on a fixed track from which it can not turn out; it necessarily follows that it has the right of way in case of meeting a person or vehicle on its track. But notwithstanding this paramount right to the use of its tracks, which necessarily includes the space between them, it owes to those travelling upon the streets the duty of exercising due care in the operation of its cars to avoid injuring them.<sup>24</sup> Each party in the use of the highway is bound to exercise ordinary and reasonable care, diligence, and caution, such as the circumstances require, to avoid colliding with the other.<sup>25</sup>

§ 1377. **Relative Rights of Street Railway Companies and Pedestrians.**—Undoubtedly street railway companies have a preference in the use of their own tracks *as against pedestrians*, and the latter must use reasonable care to keep out of the way of their cars.<sup>26</sup> Many decisions emphasize this paramount right of the railway company, and some go so far as, in effect, to construe it into a license on the part of the railway companies to run down any foot-passenger who may expose himself upon their tracks, or so near thereto as to be struck by their passing cars.<sup>27</sup> On the other hand, the law will not uphold the

<sup>23</sup> *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475; s. c. 2 Chic. L. J. Wkly. 287; 37 Atl. Rep. 379.

<sup>24</sup> *Goldrick v. Union R. Co.*, 20 R. I. 128; s. c. 2 Am. Neg. Rep. 647; 37 Atl. Rep. 635.

<sup>25</sup> *Hall v. Ogden City & C. St. R. Co.*, 13 Utah 243; s. c. 44 Pac. Rep. 1046; 4 Am. & Eng. Rail. Cas. (N. S.) 77. One court holds that although the right of a street railway to the part of a street occupied by its rails is only in common with that of other travellers, it has an exclusive right thereto for reasonable time for the use of a usual and ordinary appliance for repairing an overhead wire, where such must be exclusive to be available at all: *Potter v. Scranton Traction Co.*, 176 Pa. St. 271; s. c. 38 W. N. C. 453; 35 Atl. Rep. 188; 4 Am. & Eng. R. Cas. (N. S.) 307. Duty of vehicles to give the way to street cars approaching at a reason-

able speed and signaling: *Breary v. Traction Co.*, 5 Pa. Dist. Rep. 95.

<sup>26</sup> *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625; s. c. 36 N. Y. St. Rep. 385; 26 N. E. Rep. 967. See also *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605; s. c. 27 Atl. Rep. 1067; 22 L. R. A. 374; 56 Am. & Eng. Rail. Cas. 590,—where these relative rights are intelligently discussed by Magie, J.

<sup>27</sup> *Childs v. New Orleans City R. Co.*, 33 La. An. 154; *Warner v. People's St. R. Co.*, 141 Pa. St. 615. In this line of thought, it has been held erroneous to charge a jury that a person may foolishly, carelessly, and recklessly get upon the track of a street railway, and yet recover damages unless the company is without fault in running the car against him: *Redford v. Spokane St. R. Co.*, 9 Wash. 55; s. c. 36 Pac. Rep. 1085.



street railway company in exercising its license or franchise of using the street unreasonably or negligently, so as unduly to imperil the general public in the ordinary use of the street. It can not, for example, runs its cars at such a *high rate of speed* as will be incompatible with the reasonable safety of the general public in using the highway.<sup>28</sup> Foot-passengers, on the other hand, are required to exercise reasonable care to avoid injury by bringing themselves in contact with the cars of street railway companies; and this care is in proportion to the risk which they run, and it may be greater in the case of cars propelled by cables and by electricity than in case of ordinary horse cars. But, on the other hand, the measure of care exacted of travellers in crossing a *steam railroad track* can not obviously be applied, with propriety and strictness, in the case of street railways in crowded cities, the cars of which can be quickly stopped, and where people necessarily cross the streets frequently and hurriedly.<sup>29</sup> In the language of Gray, C. J., in a case of this character, "the cases relating to injuries suffered by being struck by a locomotive engine at a railroad crossing afford no test of the degree of care required of the plaintiff in this case. The cars of a horse railway have not the same right to the use of the track over which they travel, do not run at the same speed, are not attended with the same danger, and are not so difficult to check quickly and suddenly, as those of an ordinary railroad corporation. A person lawfully travelling upon the highway is not, therefore, bound to exercise the same degree of watchfulness and attention to avoid the one as to keep himself out of the way of the other."<sup>30</sup> The many decisions scattered through this chapter emphasize the duty of the cable gripman and electric motorman to keep his car so far under control as to avoid injuries to pedestrians who may come upon the track in front of the car in the exercise of their ordinary rights in the use of the street.<sup>31</sup>

§ 1378. **Relative Care Required of the Company and of the Public.**<sup>32</sup>—Many of the judicial decisions contain dissertations upon the relative care required of the street railway company and of the public, to avoid accidents in consequence of collisions; but they all come substantially to the proposition that it is the duty of each to *act reasonably* under all the circumstances of the case. One court has reasoned,

<sup>28</sup> Newark Pass. R. Co. v. Block, 55 N. J. L. 605; s. c. 27 Atl. Rep. 1067; 22 L. R. A. 374; 56 Am. & Eng. Rail. Cas. 590.

<sup>29</sup> Driscoll v. Market Street Cable R. Co., 97 Cal. 553; s. c. 32 Pac. Rep. 591; Smith v. Metropolitan St. R. Co., 7 App. Div. 253; s. c. 74 N.

Y. St. Rep. 706; 40 N. Y. Supp. 148.

<sup>30</sup> Lynam v. Union R. Co., 114 Mass. 83, 88.

<sup>31</sup> Consolidated Traction Co. v. Glynn, 59 N. J. L. 432; s. c. 37 Atl. Rep. 66.

<sup>32</sup> Compare § 1437, where this section is referred to.



But

in substance, that while a street railroad has a right to run its cars on a public street, yet the public have also a right to travel thereon; that the railroad company must exercise such care and precaution, for the purpose of avoiding accidents and endangering property or person, as a reasonable prudence would suggest; that it has only an equal right with the travelling public to the use of the street where its track is laid, with a few exceptions, such as, that the cars run on a track, and when a vehicle meets a car it must give way; that a person is entitled to walk on a street railroad track, using reasonable care and prudence to avoid injuries; but that he is not required to abandon the track in order to avoid possible injuries which may result from the carelessness of the company; and that, if he is injured by the carelessness of the company while walking on the track, the fact that he might have walked by the side of the track, is not *contributory* negligence on his part.<sup>33</sup> Another court, speaking with reference to this question, has reasoned, in substance, that the degree of care which a person owing diligence must exercise depends upon the hazards and dangers he may expect to encounter, and the consequences which may be expected to flow from his negligence; that the same degree of care is not required of the carriers of passengers upon street cars drawn by horses, as of railroad companies, whose cars are drawn by steam; that no greater degree of care, as to pedestrians in a street, is required of them, than is required of the driver or owner of any other vehicle; that, in the attachment of horses to its cars, it is not bound to use the best method human skill and ingenuity have devised to prevent accidents, but that if it uses the method in general use, and which has been found usually adequate and safe, its duty in this respect is discharged.<sup>34</sup> On the other hand, speaking with reference to a railroad company operating an ordinary *steam railroad* on the streets of a city, it has been reasoned that, while a railroad company is held to a *very high degree of care and diligence*, in operating its road through the public streets of a city, yet the care and caution in this respect are required to be exercised in reference to the proper uses of the streets of a thoroughfare for travel, rather than to the safety of persons in wrongfully getting on their cars when running. The duty imposed upon the company does not require them to use every precaution to avoid injury to individuals, or to employ any particular means, which it may appear, after an accident has occurred, would have avoided it. They are only required to use every reasonable precaution, such as would have been adopted by a very pru-

<sup>33</sup> *Shea v. Potrero &c. R. Co.*, 44 Cal. 414.

<sup>34</sup> *Unger v. Forty-second Street R. Co.*, 51 N. Y. 497, per Earl, C.



dent person, prior to the accident.<sup>35</sup> Another court has reasoned, in substance, that the drivers of street cars, who drive through a densely populated city, ought always to have their teams under immediate and absolute control, and are bound to drive in such a manner as, if possible, to injure no one. They may generally rely upon the instinct of self-preservation to induce every one to endeavor to avoid injury; but when, from infancy or other apparent cause, a person liable to be injured can not be expected to exercise the usual degree of prudence in this respect, a greater degree of caution is necessary on the part of the driver.<sup>36</sup> In all such cases, the governing question must be whether, under a just application of the foregoing principles, there was a condition of facts which, if believed by the jury, would constitute what is frequently called *evidence of negligence*, in which case the plaintiff is entitled to have his case submitted to the jury; and whether, on the other hand, there is a condition of facts arising out of the testimony adduced in behalf of the plaintiff, or out of other undisputed testimony, showing that he is guilty of *contributory negligence*,—in which case it will be the duty of the judge to order a nonsuit, or direct verdict for the defendant, according to the course of practice in the particular court. To dwell further upon this subject would involve an extensive disquisition upon the law of negligence, as applied to the operations of railways in streets, upon which subject several thousand judicial decisions have already been rendered in the United States. A further discussion of these principles, and of their application in particular cases, lies outside of the scope of the present work.<sup>37</sup>

**§ 1379. Degree of Care Required of the Street Railway Company.**—Persons using the railway track for purposes of travel or mo-

<sup>35</sup> Chicago &c. R. Co. v. Stumps, 55 Ill. 367.

<sup>36</sup> Schierhold v. North Beach &c. R. Co., 40 Cal. 447. See also Barksdull v. New Orleans &c. R. Co., 23 La. An. 180.

<sup>37</sup> The following illustrative cases, which happen to rest under the eye of the author at the time of the present writing, are merely referred to:—Gallagher v. Coney Island &c. R. Co., 4 N. Y. Supp. 870. Case for a jury where the car was driven at the rate of five or six miles an hour, and the plaintiff did not see it: Brown v. Seventy-third St. R. Co., 21 N. Y. St. Rep. 475; s. c. 4 N. Y. Supp. 192. Verdict properly ordered for defendant, where plaintiff jumped from the platform of one of the defendant's cars, upon the middle of the defendant's other

track, to avoid a kick offered by the conductor: McCann v. Sixth Ave. R. Co., 21 N. Y. St. Rep. 482; s. c. 3 N. Y. Supp. 418. Company exonerated where a child eighteen months old in charge of its mother was run over in consequence of the mother becoming confused: Wolf v. Houston &c. R. Co., 16 N. Y. Civ. Pro. 107; s. c. 19 N. Y. St. Rep. 763; 2 N. Y. Supp. 789. Verdict for plaintiff not disturbed, where child two years and a half old was run over, the driver not paying proper attention: Hyland v. Yonkers R. Co., 22 N. Y. St. Rep. 100; s. c. 4 N. Y. Supp. 305. Instructions in a case where a boy eleven years old ran against a street-car while pursued by another boy: Hays v. Gainesville St. R. Co., 70 Tex. 602; s. c. 8 Am. St. Rep. 321; 8 S. W. Rep. 491.



mentary passage can not exact of the railway company that high degree of vigilance which it is the policy of the law to impose upon carriers with reference to the safety of their passengers, namely, the *highest* or the *utmost* care of which human foresight is capable. Such a degree of care is the result of a contract, express or implied; and, as between the company and the general public, no such agreement exists. As street cars are no more dangerous to pedestrians in the street than carriages, omnibuses, or any other vehicle drawn by horses, no more care can be required of street railway companies in the management of their cars and horses in the street than is required of the driver or owner of any other vehicle, namely, reasonable or ordinary care.<sup>38</sup> This degree of care has been well described as the care which a reasonably prudent man would exercise under similar circumstances;<sup>39</sup> or the care which a man of ordinary prudence would exercise under like circumstances;<sup>40</sup> or such watchful care as will prevent accidents or injuries to persons, who, without negligence on their part, may not be able to get out of the way of the passing car.<sup>41</sup> It is manifestly a care proportioned to the apparent danger in view of the surrounding circumstances; and, on the principle already considered,<sup>42</sup> it is a care which increases with the increase of the danger.<sup>43</sup> For example, it has been reasoned that *great care* is required of a cable car company, in the operation of their lines, where they run parallel to and within a few feet of each other.<sup>44</sup> Speaking with reference to *horse* railroads, it

<sup>38</sup> Pendleton Street R. Co. v. Shires, 18 Ohio St. 255; Pendleton Street R. Co. v. Stallman, 22 Ohio St. 1, 26; Baltimore &c. R. Co. v. McDonnell, 43 Md. 534, 553; Unger v. Forty-second Street &c. R. Co., 51 N. Y. 497; Gilligan v. New York &c. R. Co., 1 E. D. Smith (N. Y.) 453, 457; Falotio v. Broadway &c. R. Co., 9 Daly (N. Y.) 243; Pope v. Kansas City Cable R. Co., 99 Mo. 400; s. c. 12 S. W. Rep. 891; 43 Am. & Eng. Rail. Cas. 290; McClain v. Brooklyn City R. Co., 116 N. Y. 459; s. c. 22 N. E. Rep. 1062; 27 N. Y. St. Rep. 549; 40 Am. & Eng. Rail. Cas. 254; Stanley v. Union Depot R. Co., 114 Mo. 606; s. c. 21 S. W. Rep. 832; Gilmore v. Federal Street &c. R. Co., 153 Pa. St. 31; s. c. 31 W. N. C. 507; 23 Pitts. L. J. (N. S.) 438; 25 Atl. Rep. 651; McGary v. West Chicago St. R. Co., 85 Ill. App. 610; North Chicago St. R. Co. v. Allen, 82 Ill. App. 128; Anderson v. Minneapolis Street R. Co., 42 Minn. 490; s. c. 44 N. W. Rep. 518; 43 Am. & Eng. R. Cas. 294;

McKeown v. Cincinnati St. R. Co. (Cin. Super. Ct.), 2 Ohio Leg. News 388; Altemeier v. Cincinnati St. R. Co., 4 Ohio N. P. 224; s. c. 4 Ohio Leg. News 300; Cumming v. Brooklyn &c. R. Co., 104 N. Y. 669; s. c. 6 Cent. Rep. 394.

<sup>39</sup> Moroney v. Brooklyn City R. Co., 30 N. Y. St. Rep. 911; s. c. 9 N. Y. Supp. 546.

<sup>40</sup> San Antonio St. R. Co. v. Mechler, 87 Tex. 628; s. c. 30 S. W. Rep. 899; aff'd 29 S. W. Rep. 202.

<sup>41</sup> Kestner v. Pittsburgh &c. T. Co., 158 Pa. St. 422; s. c. 27 Atl. Rep. 1048.

<sup>42</sup> Vol. I., §§ 25, 26.

<sup>43</sup> Hall v. Ogden City &c. R. Co., 13 Utah 243; s. c. 44 Pac. Rep. 1046; 4 Am. & Eng. Rail. Cas. (N. S.) 77; Thompson v. Salt Lake &c. Transit Co., 16 Utah 281; s. c. 40 L. R. A. 172; 52 Pac. Rep. 92; 10 Am. & Eng. Rail. Cas. (N. S.) 563.

<sup>44</sup> West Chicago St. R. Co. v. Yund, 68 Ill. App. 609; s. c. aff'd in 169 Ill. 47; 43 N. E. Rep. 208.



has been described by saying that it is not the high degree of care which the law demands from carriers in respect of their passengers, but that the street railway company is exonerated by the exercise of the care required of the owners and drivers of other wheeled vehicles which traverse the streets.<sup>45</sup> On the other hand, there are holdings to the effect that street railway companies owe to the general travelling public, on the street, the same high degree of care which the law exacts from carriers of passengers.<sup>46</sup> One court has reasoned that it is the duty of a street railway company to keep its cars and roadway in good condition, to provide competent and careful servants, to see that they use reasonable care to avoid danger, to operate the cars at reasonable rates of speed, and slow up or stop if need be, where danger is imminent.<sup>47</sup>

**§ 1380. Increased Care Demanded by the Introduction of Cables and Electricity.**—On the other hand, the adoption, to satisfy the public needs of rapid transit, in large cities, of underground cables and electric trolleys as a motive power for cars on the streets, essentially changes the conditions under which the public may rightfully use the streets and imposes upon them a greater degree of vigilance, corresponding with the greater danger attending these new modes of transit.<sup>48</sup> It has been reasoned that the degree of care required from a motorman on an electric street car, traversing the street of a city, to avoid injury to persons upon the track, is different and greater than

<sup>45</sup> *Unger v. Forty-second Street & C. R. Co.*, 51 N. Y. 497; s. c. 1 Thomp. Neg., 1st ed., p. 392; *Falotio v. Broadway & C. R. Co.*, 9 Daly (N. Y.) 243.

<sup>46</sup> See *Johnson v. Hudson & C. R. Co.*, 20 N. Y. 65, 75, where Denio, J., speaking of the charge of the trial judge, says: "He did not, in my opinion, overstate the obligations which attach to persons running cars in the night, over a course which is also a public street, in saying that they were bound to exercise the utmost care and diligence, and to use all the means and measures of precaution which the highest prudence could suggest." The language of this learned judge, when carefully examined, may not be inconsistent with the rule in the text as announced in later decisions by the same court; for, certainly, ordinary care would suggest the highest degree of vigilance in running any vehicle *at night* over a

much-frequented thoroughfare. See also the case of *Liddy v. St. Louis & C. R. Co.*, 40 Mo. 506, 519, in which it is stated unqualifiedly that "the peculiar character of the vehicles employed, running as they do through the crowded thoroughfares of the city, makes it incumbent upon every company to exercise the utmost care and diligence to avoid collisions." A holding in Texas exacts the same degree of care which is exacted from carriers of passengers: *Dallas Rapid Transit R. Co. v. Dunlap*, 7 Tex. Civ. App. 471; s. c. 26 S. W. Rep. 877.

<sup>47</sup> *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199; s. c. 40 Atl. Rep. 945.

<sup>48</sup> *Hall v. Ogden City St. R. Co.*, 13 Utah 243; s. c. 44 Pac. Rep. 1046; 4 Am. & Eng. R. Cas. (N. S.) 77; *Thompson v. Salt Lake & C. Transit Co.*, 16 Utah 281; s. c. 40 L. R. A. 172; 52 Pac. Rep. 92; 10 Am. & Eng. Rail. Cas. (N. S.) 563.



that required from the engineer of a railroad train running on the company's right of way, and not at highway crossings, where any person upon the track is a trespasser, to whom the company owes no duty except not to injure him willfully or maliciously; but that, in either case, the care to be exercised must be proportioned to the danger reasonably to be apprehended at the time and place.<sup>49</sup> On the other hand, an instruction that a street car company, legally operating a street railway, is entitled to the track on meeting foot-passengers or other vehicles, and that those travelling by ordinary methods must yield to the street car, has been held misleading as calculated to create the belief in the minds of the jury that the street car companies are not bound to exercise due and proper care to prevent collision.<sup>50</sup>

§ 1381. **Excludes Liability for Mistakes of Judgment by Competent Men.**<sup>51</sup>—Assuming that the street railway company employs a competent gripman, motorman or driver, it would not be liable for his mistake of judgment made in good faith where, in a sudden emergency two lines of action are open to him, and he chooses the one which turns out afterwards not to have been the better means of escaping the catastrophe.<sup>52</sup>

<sup>49</sup> *Stelk v. McNulta*, 99 Fed. Rep. 138. Upon this subject, it has been said by the Supreme Court of Pennsylvania, speaking through McCollum, J.: "Now that rapid transit is recognized and demanded as essential to the prosperity of, and the transaction of business in our large cities, the use of the streets for individual convenience is necessarily qualified so as to make such transit possible, and to minimize its dangers. The substitution of cable and electric cars for the horse-car and the omnibus, is a change which renders impracticable and dangerous certain uses of the streets which were once permissible and comparatively safe. It introduces new conditions, the non-observance of which constitutes negligence. It is the duty of property owners on streets occupied by cable and electric lines of railway, and of persons crossing or driving upon such streets, to recognize and conform to these conditions. The risk of crossing or possession of the tracks of a railway operated by horse-power is not to be compared with the peril involved in a crossing or occupancy of the tracks of a steam, cable, or electric railway. The conditions are nota-

bly unlike in the size, weight, and speed of the cars, and in the power by which they are moved." *Winter v. Federal Street & C. R. Co.*, 153 Pa. St. 26, 28. See also *Schnur v. Citizens' Traction Co.*, 153 Pa. St. 29.

<sup>50</sup> *Chicago & C. R. Co. v. Ingraham*, 131 Ill. 659; s. c. 23 N. E. Rep. 350; 41 Am. & Eng. Rail. Cas. 243. But in the same case an instruction was approved to the effect that a company legally operating a street railway is entitled to the track on meeting foot-passengers or vehicles, as against any person, carriage, etc., driven or being driven thereon, with a view to delay or embarrass the progress of the cars: *Chicago & C. R. Co. v. Ingraham*, *supra*. One of the Appellate Divisions of the State of New York has held that the degree of care expected from an electric street railway company in traversing the streets of a populous city is not less than that required by a carrier of passengers: *Penny v. Rochester R. Co.*, 7 App. Div. 595; s. c. 74 N. Y. St. Rep. 732; 40 N. Y. Supp. 172.

<sup>51</sup> Compare §§ 1451, 1452, where this section is referred to.

<sup>52</sup> *Stabenau v. Atlantic Ave. R. Co.*, 155 N. Y. 511; s. c. 50 N. E. Rep.



§ 1382. **Duty of Driver, Motorman or Gripman to Keep a Constant Lookout.**<sup>53</sup>—In the exercise of this reasonable degree of care, in view of the great danger which is liable to follow from an omission of it, the law exacts nothing less than that the driver, the motorman, or the gripman shall keep a constant lookout, not only ahead, but also to the right and left,<sup>54</sup> so as to discover persons upon the track in dangerous proximity to the approaching car, or persons approaching the track without discovering or taking heed of the approaching car.<sup>55</sup> Therefore, where a street car ran over a boy at a street crossing, and the driver was looking backward at the time, this fact was sufficient to take the question of the negligence of the defendant to the jury.<sup>56</sup>

277; rev'g 89 Hun (N. Y.) 609; Bishop v. Belle City St. R. Co., 92 Wis. 139; s. c. 65 N. W. Rep. 733. Compare *post*, § 1450, *et seq.*

<sup>53</sup> Compare §§ 1385, 1390, 1404, 1406, 1424, 1432, 1460, 1464, where this section is referred to.

<sup>54</sup> Baltimore Traction Co. v. Wallace, 77 Md. 435; s. c. 21 Wash. L. Rep. 313; 26 Atl. Rep. 518; Winters v. Kansas City Cable R. Co., 99 Mo. 509; s. c. 12 S. W. Rep. 652; 6 L. R. A. 536; 40 Am. & Eng. Rail. Cas. 261.

<sup>55</sup> Owens v. People's Pass. R. Co., 155 Pa. St. 334; s. c. 26 Atl. Rep. 748; 32 W. N. C. 313; Schnur v. Citizens' Traction Co., 153 Pa. St. 29; s. c. 25 Atl. Rep. 650; 23 Pitts. L. J. (N. S.) 437; Lahey v. Central Park & C. R. Co., 51 N. Y. St. Rep. 589; s. c. 22 N. Y. Supp. 380; Dallas Rapid Transit R. Co. v. Elliott, 7 Tex. Civ. App. 216; s. c. 26 S. W. Rep. 455; Thoresen v. La Crosse City R. Co., 87 Wis. 597; s. c. 58 N. W. Rep. 1051; Kestner v. Pittsburgh & C. Traction Co., 158 Pa. St. 422; s. c. 27 Atl. Rep. 1048; Swain v. Fourteenth Street R. Co., 93 Cal. 179; s. c. 28 Pac. Rep. 829; Senn v. Southern R. Co., 108 Mo. 142; s. c. 18 S. W. Rep. 1007; Strutzel v. St. Paul City R. Co., 47 Minn. 543; s. c. 50 N. W. Rep. 690; 11 Rail. & Corp. L. J. 132; Wells v. Brooklyn City R. Co., 58 Hun (N. Y.) 389; s. c. 34 N. Y. St. Rep. 636; 12 N. Y. Supp. 67; Anderson v. Minneapolis Street R. Co., 42 Minn. 490; s. c. 44 N. W. Rep. 518; 43 Am. & Eng. Rail. Cas. 294; Dallas & C. Transit Co. v. Dunlap, 7 Tex. Civ. App. 471; s. c. 26 S. W. Rep. 877; Barnes v. Shreve-

port & C. R. Co., 47 La. An. 1218; s. c. 17 So. Rep. 782; Jones v. Greensburg & C. St. R. Co., 9 Pa. Super. Ct. 65; s. c. 43 W. N. C. 298; Baltimore & C. R. Co. v. McDonnell, 43 Md. 534, 552 (where this duty is strongly enforced); Pope v. Kansas City & C. R. Co., 99 Mo. 400; s. c. 12 S. W. Rep. 891; 43 Am. & Eng. R. Cas. 290; Schmidt v. Steinway & C. R. Co., 55 Hun (N. Y.) 496; s. c. 29 N. Y. St. Rep. 200; 8 N. Y. Supp. 664, and 9 N. Y. Supp. 939; Citizens' St. R. Co. v. Merl, 134 Ind. 609; s. c. 33 N. E. Rep. 1014; Mason v. Atlantic Avenue R. Co., 4 Misc. (N. Y.) 291; s. c. 53 N. Y. St. Rep. 454; 24 N. Y. Supp. 139. As to the liability of street railways for injuries to pedestrians, see 13 L. R. A. 74, note. In an action for death caused by a collision between a cable car and a wagon driven by deceased, an *instruction* requiring a vigilant watch of the track ahead is not confusing, although there were *several parallel tracks*: Pope v. Kansas City Cable R. Co., 99 Mo. 400; s. c. 12 S. W. Rep. 891; 43 Am. & Eng. Rail. Cas. 290. Motorman negligent in failing to see in time to stop the car, one who falls on the track while the car is eighty feet away: Kitay v. Brooklyn & C. St. R. Co., 23 App. Div. (N. Y.) 228; 48 N. Y. Supp. 982. Gripman negligent in allowing his attention to be diverted to a woman on the sidewalk, thereby running over a person who attempts to cross the street in front of his car: Martin v. Third Ave. R. Co., 27 App. Div. 52; s. c. 50 N. Y. Supp. 284.

<sup>56</sup> Collins v. South Boston R. Co.,



§ 1383. **This Duty more Imperative in Case of Cable Cars.**—This duty is obviously more imperative in the case of a car drawn by an underground cable than in the case of a horse car, because the speed of the cable car is much greater, and the difficulty of stopping it quickly may be assumed to be greater. It has been, therefore, well said that the gripman of a cable car “should always be on the alert to avoid danger, and his attention never should be diverted from his duties. He should keep his eye constantly on the track before him. If he is permitted to gaze at houses or other objects while the car is in motion, and an accident occurs by reason of such conduct, the company employing him must expect to be held responsible; and it is suggested for the benefit of such corporations, as well as for the safety of the public, that under no circumstances should any one be allowed to ride in the cab with the gripman. Such a matter can not fail to distract his attention from his duties and may be the cause of some serious accident.”<sup>57</sup>

§ 1384. **Still more Imperative in Respect of Cars Propelled by Electricity.**<sup>58</sup>—In respect of cars propelled by electricity, communicated through an overhead trolley, the danger is even greater; since those cars are often driven at a higher rate of speed than cable cars, and are not equally susceptible to the control of those in charge of them. The great excess of accidents committed by these cars over those committed by cable cars attests the accuracy of this statement. In view of this well-known fact, the vigilance which the law exacts of the motorman of the electric car, under the description of reasonable or ordinary care, to keep a lookout for persons in danger on the street, must be even greater and more exacting than in the case of the cable car.<sup>59</sup> This duty is frequently enforced by provisions contained in the charters of these companies, in general statutes, and in city ordinances, some of which, like that of the city of St. Louis,<sup>60</sup> impose a severer rule of diligence than the rule of ordinary care imposed by the principles of the common law; and a failure on the part of the driver, gripman, or motorman to comply with the ordinance is *negligence per se*. So held under an ordinance making it the duty of the driver

142 Mass. 301. And so where just before running over a child, the face of the motorman was turned away from the track while talking with a passenger, and no signal of the approach of the car was given: *Karahuta v. Schuylkill Traction Co.*, 6 Pa. Super. Ct. 319; s. c. 42 W. N. C. 47.

<sup>57</sup> *Schnur v. Citizens' Traction Co.*,

153 Pa. St. 29. See also *Chilton v. Central Traction Co.*, 152 Pa. St. 425.

<sup>58</sup> Compare § 1437, where this section is referred to.

<sup>59</sup> See, on this subject, *Gilmore v. Federal Street &c. R. Co.*, 153 Pa. St. 31.

<sup>60</sup> See *Fath v. Tower Grove &c. R. Co.*, 105 Mo. 537; affirming s. c. 39 Mo. App. 447.



of a car to keep a vigilant lookout for all persons approaching the track, and to stop the car on the first appearance of danger, a failure to perform this duty, followed by an injury to one near the track, being actionable negligence.<sup>61</sup> And this is so, although the ordinance imposes a pecuniary penalty for its non-observance.<sup>62</sup> For a motor-man on an electric car to run his car down grade on the principal street of a city where persons are frequently crossing, without keeping a vigilant lookout and preserving such control over the speed of his car as to enable him to stop it promptly, is evidence of culpable negligence making the company liable for damages for the death or injury of a foot-passenger caused thereby.<sup>63</sup>

§ 1385. **What will and what will not Excuse the Failure to Perform this Duty.**—While it is the general duty of the driver, motor-man or gripman to keep a constant lookout ahead and to the right and left,<sup>64</sup>—yet there are circumstances which excuse the temporary or momentary inattention to this duty,—as where he looks around to observe a passenger getting on board,<sup>65</sup> or to see whether persons standing on the sidewalk desire to get upon his car;<sup>66</sup> or where his attention is otherwise directed to a duty necessary to the safety of his passengers.<sup>67</sup> Neither can it be expected that when danger is imminent on one side of his car, his attention will be equally bestowed to the other, when he has no reason to apprehend danger from both quarters, and his whole mind is bent in the former direction.<sup>68</sup> Nor can a driver be expected to keep a lookout for a source of danger after the car has passed it, unless his attention is attracted to the possibility of it as he passes.<sup>69</sup> It is not, as matter of law, the duty of the *conductor* of a street railroad car to observe the tracks in front of the car and a portion of the track on either side.<sup>70</sup> Nor does the motorman of a trolley car owe the duty of being on the *lookout* for pedestrians *on a trestle* constructed on private property and which is in no respect a public

<sup>61</sup> Hays v. Gainesville St. R. Co., 70 Tex. 602; s. c. 8 Am. St. Rep. 624; 8 S. W. Rep. 291.

<sup>62</sup> See Fath v. Tower Grove &c. R. Co., 105 Mo. 537, where this question is learnedly discussed by Sherwood, P. J.; affirming s. c. 39 Mo. App. 447.

<sup>63</sup> Dallas Rapid Transit R. Co. v. Elliott, 7 Tex. Civ. App. 216; s. c. 26 S. W. Rep. 455.

<sup>64</sup> Ante, § 1382.

<sup>65</sup> Citizens' St. R. Co. v. Carey, 56 Ind. 396, 405.

<sup>66</sup> Johnson v. Reading &c. Pass. R.

Co., 160 Pa. St. 647; s. c. 34 W. N. C. 203; 28 Atl. Rep. 1001.

<sup>67</sup> Culbertson v. Metropolitan St. R. Co., 140 Mo. 35; s. c. 36 S. W. Rep. 834.

<sup>68</sup> Boland v. Missouri R. Co., 36 Mo. 484.

<sup>69</sup> Lawrence v. Pendleton St. R. Co., 1 Cin. Superior Ct. 180. See also Bulger v. Albany R. Co., 42 N. Y. 459.

<sup>70</sup> Macon &c. St. R. Co. v. Holmes, 103 Ga. 655; s. c. 30 S. E. Rep. 563; 4 Am. Neg. Rep. 251; 12 Am. & Eng. Rail. Cas. (N. S.) 385.



highway;<sup>71</sup> nor is he chargeable with negligence in failing to see in time to avert injury in the night-time at a poorly lighted place, a boy who falls upon the track six feet in front of the car;<sup>72</sup> nor for failing to keep such a lookout as will avert injury where a boy four years old playing on the sidewalk with other boys in the middle of a block, suddenly runs into the street and across the railway track directly in front of an approaching car.<sup>73</sup> But, on a principle already considered, he may rightfully assume that the members of the public will act rightly and will not thrust themselves into danger in places where they are mere trespassers.<sup>74</sup> This question is, however, disputed even with reference to steam railways;<sup>75</sup> and several authoritative courts maintain the doctrine that a corporation driving an instrument of such great danger can not excuse itself from the duty of keeping a lookout even for trespassers upon its tracks. On the other hand, a driver of a street car is not excused for failure to keep a lookout upon approaching the intersection of two streets in a very busy part of the city, by the fact that his attention is diverted by an attempt to identify another car which he is passing, for the purpose of determining whether it is the car to which he should change.<sup>76</sup>

**§ 1386. Illustrations of Negligence in Failing to Keep a Lookout.**—Therefore, for a driver to allow his attention to be momentarily distracted by the appearance of a young lady at a street door, to whom his idle curiosity is attracted;<sup>77</sup> or to gaze at a fire in the neighborhood;<sup>78</sup> or to wind the lines about the brake, and sit down to examine a pigeon;<sup>79</sup> or to turn his face away from his horses, to engage in conversation upon private matters with a friend upon the platform,<sup>80</sup> is conduct in a high degree reprehensible, constituting negligence *per se* on the part of the company. So, negligence has been imputed to a *gripman* who at the time of running over a child, which suddenly appeared on the track, was standing upon one side of his cab looking toward the houses, and not having hold of his grip or brake;<sup>81</sup> and to the driver of a street car for driving upon and injuring a passenger

<sup>71</sup> Camden &c. R. Co. v. Young, 60 N. J. L. 193; s. c. 37 Atl. Rep. 1013.

<sup>72</sup> De Iola v. Metropolitan St. R. Co., 37 App. Div. 455; s. c. 56 N. Y. Supp. 22.

<sup>73</sup> Graham v. Consolidated Traction Co. (Conn.), 44 Atl. Rep. 964.

<sup>74</sup> Vol. I., §§ 190, 191.

<sup>75</sup> Post, §§ 1711, 1712.

<sup>76</sup> Thoresen v. La Crosse City R. Co., 87 Wis. 597; s. c. 58 N. W. Rep. 1051.

<sup>77</sup> Baltimore &c. R. Co. v. McDonnell, 43 Md. 534, 553.

<sup>78</sup> Commonwealth v. Metropolitan R. Co., 107 Mass. 236.

<sup>79</sup> Mangam v. Brooklyn R. Co., 38 N. Y. 455; s. c. 36 Barb. (N. Y.) 230.

<sup>80</sup> Mentz v. Second Avenue &c. R. Co., 3 Abb. App. Dec. 274 (affirming s. c. 2 Robt. 356); Oldfield v. New York &c. R. Co., 14 N. Y. 310; s. c. 3 E. D. Smith 103.

<sup>81</sup> Schnur v. Citizens' Traction Co., 153 Pa. St. 29; s. c. 25 Atl. Rep. 650; 23 Pitts. L. J. (N. S.) 437.



stepping from his car into a transfer car without negligence.<sup>82</sup> It is quite immaterial that, as between himself and his employer, the driver of the street car was not guilty of negligence. He may, for example, have failed to discover the person or vehicle in the position of danger by reason of his attention being absorbed in *collecting fares* or *making change* for passengers, upon a car where no conductor is provided for that purpose. In such a case negligence will be imputable to the railway company from the fact of failing to provide a conductor to perform such duties and devolving them upon the driver, thus preventing him from maintaining a proper lookout for the safety of the public.<sup>83</sup> It is negligence for a motorman in control of an electric car, to run his car down a grade on the principal street of a city, where persons are frequently crossing the track, without keeping a vigilant lookout and preserving such control over the speed of his car as will enable him to stop it promptly,—rendering the company liable for the death of one struck by the car while crossing the track.<sup>84</sup>

§ 1387. **No Defense that the Driver, Motorman, etc., Failed to See the Person on the Track.**—It follows from the foregoing that where a person is injured by being struck by a car driven upon him from behind while he is walking along the track on a clear day and in plain view, it will be no defense on the part of the company that the motorman failed to see him.<sup>85</sup> It also follows from the foregoing that it will be no defense whatever that the driver, motorman or gripman failed to see the traveller,—or, we will say failed to see a *child* upon its track or approaching its track, whereby the child was injured; since in such cases the company will be liable if its servant, by the exercise of ordinary care, *could have seen* the child in time to have prevented the accident by the exercise of ordinary care.<sup>86</sup> Nor will the failure of the driver of the street car to see a wagon on the track ahead of his car, be excused by the fact that he is at the time giving his attention to the identification of another car, to which he is expected to exchange.<sup>87</sup> The plain rule is that if the motorman by having his attention on the street in front of his car could have dis-

<sup>82</sup> *Citizens' St. R. Co. v. Merl*, 134 Ind. 609; s. c. 33 N. E. Rep. 1014.

<sup>83</sup> *Anderson v. Minneapolis St. R. Co.*, 42 Minn. 490; s. c. 44 N. W. Rep. 518; 43 Am. & Eng. Rail. Cas. 294. As to the validity of an ordinance requiring conductors on street cars, see 15 L. R. A. 604.

<sup>84</sup> *Dallas & C. Transit Co. v. Elliott*, 7 Tex. Civ. App. 216; s. c. 26 S. W. Rep. 455.

<sup>85</sup> *Conway v. New Orleans & C. R. Co.*, 51 La. An. 146; s. c. 5 Am. Neg. Rep. 354; 24 South. Rep. 780.

<sup>86</sup> For an instruction held erroneous because of omitting this element, see *Welsh v. Jackson County Horse R. Co.*, 81 Mo. 466.

<sup>87</sup> *Thoresen v. La Crosse City R. Co.*, 87 Wis. 597; s. c. 58 N. W. 1051.



covered that a child was about to cross the track, or after discovering the dangerous situation of the child, failed to give the usual signals of warning, actionable negligence will be imputed to the railway company.<sup>88</sup> Nor will the negligence of the traveller in exposing himself to danger upon the street railway track, constitute a defense on the part of the company, if its servant in charge of its car either discovered or could have discovered the dangerous situation of the traveller and failed to use reasonable efforts to avoid injuring him.<sup>89</sup>

§ 1388. **Duty to Avoid Injury to Traveller after Seeing Him in a Position of Danger.**<sup>90</sup>—Many enlightened courts apply the doctrine of the leading case of *Davies v. Mann*,<sup>91</sup> to the protection of *persons* as well as *property*, though it is to be regretted that other courts fail to appreciate the wisdom and justice of this view. The rule of the former courts, applied to the subject under consideration, is substantially that, although the driver of a vehicle, a foot-passenger, or a child may, through his own negligence, expose himself to the danger of being run over by a street car,—yet if the driver, gripman or motorman *sees his exposed position in time*, by the exercise of ordinary or reasonable care in giving him warning or in checking his car, to avoid running over him or injuring him, but nevertheless fails to do so, he is guilty of negligence such as will make the railway company liable for the injury which follows.<sup>92</sup> The doctrine applied by some courts

<sup>88</sup> *Baird v. Citizens' R. Co.*, 146 Mo. 265; s. c. 48 S. W. Rep. 78.

<sup>89</sup> *Owensboro City R. Co. v. Hill*, 56 S. W. Rep. 21 (no off. rep.). See also *Ennis v. Union Depot R. Co.* (Mo.), 55 S. W. Rep. 878; *Cooney v. Southern & C. R. Co.*, 80 Mo. App. 226; s. c. 2 Mo. App. Rep. 646.

<sup>90</sup> Compare § 1459, where this section is referred to.

<sup>91</sup> 10 Mees. & W. 546; s. c. 6 Jur. 954; 12 L. J. (Exch.) 10; 2 Thomp. Neg., 1st ed., p. 1105; *ante*, Vol. I., § 230, *et seq.*, especially § 235.

<sup>92</sup> *Baltimore Traction Co. v. Wallace*, 77 Md. 435; s. c. 26 Atl. Rep. 518; 21 Wash. L. Rep. 313; *Will v. West Side R. Co.*, 84 Wis. 42; s. c. 54 N. W. Rep. 30; *Huerzeler v. Central Crosstown R. Co.*, 1 Misc. (N. Y.) 136; s. c. 48 N. Y. St. Rep. 649; 20 N. Y. Supp. 676; *Czezewzka v. Benton-Belfontaine R. Co.*, 121 Mo. 201; s. c. 25 S. W. Rep. 911; *Fenton v. Second Ave. R. Co.*, 56 Hun (N. Y.) 99; s. c. 29 N. Y. St. Rep. 962; 9 N. Y. Supp. 162; *McClain v. Brooklyn & C. R. Co.*, 116 N. Y. 459; s. c. 22 N. E. Rep. 1062; 27 N. Y. St. Rep. 549; 40 Am. & Eng. Rail. Cas. 254;

*Zurfuth v. People's R. Co.*, 46 Mo. App. 636; *Citizens' Street R. Co. v. Steen*, 42 Ark. 321; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473; 3 S. W. Rep. 705; *Central Pass. R. Co. v. Chatterton* (Ky. Super. Ct.), 14 Ky. L. Rep. 663; *Cass v. Third Ave. R. Co.*, 20 App. Div. 591; s. c. 47 N. Y. Supp. 356; *Brachfeld v. Third Ave. R. Co.*, 60 N. Y. Supp. 988; s. c. 29 Misc. 586. For a complaint predicated upon the failure of the gripman of the defendant to exercise ordinary care to the end of stopping his car on seeing plaintiff in the act of crossing the track, which was held not demurrable,—see *Oliver v. Denver Tramway Co.*, 13 Colo. App. 543; s. c. 59 Pac. Rep. 79. Although the doctrine of the text is steadily asserted by the Supreme Court of Missouri, it seems to have been disregarded in *Meyer v. Lindell R. Co.*, 6 Mo. App. 27. For an instruction upon this theory which was held too broad, resulting in a reversal of the judgment,—see *Hicks v. Citizens' R. Co.*, 124 Mo. 115; s. c. 25 S. W. Rep. 542; 25 L. R. A. 508.



under this head has been expressed in the proposition that mere negligence or want of ordinary care will not disentitle plaintiff, injured by a street railway car, to recover, unless his negligence was such that but for it the misfortune could not have happened; and, if the defendant might, by the exercise of care on its part, have *avoided the consequence of the neglect or carelessness of the plaintiff*, he may recover.<sup>93</sup> It has been held that if a complaint affirmatively shows that plaintiff, a child nineteen months old, was a trespasser upon the track of an electric street railway, actionable injury is not shown, unless it is averred to have been done *wantonly* or *intentionally*, or that the company's employes failed to use due care to avoid injuring the child after it has been discovered, and that its perilous situation became apparent, or that such conditions existed, as to time and place, as made it necessary for the men in charge of the car to keep a lookout. A complaint averring simple negligence is insufficient for the purpose.<sup>94</sup> The same rule has been applied where the person injured is in front of the street car in violation of a municipal ordinance giving it the right to an unobstructed track, and imposing a penalty on those who fail to turn out on the approach of its cars: such an ordinance does not justify the driver of a car in running down a person in a sleigh, standing near the track, who makes an effort to get out of the way.<sup>95</sup> But the meaning of this rule is that the failure of the driver, gripman or motorman in this respect is *evidence of negligence* to go to a jury, and is *not negligence per se* in such a sense that the judge can charge the jury, upon a given state of facts, that it was negligence not to stop the car; since, in these and other cases, the standard of duty is a shifting one, and must depend upon the view which the jury takes of the evidence in each particular case.<sup>96</sup> Under the operation of the rule, although the parents of a child may by their negligence expose it to a position of peril on the highway, yet if the driver of an approaching street car can avoid the injury after discovering the child in its dangerous position, by the exercise of ordinary or reasonable care, and fails to do so, the company will be liable.<sup>97</sup>

<sup>93</sup> Baltimore &c. R. Co. v. Rifco-witz, 89 Md. 338; s. c. 43 Atl. Rep. 762.

<sup>94</sup> Highland Ave. &c. R. Co. v. Robbins (Ala.), 27 South. Rep. 422.

<sup>95</sup> Laethem v. Ft. Wayne &c. R. Co., 100 Mich. 297; s. c. 58 N. W. Rep. 996.

<sup>96</sup> Philadelphia &c. R. Co. v. Henrice, 92 Pa. St. 431; s. c. 37 Am. Rep. 699; Chicago &c. R. Co. v. Ryan, 131 Ill. 474; 23 N. E. Rep. 385. But compare Highland Ave. &c. R.

Co. v. Robbins (Ala.), 27 South. Rep. 422.

<sup>97</sup> So, where there was evidence that a grocer's wagon was driven rapidly down a street intersecting the street railway at right angles, and could have been seen by the car driver for a distance of 250 feet, and the car might have been stopped in twelve feet,—it was held that there was a question of negligence on the part of the defendant to go to the jury: Watkins v. Atlantic



§ 1389. **Right to Assume that a Person on the Track will Act Reasonably.**—As a person approaching the street railway track has the right to assume that those in charge of an approaching car will act reasonably and without negligence,<sup>98</sup> so, on the other hand, the driver, gripman or motorman of such a car may, until apprised to the contrary, assume that a person standing in a dangerous position near the track or approaching the track to cross, or driving on the track in front of him, will hear his gong and take a safe position before the car reaches him.<sup>99</sup> Applying this principle, it has been held that a motorman on an electric street car is not guilty of negligence in failing to anticipate that the driver of a wagon travelling along the street in the same direction as the car, by the side of the track, will suddenly undertake to cross the track in front of the car; but he has a right to presume that such driver will remain off the track, and not knowingly place himself or his team in imminent danger, and is not bound to moderate his speed to such a rate as will certainly avoid injury in case of the driver's attempting to cross the track.<sup>100</sup> So, he will not be

Ave. R. Co., 20 Hun (N. Y.) 237. Evidence under which a street railway company was exonerated where its car crushed the leg of a person lying drunk near the track,—on the ground that the motorman could not have stopped the car after seeing the exposed position of the drunkard in time to avert the injury to him: *Kramer v. New Orleans City &c. R. Co.*, 51 La. An., Pt. II, 1689; s. c. 26 South. Rep. 411.

<sup>98</sup> Vol. I., §§ 190, 191; *Oliver v. Denver Tramway Co.*, 13 Colo. App. 543; s. c. 59 Pac. Rep. 79.

<sup>99</sup> For a case passing upon instructions embodying this principle, see *Doyle v. West End St. R. Co.*, 161 Mass. 533; s. c. 37 N. E. Rep. 741. See also the following cases, which proceeded upon this principle: *Chisholm v. Old Colony R. Co.*, 159 Mass. 3; *Seik v. Toledo &c. St. R. Co.*, 16 Ohio C. C. 393; s. c. 9 Ohio C. D. 51; *Bunyan v. Citizens' R. Co.*, 127 Mo. 12; s. c. 29 S. W. Rep. 842; *O'Rourke v. New Orleans &c. R. Co.*, 51 La. An. 755; s. c. 25 South. Rep. 323; *Lyons v. Bay Cities &c. R. Co.*, 115 Mich. 114; s. c. 4 Det. L. N. 797; 73 N. W. Rep. 139; *McKeown v. Cincinnati St. R. Co.*, 2 Ohio Leg. News 388, 390; *Daly v. Detroit &c. R. Co.*, 105 Mich. 193; *Morrissey v. Bridgeport Traction Co.*, 68 Conn. 215; s. c. 35 Atl. Rep. 1126; *Beam v. Tama*

*&c. R. Co.*, 104 Iowa 563; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 610; 73 N. W. Rep. 1045; *Davidson v. Denver Tramway Co.*, 4 Colo. App. 283; s. c. 35 Pac. Rep. 920; *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553; s. c. 32 Pac. Rep. 591; *Cawley v. La Crosse City R. Co.*, 101 Wis. 145; 82 N. W. Rep. 197.

<sup>100</sup> *Christensen v. Union Trunk Line*, 6 Wash. 75; s. c. 32 Pac. Rep. 1018. Substantially to the same effect, see *Davidson v. Denver Tramway Co.*, 4 Colo. App. 283; s. c. 35 Pac. Rep. 920. That the gripman of a cable car is not bound to anticipate that *children* whom he sees on the sidewalk will *run suddenly upon the track*,—see *Mt. Adams &c. R. Co. v. Cavagna*, 6 Ohio C. C. 606. A motorman of an electric car is not bound to anticipate that a child, whom he sees about to run across the track in front of the car, will *stumble and fall* upon the track: *Stabenau v. Atlantic Ave. R. Co.*, 155 N. Y. 511; s. c. 50 N. E. Rep. 277; *rev'g* 89 Hun (N. Y.) 609. Circumstances under which it was not error to refuse an instruction that the gripman was not bound to anticipate that the driver of the wagon would attempt to cross the car track at a street crossing: *Knoll v. Third Ave. R. Co.*, 62 N. Y. Supp. 16; s. c. 46 App. Div. 527.



blameworthy if he assumes that a woman, so about to cross the track, is possessed of the sense of hearing and will exercise her senses by stopping in time to let the car pass her.<sup>101</sup> And, in general, it would be absurd to require the motorman or gripman to stop his car whenever he sees a person or vehicle on the track in front of him at a distance no matter how great;<sup>102</sup> or near the track, but not in a position of peril.<sup>103</sup> The motorman of an electric car seeing a *bicycle rider* going on the track in front of him may assume up to the last moment that the rider will get out of the way by increasing his speed or turning aside in time to avoid the danger.<sup>104</sup> But he has no right to indulge in this assumption under all circumstances.<sup>105</sup> He may not be justified in failing to stop his car on perceiving a person walking upon or close to the track and apparently heedless of signals.<sup>106</sup> If he sees *a pedestrian staggering* and apparently not knowing what he is about when within five or six feet of the track upon which his car is approaching, it becomes his duty at once to take precautions to prevent a collision.<sup>107</sup>

**§ 1390. Liability for Failing to Avoid Injury where Driver might have Seen the Exposed Person in Time to have Prevented it.**—Other courts, applying the doctrine of the leading case of *Davies v. Mann*,<sup>108</sup> hold that the rule is the same where the driver, gripman or motorman might, by the exercise of ordinary or reasonable care in maintaining the lookout already referred to,<sup>109</sup> have discovered the person or vehicle in its exposed position in time, by the exercise of the like care in sounding a warning, or in stopping the car, to have avoided a col-

<sup>101</sup> *Schulte v. New Orleans &c. R. Co.*, 44 La. An. 509; s. c. 10 South. Rep. 811. On the other hand, it has been held that a finding of negligence on the part of a street railway company, and no negligence on the part of one knocked down by a car driven against him without slacking speed, is justified by proof that he was in full view of the driver for hundreds of feet, as he stood with his back to the car in a narrow space, flagging an approaching train at a crossing: *D'Oro v. Atlantic Ave. R. Co.*, 37 N. Y. St. Rep. 411; s. c. 13 N. Y. Supp. 789.

<sup>102</sup> *Houston &c. R. Co. v. Farrell* (Tex. Civ. App.), 27 S. W. Rep. 942 (no off. rep.).

<sup>103</sup> *Sonnenfeld Millinery Co. v. People's R. Co.*, 59 Mo. App. 668.

<sup>104</sup> *Everett v. Los Angeles &c. Elec. R. Co.*, 115 Cal. 105; s. c. 34 L. R. A.

350; 43 Pac. Rep. 207, 210; aff'd 46 Pac. Rep. 889. The gripman of a cable car has the right to assume that one crossing the street will stop until the car has entirely passed, after the front of the car has passed her: *McQuade v. Metropolitan St. R. Co.*, 17 Misc. (N. Y.) 154; s. c. 39 N. Y. Supp. 335.

<sup>105</sup> *Houston &c. R. Co. v. Woodlock* (Tex. Civ. App.), 29 S. W. Rep. 817 (no off. rep.).

<sup>106</sup> *Buttelli v. Jersey City &c. R. Co.*, 59 N. J. L. 302; s. c. 36 Atl. Rep. 700; 2 Chic. L. J. Wkly. 202.

<sup>107</sup> *Bunyan v. Citizens' R. Co.*, 127 Mo. 12; s. c. 29 S. W. Rep. 842.

<sup>108</sup> 10 Mees. & W. 546; s. c. 6 Jur. 954; 12 L. J. (Exch.) 10; 2 Thomp. Neg., 1st ed., p. 1105; Vol. I., § 235, *et passim*.

<sup>109</sup> *Ante*, § 1382, *et seq.*



lision;<sup>110</sup> and this is so, although the person injured may have been guilty of *contributory negligence* in exposing himself to the danger.<sup>111</sup> This doctrine applies to injuries to children which have been negligently exposed on the street by their parents,<sup>112</sup> as well as to cases where persons who are *sui juris* expose themselves through their own negligence.<sup>113</sup> While it is to be regretted that some American courts refuse to apply this rule to the protection of human beings,<sup>114</sup> yet it is a subject of congratulation that the courts of New York seem disposed to hold to it for the protection of *dogs* running on the streets.<sup>115</sup> An obvious application of the rule under consideration makes a street railway company liable for injury to a horse and wagon left standing in the city street so close to the street railway track as to be struck by a passing car, where the motorman either saw the position of the wagon or could by the use of proper care have seen it, in time to have stopped the car.<sup>116</sup>

<sup>110</sup> North Baltimore Pass. R. Co. v. Arnreich, 78 Md. 589; s. c. 28 Atl. Rep. 809; Baltimore Traction Co. v. Wallace, 77 Md. 435; s. c. 21 Wash. L. Rep. 313; 26 Atl. Rep. 518; Czezewzka v. Benton-Belfontaine R. Co., 121 Mo. 201; s. c. 25 S. W. Rep. 911; Zurfloth v. People's R. Co., 46 Mo. App. 636; Baltimore City Pass. R. Co. v. McDonnell, 43 Md. 552; Kean v. Baltimore & C. R. Co., 61 Md. 154; Davidson v. Schuylkill Traction Co., 4 Pa. Super. Ct. 86; Baltimore Traction Co. v. Appel, 80 Md. 603; s. c. 31 Atl. Rep. 964; McGrane v. Flushing & C. R. Co., 13 App. Div. 177; s. c. 43 N. Y. Supp. 385; Geipel v. Steinway R. Co., 14 App. Div. 551; s. c. 43 N. Y. Supp. 934; Lake Roland R. Co. v. McKewen, 80 Md. 593; s. c. 31 Atl. Rep. 797; San Antonio St. R. Co. v. Renken, 15 Tex. Civ. App. 229; s. c. 38 S. W. Rep. 829.

<sup>111</sup> Lake Roland R. Co. v. McKewen, 80 Md. 593; s. c. 31 Atl. Rep. 797.

<sup>112</sup> Czezewzka v. Benton-Belfontaine R. Co., 121 Mo. 201; s. c. 25 S. W. Rep. 911.

<sup>113</sup> For an illustration of this, see Mason v. Atlantic Ave. R. Co., 4 Misc. 291; s. c. 53 N. Y. St. Rep. 454; 24 N. Y. Supp. 139,—where a boy was run over by a rapidly driven street car, while the driver, instead of looking ahead, which would have enabled him to see the boy, was engaged in conversing with a passen-

ger, and did not know of the accident until his attention was called to it.

<sup>114</sup> See, for example, Seik v. Toledo & C. St. R. Co., 9 Ohio C. D. 51; s. c. 16 Ohio C. C. 393,—which holds that the motorman must have failed to exercise ordinary care to avoid the collision, *after actually becoming aware of the danger*, and that it is not sufficient that he ought to have observed the danger: a decision which denies to a human being the protection which the Supreme Court of that State, at the time when it was a great court, accorded to Kerwhaker's hogs (Kerwhaker v. Cleveland & C. R. Co., 3 Ohio St. 172; s. c. 1 Thomp. Neg., 1st ed., p. 472); and which applies to *street* railroads, where the public have the right to the tracks as part of the highway (*ante*, § 1374, *et seq.*), the doctrine which obtains with reference to *steam* railways, which, in general, have the right to the exclusive use of their tracks.

<sup>115</sup> Meisch v. Rochester Electric R. Co., 72 Hun (N. Y.) 604; s. c. 55 N. Y. St. Rep. 146; 25 N. Y. Supp. 244.

<sup>116</sup> Higgins v. Wilmington Street R. Co., 1 Marv. (Del.) 352; s. c. 41 Atl. Rep. 86. An instruction that if, just before the accident, the wagon was driven alongside the track and it was turned into the track in front of the car, the verdict must be for defendant, was properly refused, since turning into the track might



§ 1391. **Running over Persons at Work on the Streets.**—Persons employed in the reparation of the streets, in the digging of sewers, in the construction of gas mains and the like are as a general rule *lawfully on the street*,<sup>117</sup> and can not be treated as *trespassers* or *bare licensees*. The proper discharge of their employment necessarily absorbs their care and attention. They can not keep their eyes on their work and at the same time look up and down the street for approaching cars or vehicles.<sup>118</sup> Their situation is passive. They are driving no instrument of danger. It follows, both on moral and legal grounds, that if, while so absorbed at their work, they fail, even through inattention or negligence, to see an approaching street car in time to get out of the way and avoid it, this will not exonerate the street railway company, if the car is driven upon them under such circumstances that the driver, gripman or motorman might, by the exercise of ordinary or reasonable care, have seen them at their work in their exposed position, and might, by the exercise of the like care, have warned them in time, or checked his car in time to avoid running upon them. Further than this, if the railway company, through its servants, has been in the habit of *giving a certain warning* to laborers working on the street on the approach of its cars, and the warning is neglected in a particular instance, whereby they fail to get out of the way and are run over, they will be entitled to recover damages; for they have a right to rely upon the giving of the customary warning.<sup>119</sup>

have been far enough in front of the car to have given the gripman ample time to stop the car and prevent the accident: *Geoghegan v. Third Ave. R. Co.*, 64 N. Y. Supp. 630.

<sup>117</sup> This was the case where a person injured was engaged in laying water pipes under the track of the street railway, in a trench dug for that purpose: *Owens v. People's Pass. R. Co.*, 155 Pa. St. 334; s. c. 32 W. N. C. 313; 26 Atl. Rep. 748.

<sup>118</sup> See the reasoning of *McCollum, J.*, in *Owens v. People's Pass. R. Co.*, 155 Pa. St. 334; 32 W. N. C. 313; 26 Atl. Rep. 748,—to the effect that the care and attention which is demanded of persons about to cross a steam, or even a street railway, can not be exacted of persons in such a situation as the one here specified. As to the liability of street railway company for injuries to workmen in street,—when liable,—see *Pittsburgh Electric R. Co. v. Kelly*, 57 Kan. 514; s. c. 46 Pac. Rep. 945; *Schmidt v. Steinway & Co. R. Co.*, 55 Hun (N. Y.) 496; rev'd 132 N. Y.

566. When not liable,—see *Daly v. Detroit & Co. St. R. Co.*, 105 Mich. 193; *McKeown v. Cincinnati St. R. Co.*, 2 Ohio Leg. News 388; *Morrissey v. Westchester & Co. R. Co.*, 18 App. Div. (N. Y.) 67; 45 N. Y. Supp. 444.

<sup>119</sup> So held where the plaintiff and others were engaged in laying water pipes under the tracks of the defendant railway company, in a ditch dug for that purpose, and the company was drawing its cars across the excavation by means of a rope, and failed, on the particular occasion, to give the customary signal to enable the laborers in the ditch to get out of the way, whereby the plaintiff was injured: *Owens v. People's Pass. R. Co.*, 155 Pa. St. 334; s. c. 32 W. N. C. 313; 26 Atl. Rep. 748. Where a piece of a sewer pipe was knocked into an excavation by a street car, injuring a workman, it was held, by a divided court, reversing a united court, that there was no evidence of negligence: *Schmidt v. Steinway & Co. R. Co.*, 132 N. Y. 566; s. c. 43 N. Y. St. Rep.



While the gripman or motorman may, within qualified limits, assume that they will heed his warning signal and get out of the way,<sup>120</sup> yet it is his duty to keep his car under control so that he can stop it before running upon one who inadvertently fails to do so.<sup>121</sup>

§ 1392. **Duty of Company to Give Warning by Means of Gongs, Lights, etc.**—It is the plain duty of a street railway company, whether imposed by statute or ordinance or not, to give audible signals by gong, bell or otherwise, to persons or vehicles on the track in front of the car moving or about to move, or seen approaching the track in front of it, or likely to attempt to cross in front of it at intersecting street crossings.<sup>122</sup> This duty is more imperative at *street crossings*, where, as we have seen,<sup>123</sup> the rights of the company and the public, to the use of the street, are equal, and where persons or vehicles are liable at

683; 30 N. E. Rep. 389; reversing s. c. 55 Hun (N. Y.) 496; 29 N. Y. St. Rep. 201; 8 N. Y. Supp. 664; 9 N. Y. Supp. 939. That it is evidence of negligence for a street car to approach an excavation in the street, in which work is being done, at a speed of six miles an hour, while the watchman stationed there is temporarily absent, without looking for obstructions, so that a workman is injured by a pipe being struck and whirled about by the step of the car,—see *Lahey v. Central Park & C. R. Co.*, 51 N. Y. St. Rep. 589; 22 N. Y. Supp. 380. But as this seems to have been an action brought by another injured workman on account of the same accident as the preceding, the case is without authority. Motorman not guilty of negligence in moving his car forward after stopping twenty-five feet from a place where a gang of men were opening a drain although one of them raised his hand as a signal to stop while the motorman was apparently looking at him, and after crossing the track, stooped down with his back to the car to pick up a plank, one end of which was on the track, and the plank was struck by the car and thrown against him: *Morrissey v. Westchester Elec. R. Co.*, 18 App. Div. 67; s. c. 45 N. Y. Supp. 444. Street railway company not liable for death of workman upon street, who, in condition of fright, steps to wrong side of track and into danger, unless some neglect or wrong-

ful act on its part occasioned such fright: *McKeown v. Cincinnati St. R. Co.*, 2 Ohio Leg. News 388. Circumstances under which a workman engaged in repairing the space between the rails of a street railway track, by depositing hot asphalt by means of a shovel, was not imputable with contributory negligence as matter of law, the question being for the jury, where he stepped aside while a passenger car went by and then stepped between the tracks to deposit a shovelful of asphalt, but was almost immediately struck by a freight car which followed the passenger car without signaling its approach: *Bengivenga v. Brooklyn Heights R. Co.*, 62 N. Y. Supp. 912.  
<sup>120</sup> *McKeown v. Cincinnati St. R. Co.*, 2 Ohio Leg. News 388.

<sup>121</sup> *Pittsburgh Electric R. Co. v. Kelly*, 57 Kan. 514; s. c. 46 Pac. Rep. 945.

<sup>122</sup> *Mitchell v. Tacoma R. & C. Co.*, 9 Wash. 120; s. c. 37 Pac. Rep. 341; *Consolidated Traction Co. v. Chenoweth*, 61 N. J. L. 554; s. c. 5 Am. & Eng. Rail. Cas. (N. S.) 599; 35 Atl. Rep. 1067; aff'g 58 N. J. L. 416; 34 Atl. Rep. 817; *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577; s. c. 37 Atl. Rep. 135; *Schulman v. Houston & C. R. Co.*, 15 Misc. (N. Y.) 30; s. c. 36 N. Y. Supp. 439; 71 N. Y. St. Rep. 489; *Dennis v. North Jersey St. R. Co.* (N. J. L.), 45 Atl. Rep. 807; *Devine v. Brooklyn & C. R. Co.*, 34 App. Div. 248; s. c. 54 N. Y. Supp. 626.

<sup>123</sup> *Ante*, § 1374, *et seq.*



any time to emerge from behind rows of buildings upon the track.<sup>124</sup> It is imperative at private crossings which are much frequented, especially where the car is approaching in the night-time so that it can not readily be seen.<sup>125</sup> Decisions exist—too many of them—condoning the failure to perform this duty,<sup>126</sup> in some cases on the ground that the injured person *saw* or *knew* that the car was approaching.<sup>127</sup> It has been held that the failure of a motorman to sound the gong on approaching a crossing which is *not in use by foot-passengers* does not render the company liable for an injury to one who suddenly runs on the track immediately in front of a car some distance from such crossing, and so close to the car as to render it impossible to stop it in time to prevent an accident.<sup>128</sup> It would seem to be the plain duty of a company, when running its street cars at night, to have them *lighted* sufficiently to give pedestrians and others timely notice of their approach.<sup>129</sup> Therefore, in a case the facts of which were that a horse car of the defendant's was driven upon its track *without lights or bells*, on a dark evening, in a street of New York City obstructed by a sewer in the process of construction, and the plaintiff's husband, a sober cartman, was found dead upon the track, under circumstances authorizing the inference that he had fastened his horse, and was groping in the dark to find a safe passage for his team when struck by the defendant's car, there being no witness to the accident,—the court held that the dangerous tendency of the defendant's conduct was such as, in the absence of other evidence, to warrant the presumption that the accident was caused by the defendant's negligence.<sup>130</sup> It has been

<sup>124</sup> South Covington &c. St. R. Co. v. Beatty, 20 Ky. L. Rep. 1845; s. c. 6 Am. Neg. Rep. 75; 50 S. W. Rep. 239 (no off. rep.); Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197; s. c. 32 L. R. A. 276; Driscoll v. Market Street R. Co., 97 Cal. 553; s. c. 32 Pac. Rep. 591; Watson v. Minneapolis &c. R. Co., 53 Minn. 551; s. c. 55 N. W. Rep. 742; Mitchell v. Tacoma &c. Co., 9 Wash. 120.

<sup>125</sup> Dunican v. Union R. Co., 39 App. Div. 497; s. c. 57 N. Y. Supp. 326; 6 Am. Neg. Rep. 155.

<sup>126</sup> Bethel v. Cincinnati St. R. Co., 15 Ohio C. C. 381; s. c. 8 Ohio C. D. 310; Devine v. Brooklyn &c. R. Co., 34 App. Div. 248; s. c. 54 N. Y. Supp. 626; Eddy v. Cedar Rapids &c. R. Co., 98 Iowa 626; s. c. 67 N. W. Rep. 676; Owensboro City R. Co. v. Hill (Ky.), 56 S. W. Rep. 21 (no off. rep.); Graham v. Consolidated Traction Co. (N. J.), 44 Atl. Rep. 964.

<sup>127</sup> Schulman v. Houston &c. R. Co., 15 Misc. (N. Y.) 30; s. c. 36 N. Y. Supp. 439; 71 N. Y. St. Rep. 489; Huber v. Nassau Elec. R. Co., 22 App. Div. 426; s. c. 48 N. Y. Supp. 38 (saw it 300 feet away); Anderson v. Metropolitan St. R. Co., 61 N. Y. Supp. 899.

<sup>128</sup> Kline v. Electric Traction Co., 181 Pa. St. 276; s. c. 40 W. N. C. 337; 37 Atl. Rep. 522.

<sup>129</sup> Shea v. Potrero &c. R. Co., 44 Cal. 414; Johnson v. Hudson &c. R. Co., 20 N. Y. 65.

<sup>130</sup> Johnson v. Hudson &c. R. Co., 20 N. Y. 65. Similarly, see Tompkins v. Scranton Traction Co., 3 Pa. Super. Ct. 576. An instruction that the company is bound "to furnish lights on its cars at night, such as will enable its drivers to see objects ahead on the track with aid of the street lights, in time to avoid an accident," has been held erroneous as laying down a general



held not negligence *per se* for the electric car not to have a *headlight* after nightfall, where *colored signal lights* in front and rear, required by a city ordinance, are carried;<sup>131</sup> and the sounding of a *gong* for a considerable distance, on the approach of a motor car to the junction of two streets, has been held *a sufficient warning* to travellers, in the absence of a statute requiring other or different signals.<sup>132</sup> It has been well held that evidence of the omission of the motorman to sound the gong at a place where the law did not require it to be sounded, is admissible, as a part of the history of the transaction,—as a part of the *res gestae*,—as bearing upon the degree of care exercised by the men in charge of the car, and also upon the question of the contributory negligence of the injured traveller.<sup>133</sup>

§ 1393. **Injuries from the Use of Defective Appliances.**—The obligation of keeping its appliances in a condition of reasonable safety extends to the protection of *persons using the highway*, as well as to the protection of its *passengers*. If a street railway company uses an electric car with brakes so defective that they do not work well, and with a motor so defective that the motorman receives a shock which interferes with his action while trying to stop the car to avoid an accident, and if, in consequence of these defects, an injury happens to one attempting to cross the track, the company will be liable to pay damages, on the footing of negligence.<sup>134</sup> The same obligation demands of the street railway company the exercise of reasonable care to the end of employing competent, skillful, and sober motormen to operate its cars; but its failure to exercise due care in the employment of a motorman, or in furnishing proper equipments to a car, does not render it liable for damages caused by a collision with a street car, unless its negligence in the particulars named was the *proximate cause* of the injury.<sup>135</sup> The use of *fenders*, *pilots*, or *safety-guards* in front of street cars to minimize the danger to pedestrians who are run against by the cars, is a modern device, which street railway companies have been compelled to adopt, though not without reluctance and in some cases contest, by statutes and municipal ordinances enacted to satisfy

proposition of law, instead of giving an instruction applicable to the facts of the particular case: *Memphis City R. Co. v. Logue*, 13 Lea (Tenn.) 32. The decision seems hypercritical.

<sup>131</sup> *McGee v. Consolidated St. R. Co.*, 102 Mich. 107; s. c. 26 L. R. A. 300; 60 N. W. Rep. 293.

<sup>132</sup> *Van Patten v. Schenectady St. R. Co.*, 80 Hun (N. Y.) 494; 62 N.

Y. St. Rep. 378; 30 N. Y. Supp. 501.

<sup>133</sup> *Kleiner v. Third Ave. R. Co.*, 56 N. E. Rep. 497; reversing s. c. 57 N. Y. Supp. 1140; 38 App. Div. 623.

<sup>134</sup> *Thompson v. Salt Lake & Transit Co.*, 16 Utah 281; s. c. 52 Pac. Rep. 92; 40 L. R. A. 172; 10 Am. & Eng. Rail Cas. (N. S.) 563.

<sup>135</sup> *Snider v. New Orleans & C. R. Co.*, 48 La. An. 1; s. c. 18 South. Rep. 695.



the demands of an outraged public opinion. At the same time, these appliances have not proved as effectual for the protection of pedestrians as was expected, and are still regarded by some as of doubtful utility. While these devices were in an experimental stage it was clearly not negligence *per se* for a street railway company to fail to adopt them, unless required to do so by statute or ordinance.<sup>136</sup>

**§ 1394. Injuries Springing from the Disobedience of Statutes and Ordinances.**—The principle being that the violation of a valid statute or municipal ordinance, enacted to conserve the safety of the public, is *negligence per se*,<sup>137</sup> or at least *evidence of negligence* to go to a jury,<sup>138</sup>—it will follow that if an injury happens as the direct consequence of running a street car at a *rate of speed* prohibited by a valid municipal ordinance;<sup>139</sup> or of stopping a street car midway between crossings in violation of such an ordinance;<sup>140</sup> or of failing to keep a vigilant watch for vehicles and persons on foot, and especially children in front of its cars, as required by such an ordinance,<sup>141</sup>—there will,

<sup>136</sup> *Mullen v. Springfield St. R. Co.*, 164 Mass. 450; s. c. 41 N. E. Rep. 664; *Buente v. Pittsburgh &c. Traction Co.*, 2 Pa. Super. Ct. 185; *West Chicago St. R. Co. v. Sullivan*, 64 Ill. App. 628; *aff'd* in 165 Ill. 302; s. c. 46 N. E. Rep. 234; *Hogan v. Citizens' R. Co.*, 150 Mo. 36; s. c. 51 S. W. Rep. 473. A municipal ordinance requiring all street railway companies to be provided with "the most improved modern pilot or safety-guard" was ciphered into nonsense and its application was refused in the case of a child run over and killed by a car which had a fender such as was in general use: *Buente v. Pittsburgh &c. Traction Co.*, 2 Pa. Super Ct. 185. Where the defendant introduced evidence tending to show that its switch was in perfect condition, in a case of an injury produced by the derailment of its car at a switch, colliding with the plaintiff's vehicle,—an instruction as to the location, construction and maintenance of the switch was held proper, although there was no allegation nor proof that the switch was improperly constructed: *Nashville St. R. Co. v. O'Bryan* (Tenn.), 55 S. W. Rep. 300. Evidence of the motorman sufficient to take to the jury the question whether a car was equipped with suitable appliances for stopping it: *Chicago City R.*

*Co. v. Mager*, 185 Ill. 336; s. c. 56 N. E. Rep. 1058; *aff'g* s. c. 85 Ill. App. 524. State of the evidence in which it was admissible to show that a car, if properly equipped, going eight miles an hour, could be stopped in twelve feet: *McDonald v. Brooklyn Heights R. Co.*, 64 N. Y. Supp. 480.

<sup>137</sup> Vol. I, § 10.

<sup>138</sup> Vol. I, § 11.

<sup>139</sup> *Weber v. Kansas City Cable R. Co.*, 100 Mo. 194; s. c. 12 S. W. Rep. 804; 7 L. R. A. 819; 41 Am. & Eng. Rail. Cas. 117; *Wall v. Helena St. R. Co.*, 12 Mont. 44; s. c. 29 Pac. Rep. 721; 50 Am. & Eng. Rail. Cas. 474; *Omaha St. R. Co. v. Duvall*, 40 Neb. 29; s. c. 58 N. W. 531; *Chouquette v. Southern Elec. R. Co.*, 152 Mo. 257; s. c. 53 S. W. Rep. 897.

<sup>140</sup> *Mueller v. Milwaukee St. R. Co.*, 86 Wis. 340; s. c. 56 N. W. Rep. 914; 21 L. R. A. 721. In this case the car stopped in the street in front of the first carriage in a funeral procession, whereby the next carriage following close behind, unable to stop quickly, thrust its pole through the back of the first carriage. It was held that the violation of the city ordinance by the street railway company was the *proximate cause* of the injury.

<sup>141</sup> *Fath v. Tower Grove &c. R. Co.*, 105 Mo. 537; s. c. 16 S. W. Rep. 913;



at least, be a question of negligence to go to the jury. On the other hand, an ordinance providing, under a penal sanction, that street cars "shall at all times be entitled to the track, and any vehicles upon the track shall turn out when any car comes up, so as to leave the track unobstructed," does not excuse the negligence of the street car company in running upon the vehicle of one who has placed his vehicle on the street in violation of the ordinance.<sup>142</sup> It has been held that a city ordinance providing that, on the appearance of danger to any person on or near a street car track, the car shall be stopped when by so doing the injury may be averted, is inadmissible in evidence in an action for personal injuries against a street car company, on the ground that a city has no power to determine when or under what circumstances a street car company would be guilty of negligence.<sup>143</sup> But if the city has power, under its charter or governing statute, to regulate street railways, then such an ordinance is in the nature of a

13 L. R. A. 913; aff'g 39 Mo. App. 447; *Senn v. Southern R. Co.*, 135 Mo. 512; s. c. 36 S. W. Rep. 367. Upon the question of the *validity of such ordinances as police regulations*, it has been held that an ordinance requiring both a driver and a conductor to accompany every street car, is a proper exercise of the police power: *South Covington & C. R. Co. v. Berry*, 93 Ky. 43; s. c. 13 Ky. L. Rep. 943; 15 L. R. A. 604; 50 Am. & Eng. Rail. Cas. 434; 18 S. W. Rep. 1026. Also that an ordinance is valid which requires conductors and drivers of street cars to *keep a vigilant watch* for all vehicles and persons on foot, especially for children, either on the track or moving towards it, and that, on the first appearance of danger to such person or vehicle, the car shall be stopped in the shortest time and space possible, is a valid ordinance, founded upon the consideration of the grant of a license or franchise to the street railway company to use the city streets for profit, in derogation of the common right of the public to such use: *Fath v. Tower Grove & C. R. Co.*, 105 Mo. 537; s. c. 16 S. W. Rep. 913; 13 L. R. A. 913; affirming s. c. 39 Mo. App. 447. But more recently the Supreme Court of Missouri have fallen down upon the wretched doctrine that a city has no power to adopt such an ordinance, and that, in order for such an ordinance to be

valid, it must have been accepted by the street railway company; and that an agreement by the company to hold the city harmless from all damages that may accrue to it by reason of its failure to comply with such an ordinance, does not show such an acceptance, since the city could not be held in damages for any failure of the company to obey such an ordinance: *Sanders v. Southern Electric R. Co.*, 147 Mo. 411; s. c. 48 S. W. Rep. 855; *Murphy v. Lindell R. Co.* (Mo.), 54 S. W. Rep. 442. A street railway company can not confer authority on a private person to obstruct the public street so as to enable him to escape indictment for creating a public nuisance. It was so held where the company licensed the owner of a building to move the building across its track in the night, and cut its wires to enable him to do so, but he left the house standing across the street during the following day: *State v. Pratt*, 52 Minn. 131; s. c. 53 N. W. Rep. 1069.

<sup>142</sup> *Laethem v. Ft. Wayne & C. R. Co.*, 100 Mich. 297; s. c. 58 N. W. Rep. 996.

<sup>143</sup> *Rockford City R. Co. v. Blake*, 173 Ill. 354; s. c. 50 N. E. Rep. 1070; 64 Am. St. Rep. 122; aff'g 74 Ill. App. 175. So, an ordinance as to the duty of drivers on meeting another conveyance, etc., inadmissible in evidence: *Culberston v. Metropolitan Street R. Co.*, 140 Mo. 35.



police regulation, and is plainly valid, and a violation of it is a *violation of law*, and any person injured by such violation has an action for the resulting damages.<sup>144</sup> The violation of a municipal ordinance enacted to promote the safety of the public, prescribing certain precautions to be taken by street railway companies in moving their cars,—as, for example, commanding that it keep a vigilant watch for persons on or moving towards the track, and, on the first appearance of danger to such persons, to stop the car in the shortest possible space of time,—will not authorize a recovery by one who is injured in consequence of such violation, where he was guilty of negligence, which, concurring with the violation of the ordinance, contributed to, or caused his injury.<sup>145</sup> Whether the theory arising in the particular jurisdiction is that the violation of such an ordinance is negligence *per se*, or merely evidence of negligence to be considered by the jury, such an ordinance will be, in a proper state of the pleadings, *admissible in evidence* in connection with evidence tending to show that it has been disregarded.<sup>146</sup>

**§ 1395. Injuries from Propelling Street Cars at a High Rate of Speed.**—In dealing with this question, it is necessary to balance the right of the street railway company to the opportunity of a reasonable and profitable enjoyment of its franchise, and the right of the public to rapid transit between their homes and places of business, on the one hand,—and the right of the public to use the streets and highways for ordinary purposes with safety, on the other hand. Nor should the fact be laid out of view that, in order to furnish the public with safe and convenient transit, and to avoid the danger of cars colliding with each other when going in the same direction, it is necessary, so far as practicable, to run street cars upon a fixed schedule of time. Balancing these opposing rights of the street railway company and of the traveling public which it represents on the one hand, and of ordinary drivers, horseback riders, and foot-passengers on the other hand,—it is a just conclusion that street cars, and especially those propelled by electricity, which are consequently capable of attaining a high rate of speed,—can not be lawfully run at a rate of speed which is incompatible with the lawful and customary use of the highway by others, with reasonable safety.<sup>147</sup> Upon the question what rate of speed is exces-

<sup>144</sup> Vol. I, § 12.

<sup>145</sup> *Murphy v. Lindell R. Co. (Mo.)*, 54 S. W. Rep. 442.

<sup>146</sup> *Buy v. Third Ave. R. Co.*, 61 N. Y. Supp. 113.

<sup>147</sup> *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605; s. c. 27 Atl. Rep. 1067; 22 L. R. A. 374; 56 Am. & Eng. Rail. Cas. 590 (where these relative

rights are very clearly stated by *Magie, J.*); *Harkins v. Pittsburgh &c. Traction Co.*, 173 Pa. St. 149; s. c. 38 W. N. C. 163; 26 Pitts. L. J. (N. S.) 427; 33 Atl. Rep. 1045; *Breary v. Traction Co.*, 5 Pa. Dist. Rep. 95; *Toronto R. Co. v. Gosnell*, 24 Can. S. C. 582.



sive, regard must be had to the right of the public to rapid transit, to the right of street railway companies to furnish them with rapid transit, to the extent and character of the traffic upon the street or highway at the particular place, and, in general, to all the surrounding facts and circumstances; and the best general conclusion will be that, in view of all those facts and circumstances, the street railway company must not propel its cars at a speed which is unreasonable and dangerous; and this although there is no statute or municipal regulation as to speed,<sup>148</sup> or although there is a statute or ordinance fixing an outside limit which is not reached or exceeded by the company.<sup>149</sup> Upon the question what rate of speed is to be deemed *unreasonable* or *dangerous*, no exact definition can be made; but the obvious conclusion of reason is that a rate of speed which *prevents the motorman from maintaining control of his car* so as to stop it within a reasonable distance upon an appearance of danger to others, falls within this category;<sup>150</sup> and, on the other hand, that a rate of speed which, although greater than usual, does not prevent the motorman from keeping his car well in hand, and does not endanger persons using the street with reasonable care for their own safety, is not negligent or blameworthy.<sup>151</sup> The true view is that the railway company must not adopt such a rate of speed as will prevent its motorman from keeping control of the car, especially upon a down grade; and if a car can not otherwise be kept under control, the *sanding* of the tracks may be regarded as a reasonable means to be adopted for that purpose, the failure to resort to which may be negligence.<sup>152</sup> Particular circumstances, such as the *darkness* of the night,<sup>153</sup> the overloading of the car,<sup>154</sup> the negligent failure to give a signal,<sup>155</sup> especially where two street railroads pass each other at a crowded crossing where passengers are liable to alight,<sup>156</sup> or a defective condition of the roadway due to the negligence of the company,—may make a rate of speed negligent and

<sup>148</sup> *Ewing v. Toronto R. Co.* (C. P.), 24 Ont. Rep. 649.

<sup>149</sup> *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475; s. c. 37 Atl. Rep. 379.

<sup>150</sup> *Ewing v. Toronto R. Co.* (C. P.), 24 Ont. Rep. 694; *Davidson v. Schuylkill Traction Co.*, 4 Pa. Super. Ct. 86; *Gosnell v. Toronto R. Co.*, 21 Ont. App. 553.

<sup>151</sup> *Kline v. Electric Traction Co.*, 181 Pa. St. 276; s. c. 40 W. N. C. 337; 37 Atl. Rep. 522.

<sup>152</sup> *Lawler v. Hartford St. R. Co.* (Conn.), 43 Atl. Rep. 545.

<sup>153</sup> *Calumet & C. R. Co. v. Lynholm*, 70 Ill. App. 371.

<sup>154</sup> *Richmond Railway & C. Co. v. Garthright*, 92 Va. 627; s. c. 24 S. E. Rep. 267; 32 L. R. A. 220.

<sup>155</sup> *West Chicago St. R. Co. v. McCallum*, 67 Ill. App. 645.

<sup>156</sup> *West Chicago St. R. Co. v. Annis*, 62 Ill. App. 180; *Fonda v. St. Paul & C. R. Co.*, 71 Minn. 438; s. c. 74 N. W. Rep. 166; *Dobert v. Troy & C. R. Co.*, 91 Hun 28; s. c. 36 N. Y. Supp. 105; 71 N. Y. St. Rep. 392; *Graham v. Consolidated Traction Co.*, 62 N. J. L. 90; s. c. 44 Atl. Rep. 964; *West Chicago St. R. Co. v. Shiplett*, 85 Ill. App. 683 (question for jury).



blameworthy which might not otherwise be so. As in case of steam railroads,<sup>157</sup> there is no rule of law fixing the maximum rate of speed at which a street car may be run, and the running of such a car at a high rate of speed is negligence as matter of law.<sup>158</sup>

§ 1396. **Further of Propelling Street Cars at a High Rate of Speed.**—For example, to run a cable car at a speed from ten to twelve miles an hour through the streets of a populous city is not negligence *per se*, where such speed is permitted by the statute law or by municipal ordinance.<sup>159</sup> It has been held a question for the jury whether to run a cable train in the city of Chicago at the rate of six miles an hour was negligently dangerous.<sup>160</sup> Another court has found evidence of negligence fit to be submitted to a jury in the fact of running an electric car at the rate of ten or eleven miles an hour over a crossing in a much frequented street without giving any signal;<sup>161</sup> and another court has ascribed to the act of running an electric car over such a crossing at a rate not in excess of the usual rate, which is from twelve to fourteen miles an hour for the whole trip, the conclusion of negligence evincing little less than a wanton and reckless disregard of human life.<sup>162</sup> Obviously, the driver, gripman, or motorman is not bound to reduce his speed to such a rate as will *certainly* avoid injury to any one who may attempt to cross the track in an unreasonable and improper manner.<sup>163</sup> In the days of *horse cars*, one authoritative court held that, in the absence of evidence tending to a different conclusion, the reasonable rate of speed for a street car was the average

<sup>157</sup> *Post*, § 1873.

<sup>158</sup> *Bittner v. Crosstown St. R. Co.*, 153 N. Y. 76; s. c. 46 N. E. Rep. 1044; rev'g s. c. 12 Misc. (N. Y.) 514; s. c. 68 N. Y. St. Rep. 367; 33 N. Y. Supp. 672.

<sup>159</sup> *Rack v. Chicago City R. Co.*, 69 Ill. App. 656; *White v. Albany R. Co.*, 35 App. Div. 23; s. c. 54 N. Y. Supp. 445.

<sup>160</sup> *Chicago & C. R. Co. v. Roach*, 76 Ill. App. 496.

<sup>161</sup> *Rosenberg v. West End St. R. Co.*, 168 Mass. 561; s. c. 47 N. E. Rep. 435.

<sup>162</sup> *Evansville St. R. Co. v. Gentry*, 147 Ind. 408; s. c. 37 L. R. A. 478; 5 Am. & Eng. Rail. Cas. (N. S.) 500; 44 N. E. Rep. 311.

<sup>163</sup> *Christensen v. Union Trunk Line*, 6 Wash. 75, 79; *Meyer v. Lindell R. Co.*, 6 Mo. App. 27. No inference of negligence drawn from the statement of witnesses that the car was "going unusually fast" and

"almost as fast as it could," where the witnesses testifying thereto admit on cross-examination that their estimates are mere *conjectures*: *Moss v. Philadelphia Traction Co.*, 180 Pa. St. 389; s. c. 36 Atl. Rep. 865. Upon the question at what rate of speed street cars may be run, see, in addition to cases above cited, the following: *Greeley v. Federal & C. Pass. R. Co.*, 153 Pa. St. 218; *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551; *Huerzeler v. Central & C. R. Co.*, 1 Misc. (N. Y.) 136; *Newark & C. R. Co. v. Block*, 55 N. J. L. 605; s. c. 22 L. R. A. 374; *Alexander v. Rochester & C. R. Co.*, 128 N. Y. 13; *Bernhard v. Rochester R. Co.*, 68 Hun (N. Y.) 369; *Laethem v. Fort Wayne & C. R. Co.*, 100 Mich. 297; *Van Patten v. Schenectady St. R. Co.*, 80 Hun (N. Y.) 494; s. c. 62 N. Y. St. Rep. 378; 30 N. Y. Supp. 501 (four or five miles an hour not dangerous).



rate of speed employed by carriages used to convey passengers by horse power.<sup>164</sup> But, plainly, such a rate of speed could not be applied to cars driven by electricity, or even by underground cables, where these means of propulsion are employed to secure a higher rate of speed, and thereby to meet the necessities of the public for rapid transit. Nor would a railway company be justified in propelling its cars at a rate of speed as high as that used by stage coaches, under all circumstances and in all places. For instance, such a rate of speed would be reckless and dangerous on Broadway, in the city of New York, for a distance of at least two miles from the Battery. Nor could such a rate of speed be tolerated on Fulton street in Brooklyn, for a space of a mile or more from the eastern approach of the bridge. In point of fact, at the places named, surface cars habitually run at a slow rate of speed. These considerations indicate the impossibility, in the absence of a municipal regulation, of attempting to lay down any rule of law with reference to the rate of speed of a street car, whatever may be the means of propulsion used. But, as in other cases, no rate of speed, however dangerous, not resorted to for the intentional purpose of inflicting injury, will warrant a recovery of damages, where the person run over by the car was guilty of contributory negligence, which was the proximate cause of his injury; and if the state of the evidence warrants it, the judge may properly submit to the jury the question whether the presumption fairly arises out of the evidence adduced by the plaintiff, that the traveller who was run over and killed, was himself guilty of negligence which contributed to his death.<sup>165</sup> Nor is it necessary more than to state the proposition that, no matter how great the rate of speed of the car, or what the motive for adopting a high or excessive rate of speed may have been, the excessive rate of speed will not support an action grounded on negligence, if it was not the *proximate cause* of the injury,—that is to say, if the collision could not have been avoided if the car had been driven at a proper rate of speed; and had been kept under proper control.<sup>166</sup> On the other hand, where the injury to the traveller is caused by the high rate of speed at which the car is run,—as when it is turned by a switch around a corner in a different direction from that indicated by the placard which it carries, it may not be error to allow the jury to visit the company with *punitive damages*, if they shall find from the evidence that its servants in charge of the car were guilty of such *wantonness* or *recklessness* as to indicate a willful disregard of the rights of the in-

<sup>164</sup> Adolph v. Central Park R. Co., 76 N. Y. 530.

<sup>166</sup> Hoffman v. Syracuse &c. Transit Co., 63 N. Y. Supp. 442; s. c. 50

<sup>165</sup> Schausten v. Toledo &c. St. R. Co., 18 Ohio Cir. Ct. 691.



jured traveller.<sup>167</sup> With reference to the manner of proving the rate of speed at which a horse car was being run in a given instance, it has been obviously well held that *evidence* as to the capacity of the horse for speed is inadmissible.<sup>168</sup> Nor will evidence of particular instances in which the cars of the defendant street railway company have been operated at a given speed, be admissible to show the speed at which the car was run at the time of the accident in question.<sup>169</sup> But this holding seems to admit of some doubt. Clearly, it would be admissible to show that the cars of the defendant company were *habitually* operated at a given rate of speed at the particular point on its line, in the absence of direct evidence tending to show the speed of the particular car which did the injury.<sup>170</sup>

§ 1397. **Instances and Examples of Rates of Speed.**—Negligence has been justly ascribed to the act of running an electric car along a narrow and unlighted alley, on a dark night, at a rate of speed that will not permit its stoppage within the distance covered by the light thrown forward by its own headlight.<sup>171</sup> The same court ascribed gross negligence to the act of such company in running its electric cars at a high rate of speed at a place where the company had made a cut below the grade of the street, piling the dirt on both sides of its track so as to obstruct ordinary travellers in endeavoring to turn out from the track.<sup>172</sup> Another court has justly ascribed negligence to the act of running an electric car over a crossing in a much travelled street, at a high and dangerous rate of speed, or without being on the lookout, and having the car under control, and using the proper means to stop

<sup>167</sup> Nashville &c. St. R. Co. v. O'Bryan (Tenn.), 55 S. W. Rep. 300.

<sup>168</sup> Spargo v. West End St. R. Co., 175 Mass. 174.

<sup>169</sup> Wade v. City &c. R. Co. (Or.), 59 Pac. Rep. 875.

<sup>170</sup> For a case where the evidence adduced to show that the car was being operated at an excessive rate of speed, was *too vague and unsatisfactory* to support a verdict for the plaintiff, especially in view of the fact that the car was stopped within a few feet after the motorman discovered the peril of the boy that was run over,—see Graham v. Consol. Traction Co., 62 N. J. L. 90; s. c. 44 Atl. Rep. 964.

<sup>171</sup> Gilmore v. Federal Street &c. Pass. R. Co., 153 Pa. St. 31; s. c. 31 W. N. C. 507; 23 Pitts. L. J. (N. S). 438; 25 Atl. Rep. 651. This was a

dictum, based upon undisputed evidence in the case, notwithstanding which the court reversed the rule of the trial court instructing the jury that "there is not sufficient evidence in this case of negligence on the part of the defendant company, or its employes, to justify a verdict for the plaintiffs." The decision proceeded really on the ground that the plaintiff left his horse and wagon unguarded upon the track and went into an adjacent house to deliver packages, thus exposing it to injury. It will be perceived that the decision ignores the doctrine elsewhere stated: Vol. I, §§ 238, 239.

<sup>172</sup> Greeley v. Federal Street &c. R. Co., 153 Pa. St. 218; s. c. 25 Atl. Rep. 796.



it, so as to avoid a collision.<sup>173</sup> But such a company has been exonerated from the imputation of negligence in causing the death of a child because its car was going faster than the maximum speed allowed by the city ordinance, where the mules hitched to the car became frightened at an engine, and started up the street, and, before they had gone more than about fifty yards, the child ran in front of the car only about three or four feet in advance of the mules, and so near that the driver was unable to avoid the accident.<sup>174</sup>

§ 1398. **Running Street Cars at a Prohibited Rate of Speed.**—Statutes and municipal ordinances have been enacted, in many instances, applicable both to steam and horse railways, prohibiting the running of cars and trains, within the limits of incorporated towns, in excess of a prescribed rate of speed. Unquestionably, these statutes and ordinances, within reasonable limits, are valid police regulations, and not subject to any constitutional objection;<sup>175</sup> and the general rule as to what must be a reasonable rate of speed is a question of legislative, and not of judicial discretion. But cases may easily be supposed in which state legislation or municipal ordinances may restrain the rate of speed of railway trains, within the limits of incorporated towns and villages, to such a limit as will amount to a confiscation of their business, and, in the case of interstate railways, to an unwarrantable interference with interstate commerce. But, assuming that such a statute or municipal ordinance is valid, its violation by the railroad company, or its agents or servants, is, in the view of most courts, *negligence per se*,<sup>176</sup> such as renders the company liable for all damages caused thereby;<sup>177</sup> though some courts hold it merely *evidence of negligence* to be considered by the jury.<sup>178</sup> The sound view is that the violation of any statutory or valid municipal regulation as to the speed of street cars is such a breach of duty as may be made the foundation of an action by a person sustaining special damages, where the other elements of actionable negligence concur; and this rule is said to be of special application to cars propelled by electricity.<sup>179</sup>

<sup>173</sup> *Watson v. Minneapolis Street R. Co.*, 53 Minn. 551; s. c. 55 N. W. Rep. 742.

<sup>174</sup> *Trumbo v. City Street Car Co.*, 89 Va. 780; s. c. 17 S. E. Rep. 124; 17 Va. L. J. 207.

<sup>175</sup> *State v. Cape May*, 59 N. J. L. 393; s. c. 36 L. R. A. 656; 9 Am. & Eng. Rail. Cas. (N. S.) 507; 36 Atl. Rep. 679. See also *Donnaher v. State*, 8 Smedes & M. (Miss.) 649; *State v. Trenton*, 53 N. J. L. 132; s. c. 11 L. R. A. 410.

<sup>176</sup> Vol. I, § 10.

<sup>177</sup> *Backenstoe v. Wabash & C. R. Co.*, 23 Mo. App. 148; *Weber v. Kansas City & C. R. Co.*, 100 Mo. 194; s. c. 7 L. R. A. 819; *Omaha St. R. Co. v. Duvall*, 40 Neb. 29.

<sup>178</sup> Vol. I, § 11. *Hanlon v. South Boston Horse R. Co.*, 129 Mass. 310; *Hall v. Ogden City St. R. Co.*, 13 Utah 243; s. c. 4 Am. & Eng. Rail. Cas. (N. S.) 77; 44 Pac. Rep. 1046.

<sup>179</sup> *Omaha St. R. Co. v. Duvall*, 40 Neb. 29; s. c. 58 N. W. Rep. 531.



While such statutes and ordinances are intended to promote the safety of human beings and domestic animals, yet a just interpretation of them does not limit them to such cases; but such a statute may well be held to extend to the *protection of adjacent property*; so that the owners of *buildings* injured by *vibrations* caused by the moving of trains at a prohibited rate of speed, have an action for damages, founded on the statute.<sup>180</sup> It has been held, on the one hand, that a statute limiting the rate of speed of trains passing through towns, cities, and villages, can not be construed to apply only to improved and settled portions thereof;<sup>181</sup> and, on the other, that a town ordinance forbidding the running of trains over crossings at a rate of speed exceeding ten miles an hour, does not prohibit a greater rate of speed *between crossings* within the town limits.<sup>182</sup> Another court has gone to the untenable length of holding that where the line is built under a franchise from a city, the jury may consider the ordinances granting the franchise wherein a limit of speed is fixed, although the injury was received at a point *without the city limits*.<sup>183</sup> A statute which confers power on local authorities to regulate the speed of electric cars, with the restriction that a greater rate than fifteen miles per hour shall not be allowed, does not relieve the company from the imputation of negligence where it runs its cars at a *less rate of speed*.<sup>184</sup> It is almost unnecessary to add that, in order to predicate a right to recover damages upon a violation of the statute or ordinance, it must have been the proximate cause of the accident.<sup>185</sup>

§ 1399. **Collisions between Vehicles or Pedestrians and Street Cars at Street Crossings.**—It is said that, at a street crossing, a street car and a vehicle have an equal right to cross; neither has a superior right to the other, but the right of each must be exercised in a careful

<sup>180</sup> Porterfield v. Bond, 38 Fed. Rep. 391.

<sup>181</sup> Illinois & C. R. Co. v. Jordan, 63 Miss. 458.

<sup>182</sup> Central R. & C. Co. v. Smith, 78 Ga. 694; s. c. 3 S. E. Rep. 397.

<sup>183</sup> Cogswell v. West Street & C. Co., 5 Wash. 46; s. c. 31 Pac. Rep. 411; 52 Am. & Eng. Rail. Cas. 500; 7 Am. Rail. & Corp. Rep. 48.

<sup>184</sup> Laufer v. Bridgeport Traction Co., 68 Conn. 475; s. c. 2 Chic. L. J. Wkly. 287; 37 Atl. Rep. 379.

<sup>185</sup> Vol. I, § 82; Davidson v. Schuylkill Traction Co., 4 Pa. Super. Ct. 86. A city ordinance regulating the "running speed of *trains and engines*" is not applicable to a street railway, and is inadmissible in evidence in an action brought against

it to recover for personal injuries: Hill v. Rome St. R. Co., 101 Ga. 66; s. c. 28 S. E. Rep. 631. Statute providing that "*no person* shall ride through any street - - at a swifter pace than at the rate of five miles an hour" applies to street railroads: Bly v. Nashua St. R. Co., 67 N. H. 474; s. c. 30 L. R. A. 303; 32 Atl. Rep. 764. As to an ordinance permitting a greater speed when dummy engine runs *forward* than *backward*,—see Highland Ave. & C. R. Co. v. Sampson, 112 Ala. 425; s. c. 20 So. Rep. 566. When an ordinance limiting rate of speed is not *repealed by implication*: Martineau v. Rochester R. Co., 81 Hun 263; 62 N. Y. St. Rep. 722; 30 N. Y. Supp. 778.



manner so as not to interfere with the right of the other.<sup>186</sup> When, therefore, the motorman, approaching a crossing, discovers a vehicle which has approached the crossing first, in the act of proceeding across, it is his duty to slow up his car so as to allow the vehicle to cross in safety.<sup>187</sup> Obviously, the rule of reasonable care which the law puts upon the drivers, gripmen and motormen of street cars at all times, imposes on them a more exacting attention when they approach street crossings, in a crowded city where vehicles and pedestrians may always be expected in front of them. The failure, under such circumstances, to ring the bell, sound the gong, or give other proper warning, is *negligence per se*, where there is a city ordinance requiring such precautions,<sup>188</sup> and is undoubtedly *evidence of negligence* to be submitted to a jury under all circumstances, whether there is such an ordinance or not. It will be for the defendant to excuse such failure, but it will not be able to do so by showing that the gripman's hands were otherwise necessarily engaged, and that the conductor was temporarily absent from his post.<sup>189</sup>

<sup>186</sup> *Ante*, § 1374, *et seq.*; *Bernhard v. Rochester R. Co.*, 68 Hun (N. Y.) 369; s. c. 51 N. Y. St. Rep. 880; 22 N. Y. Supp. 821; *Eckington & C. R. Co. v. Hunter*, 23 Wash. L. Rep. 401; *Omaha St. R. Co. v. Cameron*, 43 Neb. 297; s. c. 61 N. W. Rep. 606; *Huber v. Nassau & C. R. Co.*, 22 App. Div. 426; s. c. 48 N. Y. Supp. 38; *Chapman v. Atlantic Ave. R. Co.*, 14 Misc. 384; s. c. 70 N. Y. St. Rep. 753; *Degnan v. Brooklyn & C. R. Co.*, 14 Misc. 408; s. c. 70 N. Y. St. Rep. 755; 35 N. Y. Supp. 1047; *Hall v. Ogden & C. R. Co.*, 13 Utah 243; s. c. 44 Pac. Rep. 1046; 4 Am. & Eng. Rail. Cas. (N. S.) 77; *Bresky v. Third Ave. R. Co.*, 16 App. Div. 83; s. c. 45 N. Y. Supp. 108. In one case it was held not error for the court to refuse to charge that the street car had the right of way over a truck approaching the crossing: *Oniel v. Dry Dock & C. R. Co.*, 129 N. Y. 125. - - Street car company liable for suddenly starting its car, standing near a crossing, colliding with the wagon of a person who has started to cross, he being without fault: *Piper v. Pueblo City R. Co.*, 4 Colo. App. 424; s. c. 36 Pac. Rep. 158; *Ellick v. Metropolitan St. R. Co.*, 15 App. Div. 556; s. c. 44 N. Y. Supp. 523.

<sup>187</sup> *Bernhard v. Rochester R. Co.*, 68 Hun (N. Y.) 369; s. c. 51 N. Y. St. Rep. 880; 22 N. Y. Supp. 821.

<sup>188</sup> *Driscoll v. Market St. & C. R. Co.*,

97 Cal. 553; s. c. 32 Pac. Rep. 591. But see *Wallen v. North Chicago St. R. Co.*, 82 Ill. App. 103, where it is argued that a street railway company does not rest under the obligation of exercising a greater degree of watchfulness at street intersections than at other places,—a proposition which can not possibly be affirmed as a rule of law.

<sup>189</sup> *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553; s. c. 32 Pac. Rep. 591; *Fandel v. Third Ave. R. Co.*, 15 App. Div. 426; s. c. 44 N. Y. Supp. 462. It is a mere trifling with justice to advance the plea, in excuse of such failure, that the ordinance in terms requires the persons immediately in charge of the car, and not the company, to give the warning: *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553; s. c. 32 Pac. Rep. 591. Where a *bicyclist* was riding between two tracks of a street railway in the direction in which the car was approaching from behind him, and did not look back or give any indication that he heard the gong, but suddenly turned and attempted to cross the track in front of the car and was run over,—it was held that the motorman was not guilty of negligence in approaching at the usual speed until the wheelman, by turning, put himself in danger: *Gagne v. Minneapolis St. R. Co.* (Minn.), 79 N. W. Rep. 671.



§ 1400. **Further of Injuries at Street Crossings.**—On the other hand, the absence of any municipal ordinance requiring the ringing of a bell by the operators of a street cable car line at street crossings or elsewhere, does not relieve the company from liability for personal injuries to one sustained by being struck by a car, which would have been prevented if the gripman had not negligently failed to give his signal upon observing the person injured in a dangerous position.<sup>190</sup> Unless required to do so by statute or by a valid municipal ordinance, a street railway company is not required to erect signs or to maintain flagmen or gates at street crossings, although the district may be populous, and although the railway is operated by cable or by electric power.<sup>191</sup> In the absence of a statute or of a valid municipal ordinance, an electric railroad company owes no duty to *stop* its cars before reaching public highway crossings, for the motormen to look and listen, where there is no apparent reason for so doing;<sup>192</sup> but a municipal ordinance compelling passenger cars, operated by trolley or electric power, to come to a *full stop* before crossing intersecting streets, is a reasonable exercise of power to regulate the use of streets and highways.<sup>193</sup>

§ 1401. **Further of Such Injuries.**—The introduction of new forms of vehicles and of new motive power in street railways, has not impaired the right of *foot-passengers* to safe passage at *street crossings*; but the speed of cars must be regulated and such warning given of their approach, at whatever cost of pains and trouble, that the footman using ordinary care may, in the absence of unavoidable accident, cross in safety.<sup>194</sup> Manifestly, the increase of danger to the public at street crossings demands a corresponding increase of vigilance and energy on the part of the driver, gripman, or motorman, and he is bound to use that degree of care and prudence which the safety of those who, he must in good reason know, are, or are likely to be, im-

<sup>190</sup> *Mitchell v. Tacoma R. & C. Co.*, 9 Wash. 120, 125; s. c. 37 Pac. Rep. 341.

<sup>191</sup> *Eckington & C. R. Co. v. Hunter*, 6 App. D. C. 287; s. c. 23 Wash. L. Rep. 401; *Jacquin v. Grand Ave. Cable Co.*, 57 Mo. App. 320. A street railway company is not required by Mo. Rev. Stat., § 2005, to maintain a crossing or the approach thereto at a point where another street enters into, but does not cross the one on which the road is located: *Ott v. Kansas City & C. R. Co.*, 58 Mo. App. 502.

<sup>192</sup> *Savannah & C. R. Co. v. Beasley*, 94 Ga. 142; s. c. 21 S. E. Rep. 285.

<sup>193</sup> *State v. Cape May*, 59 N. J. L. 404; s. c. 36 L. R. A. 657; 6 Am. & Eng. Rail. Cas. (N. S.) 329; 36 Atl. Rep. 678.

<sup>194</sup> *Cincinnati St. R. Co. v. Snell*, 54 Ohio St. 197; s. c. 35 Ohio L. J. 140; 32 L. R. A. 276; 43 N. E. Rep. 207. Further as to the duty of street railways towards pedestrians at crossings, see *Altmeier v. Cincinnati St. R. Co.*, 4 Ohio N. P. 224; s. c. 4 Ohio Leg. News, 300.



periled by the train, demands of him.<sup>195</sup> This duty extends to the protection of the aged and infirm, as well as to those who are better able to look out for themselves. It is therefore his duty to take special care, on approaching a crossing, to have his car sufficiently *under control*, to enable him to avoid collision with aged and infirm persons on foot, whose infirmities are plainly in evidence, and who may be crossing the track at a street crossing.<sup>196</sup> He ought to notice whether or not the track is clear when he approaches a public crossing, and to sound the gong as warning.<sup>197</sup> If he sees another car standing still at a crossing in the act of receiving or discharging passengers, he ought to take such precautions as will not expose them to unnecessary danger.<sup>198</sup> While it is not negligence *per se* for a street car driver to drive his horses at a trot over a street crossing, under all circumstances,<sup>199</sup> yet circumstances may exist where negligence may be rightfully imputed to him if he fails to *check the speed* of his car at a crossing,—as where the motorman of an electric car fails so to check his speed, and in consequence runs over a loaded truck.<sup>200</sup> The sudden stopping of a car on a crossing,—especially in violation of a municipal ordinance,—whereby a *funeral procession* is suddenly stopped so that the pole of one carriage is driven into the carriage in front of it,—will furnish evidence of negligence warranting a recovery of damages from the company.<sup>201</sup> The sudden starting of a car which has been standing near a street crossing, bringing it into collision with a wagon which has started to cross the track in front of the standing car, will furnish evidence of negligence, especially where it appears that neither the motorman nor the conductor was in sight on the car when it started.<sup>202</sup>

<sup>195</sup> West Chicago St. R. Co. v. McCallum, 169 Ill. 240; s. c. 48 N. E. Rep. 424; aff'g s. c. 67 Ill. App. 645.

<sup>196</sup> Haight v. Hamilton St. R. Co., 29 Ont. Rep. 279.

<sup>197</sup> Hall v. Ogden & Co. R. Co., 13 Utah 243; s. c. 44 Pac. Rep. 1046; 4 Am. & Eng. Rail. Cas. (N. S.) 77. Application of this rule where two streets intersect each other at an acute angle: Brozek v. Steinway R. Co., 10 App. Div. 360; s. c. 48 N. Y. Supp. 345.

<sup>198</sup> Consolidated Traction Co. v. Scott, 58 N. J. L. 682; s. c. 33 L. R. A. 122; 34 Atl. Rep. 1094; 55 Am. St. Rep. 620; 4 Am. & Eng. Rail. Cas. (N. S.) 371. Compare West Chicago St. R. Co. v. Nilson, 70 Ill. App. 171.

<sup>199</sup> Lavin v. Second Ave. R. Co., 12

App. Div. 281; s. c. 42 N. Y. Supp. 512.

<sup>200</sup> Hergert v. Union R. Co., 25 App. Div. 218; s. c. 49 N. Y. Supp. 307. Evidence of negligence for gripman to fail to slacken speed of seven miles an hour, striking a cart on a crossing: Reiley v. Third Ave. R. Co., 16 Misc. (N. Y.) 11; s. c. 73 N. Y. St. Rep. 289; 37 N. Y. Supp. 593; aff'g s. c. 14 Misc. (N. Y.) 445; s. c. 70 N. Y. St. Rep. 733; 35 N. Y. Supp. 1030.

<sup>201</sup> Mueller v. Milwaukee St. R. Co., 86 Wis. 340; s. c. 21 L. R. A. 721; 56 N. W. Rep. 914.

<sup>202</sup> Piper v. Pueblo City R. Co., 4 Colo. App. 424; s. c. 36 Pac. Rep. 158. Evidence tending to show negligence and to support a judgment for the plaintiff, where the moter-



§ 1402. **Collisions with Other Street Cars at Street Railway Crossings.**—In the absence of any right of precedence, by usage or otherwise, at the intersection of two street railway tracks, cars of the different companies stand on the footing of equality, each lawfully using the public street and each owing to the other the duty of exercising reasonable care while doing so.<sup>203</sup> The rule applicable to the relative rights of street cars and other vehicles at street crossings, which makes their rights substantially equal,<sup>204</sup> applies as between cable or electric cars on the one hand, and horse cars on the other. In the absence of a statutory, municipal, or conventional regulation establishing a right of precedence, if the horse car comes upon the crossing first it will be the duty of the cable car or of the electric car, to slacken speed and allow the horse car to pass.<sup>205</sup> Where there is a city ordinance establishing a right of precedence, the failure to comply with it will not, in the view of one court, be *negligence per se*, but will be merely *evidence of negligence*.<sup>206</sup> Where a passenger on a cable car is injured in consequence of the negligent failure of the gripman to stop the car at the crossing of another street railway, so as to avoid a collision with an electric car coming on such railway, it will be no defense on the part of the cable company that the motorman of the electric company was also negligent, or that a contributing cause of the accident was the fact that a watchman, employed at the crossing by the companies jointly, signaled both cars to proceed.<sup>207</sup> The driver of a horse car, on approaching the crossing of an electric railway, is justified, in the absence of visible evidence to the contrary, in acting upon the presumption that the approaching electric car is moving within the maximum rate of speed prescribed by law, and that its motorman will respect the rights of the horse car upon its arrival first at the crossing, either by slacking speed, or coming to a full stop, so that the horse car may pass in safety.<sup>208</sup> It has been held that

man did not see the plaintiff until within fifty feet of him, and, finding that he could not stop the car, by reason of the slippery condition of the track, increased its speed and ran over the plaintiff: *Jacksonville R. Co. v. Lamb*, 86 Ill. App. 487. Evidence supporting a finding of negligence in the defendant without contributory negligence on the part of the traveller, where no warning was given of the approach of the car and no effort was made to check its speed until it collided with the wagon of the traveller: *Piercy v. Metropolitan St. R. Co.*, 62 N. Y. Supp. 867.

<sup>203</sup> *Metropolitan Street R. Co. v. Kennedy*, 82 Fed. Rep. 158; s. c. 51 U. S. App. 503.

<sup>204</sup> *Ante*, § 1374, *et seq.*

<sup>205</sup> *Metropolitan R. Co. v. Hammett*, 26 Wash. L. Rep. 762; s. c. 13 App. D. C. 370.

<sup>206</sup> Compare Vol. I, §§ 10, 11; *Connor v. Electric Traction Co.*, 173 Pa. St. 602; s. c. 38 W. N. C. 12; 34 Atl. Rep. 238.

<sup>207</sup> *Taylor v. Grand Ave. R. Co.*, 137 Mo. 363; s. c. 39 S. W. Rep. 88.

<sup>208</sup> *Metropolitan R. Co. v. Hammett*, 13 App. D. C. 370; s. c. 26 Wash. L. Rep. 762.



the highest degree of caution is required of those in charge of street railway cars at points where street railway lines intersect.<sup>209</sup> And this is undoubtedly true if they are regarded in their relation of *carriers of passengers*,<sup>210</sup> it being the rule applied when an action is brought for the death or injury of a passenger; but where the action is brought for an injury to a servant of one of the companies, or to a stranger, the rule is that of reasonable or ordinary care, which is a degree of care in proportion to the danger.<sup>211</sup>

§ 1403. **Collisions at Steam Railway Crossings.**—In the absence of a statute or valid municipal ordinance, a street railway company is not bound to maintain a watchman, flagman, or guard at a crossing of its line by railway tracks.<sup>212</sup> On the other hand, the duty which the law, in many jurisdictions, imposes upon the drivers of vehicles, for their own protection, to “stop, look, and listen,” on approaching the grade crossing of a *steam* railway,<sup>213</sup> applies with even greater force where a street railway car so approaches a steam railway crossing; since the persons in charge of the car have not only to look out for their own safety, but also for the safety of the *passengers* whose lives have been committed to their care. The obligation which the law puts upon common carriers of passengers of using the highest degree of care and diligence in order to promote the safety of their passengers, demands no less than this. Statutes and municipal ordinances have been enacted defining and enforcing this duty. Such a statute, providing that when the tracks of two railroads cross each other, the engineers and conductors must bring their trains to a full stop within one hundred feet from the crossing, and not proceed until they know the way to be clear, has been held to apply to an electric railroad, running from a point within to a point without the corporate limits.<sup>214</sup> Under another such statute requiring, under such circumstances, an employé of the company to go ahead before the car crosses a railroad track, and providing that the car shall not proceed unless signaled to do so by such employé, if a street car has *but one person in charge of it*, it is his duty on approaching the railroad track, to stop the car and go ahead and ascertain whether the way is clear; but if he finds that the way is clear, he may obviously cross the track

<sup>209</sup> Metropolitan R. Co. v. Hammett, 13 App. D. C. 370.

<sup>210</sup> Post, Vol. III.

<sup>211</sup> Vol. I, § 25.

<sup>212</sup> Jacquin v. Grand Ave. Cable Co., 57 Mo. App. 320.

<sup>213</sup> Post, § 1648.

<sup>214</sup> Louisville & C. R. Co. v. Anchors, 114 Ala. 492; s. c. 22 South. Rep. 279.



without signaling to any one, since he leaves no one in charge of the car to whom a signal can be given.<sup>215</sup>

§ 1404. **Collisions of Cars with Vehicles Going in the Same Direction.**—The very fact that a street car drives upon a vehicle which is proceeding ahead of it in the same direction, furnishes cogent evidence of negligence, capable of explanation in very few cases. The driver of the vehicle can not discharge his duty of driving so as to avoid injury to his team, to his load, or to pedestrians or other vehicles on the street, and at the same time look behind him to watch for approaching cars, but may rightfully expect the customary signal. Sometimes the structure of his vehicle or of his load is such as would prevent him from seeing a car approaching him from behind. He is not driving toward the source of danger, as is generally the case where car and vehicle collide at a street crossing, but he is receding from it and it is pursuing him. On the other hand, the driver, motorman, or gripman in charge of the car is propelling the instrument of danger, and his duty of keeping a lookout in front,<sup>216</sup> and his knowledge based upon his experience, skill, and competency, of the distance within which he can stop his car so as to avoid a collision, tend strongly to put upon him the responsibility in case a collision takes place. When he sees a vehicle on the street a short distance in front of him, it is, therefore, his duty to *reduce his car to control*, and so to manage it as to avoid a collision, if this can be done by the exercise

<sup>215</sup> *Cincinnati St. R. Co. v. Murray*, 53 Ohio St. 570; s. c. 30 L. R. A. 508; 35 Ohio L. J. 22; 42 N. E. Rep. 596. A statute enacted that the street car should come to a full stop no nearer than ten feet from the railroad crossing. This was construed to mean that the *horse* drawing the car must be stopped before reaching the ten-foot line: *Toledo & C. R. Co. v. Fuller*, 9 Ohio C. D. 123; s. c. 17 Ohio C. C. 562. Contributory negligence of street car motorman crossing railroad track, although the conductor failed to give the agreed signal: *Martus v. Delaware & C. R. Co.*, 15 Misc. 248; s. c. 36 N. Y. Supp. 417; 71 N. Y. St. Rep. 467. It has been held that the motorman of an electric car, fatally injured in an attempt to cross the track of a steam railway, was not, as matter of law, guilty of contributory negligence in attempting to cross a railroad track

*in front of an approaching train*, after having stopped twenty-five or thirty feet away and looked and listened for a train without seeing or hearing one, and after having been signaled to cross by the conductor of his car, who had gone upon the railway track to look for a train: *Harper v. Delaware & C. R. Co.*, 22 App. Div. 273; s. c. 47 N. Y. Supp. 933. Circumstances in which the motorman of an electric car was deemed guilty of contributory negligence as matter of law, in coming into collision with a backing freight train on a steam railway, which he saw an ample distance before approaching the track, but where he was prevented from stopping his car by ice: *Einsfield v. Niagara & C. R. Co.*, 63 N. Y. St. Rep. 563; s. c. 49 App. Div. 470.

<sup>216</sup> *Ante*, § 1382.



of reasonable promptness and energy.<sup>217</sup> He may not rightfully increase the speed of the car, where the person driving in front of him has not left the track upon the sounding of the gong, where he knows or ought to know that such person is not aware of his approach.<sup>218</sup> Nor will he be justified in increasing the speed of his car, after having it under full control, when but a few feet ahead of him is a wagon loaded with bales, and so close to the track as to be rubbed by the car in passing it.<sup>219</sup> Negligence may be imputed to him in failing to stop his car at once upon seeing the wheels of a heavily loaded wagon in front of the car slip on the track while the driver is attempting to get out of the way.<sup>220</sup> To drive upon a vehicle proceeding in front of his car in the same direction without giving any signal, is an act from which a jury will obviously be allowed to infer negligence.<sup>221</sup> He will not be justified under all circumstances in assuming that one driving along the track in front of the car, and who has an unobstructed view of the approaching car, will seasonably turn off the track to avoid accident.<sup>222</sup> Where he makes no effort to avoid a collision with the person driving in front of him, although he knows of the danger, it will be no defense on the part of the company that the driver of the vehicle failed to observe the approach of the car.<sup>223</sup> Whether he was negligent in attempting to pass a horse and wagon driving in the same direction on a narrow bridge, where the space between the car and the wagon was very small, though sufficient if the horse had not swerved,—will present a question for the jury.<sup>224</sup> But negligence is not necessarily imputed to him for following with his cable car after a buggy, which is only two or three feet ahead of him and travelling at the same rate of speed, when he has his car under perfect control, and a collision is caused by a temporary check in the rate of speed of the buggy which the gripman could not foresee.<sup>225</sup>

<sup>217</sup> *Flannagan v. St. Paul &c. R. Co.*, 68 Minn. 300; s. c. 71 N. W. Rep. 379; *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577; s. c. 37 Atl. Rep. 135.

<sup>218</sup> *Wilkins v. Omaha &c. R. Co.*, 96 Iowa 668; s. c. 65 N. W. Rep. 987.

<sup>219</sup> *Blakeslee v. Consolidated St. R. Co.*, 112 Mich. 63; s. c. 29 Chic. Leg. News 257; 3 Det. L. N. 844; 70 N. W. Rep. 408. See also *Knoll v. Third Ave. R. Co.*, 62 N. Y. Supp. 16; s. c. 46 App. Div. 527.

<sup>220</sup> *Bush v. St. Joseph &c. R. Co.*, 113 Mich. 513; s. c. 4 Det. L. N. 377; 71 N. W. Rep. 851.

<sup>221</sup> *Fishbach v. Steinway R. Co.*, 11 App. Div. 152; s. c. 42 N. Y. Supp. 883; *Louisville &c. R. Co. v. Stam-*

*mers*, 47 S. W. Rep. 341; 20 Ky. L. Rep. 688 (not to be rep.).

<sup>222</sup> *White v. Worcester &c. St. R. Co.*, 167 Mass. 43; s. c. 44 N. E. Rep. 1052.

<sup>223</sup> *Wilkins v. Omaha &c. R. Co.*, 96 Iowa 668; s. c. 65 N. W. Rep. 987.

<sup>224</sup> *Reilly v. Troy City R. Co.*, 32 App. Div. 131; s. c. 52 N. Y. Supp. 611.

<sup>225</sup> *Hicks v. Citizens' Street R. Co.*, 124 Mo. 115; s. c. 25 L. R. A. 508; 27 S. W. Rep. 542. Evidence which did not sustain a finding that the railway company was guilty of wanton negligence, where the plaintiff turned his wagon to the right, leaving room for the car to pass, and the motorman thereupon released



§ 1405. **Injuries from Running Horse Cars without Conductor.**<sup>226</sup>—In the absence of a statute or ordinance requiring every horse car to have a conductor, it is not *negligence per se* to run what are called “bobtail” cars, which have a driver but no conductor, and passengers on which are required to deposit their fare in a box,<sup>227</sup>—although, as the attention of the driver is necessarily distracted a portion of the time in watching the passengers to see that they deposit their fares and in making change for them, the risk of accidents to persons on the street is greater than in cases where the car has a conductor. So, it has been held that whether it is negligence to operate an electric car with only one employé, who does duty both as motorman and conductor on a line laid on a turnpike at grade, where persons, horses, and vehicles are constantly passing, is a question for the jury.<sup>228</sup>

§ 1406. **Running over Dogs.**—A dog is now regarded as an animal of a kind in which a right of property may exist, to which the law will accord its protection;<sup>229</sup> though in one State, at least, it has been necessary for the legislature so to declare.<sup>230</sup> In those jurisdictions where the so-called “American rule” exists permitting domestic animals to run at large, dogs,—at least those not of a ferocious character,—have the privilege of the highway in common with other domestic animals, in the absence of restraining statutes or municipal ordinances. In such a jurisdiction, a dog is not a trespasser by reason of being on the track of a street railway company which is laid on the surface of the street,<sup>231</sup> and the servants of the company are required to use ordinary care to avoid running over it, but no more.<sup>232</sup> The motorman of an electric car can not rightfully depend upon the habitual quickness and celerity of a dog to absolve himself from all duty of taking care

the brakes and increased the speed, at which time the plaintiff suddenly pulled his wagon close to the track, and the motorman again applied the brakes, but not in time to avert a collision: *Birmingham R. & C. Co. v. Franscomb* (Ala.), 27 South. Rep. 508. Evidence under which the court properly refused to charge the jury that if they believed the evidence, to find for the defendant, on either or both counts, that the motorman was not guilty of willful, wanton or intentional misconduct, and that the plaintiff was guilty of contributory negligence: *Birmingham R. & C. Co. v. Pinkard* (Ala.), 26 South. Rep. 880.

<sup>226</sup> Compare § 1425, where this section is referred to.

<sup>227</sup> *Dunn v. Cass Ave. & C. R. Co.*, 21 Mo. App. 188.

<sup>228</sup> *Citizens' & C. Transit Co. v. Dew*, 100 Tenn. 317; s. c. 45 S. W. Rep. 790; 40 L. R. A. 518.

<sup>229</sup> Vol. I, § 891.

<sup>230</sup> Pa. Act May 25, 1893; P. L. (Pa.) 136.

<sup>231</sup> *Citizens' & C. Transit Co. v. Dew*, 100 Tenn. 317; s. c. 40 L. R. A. 518; 45 S. W. Rep. 790.

<sup>232</sup> *Furness v. Union R. Co.*, 4 Pa. Dist. Rep. 784; s. c. 8 Kulp. 103; 1 Lack. L. News (Pa.) 332; 13 Lanc. L. Rev. (Pa.) 72.



to avoid running over it;<sup>233</sup> but, on discovering a dog in front of his car and in dangerous proximity thereto, if he fails to slacken speed, and, in consequence, runs over the dog, the company will be liable to the owner; and the rule will be the same where the motorman could, by keeping a reasonable lookout,<sup>234</sup> have discovered the dog in time to have averted the accident to it.<sup>235</sup>

**§ 1407. Responsibility of Company for Acts of its Servants under Rule of *Respondeat Superior*.**—All that has preceded in this chapter assumes, that under the rule of *respondeat superior*, a street railway company is liable for personal injuries to a third person from the negligent operation of one of its trains by persons to whom its control and management had been committed by the company.<sup>236</sup> Consequently, where the negligence of the street railway company is spoken of, the specific negligence of its servant—generally its driver, gripman, or motorman—is meant; and, on the other hand, where the language used refers to the specific negligence of the servant, the company is intended; since the rule of *respondeat superior*, resting upon the principle *qui facit per alium facit per se*, identifies the master with the servant and makes him responsible for the wrongs committed by the servant when acting within the scope of his employment.<sup>237</sup> But this leaves open the question under what circumstances the servant is to be deemed to be so acting. In one case the street car driver, on leaving his car to go for a meal, jumped off so carelessly as to strike and knock down a person on the street, who was run over and killed. It was held that the driver was engaged in the business of the corporation, so that an *indictment* against it under a statute would lie.<sup>238</sup>

**§ 1408. When Street Railway Negligence a Question for the Jury and when not.**—Where there is evidence of negligence sufficient to take the case to the jury, the question must go to them for their decision, although there is countervailing evidence so as to make a conflict of evidence; for it is not within the province of the court to weigh the evidence, or to solve conflicts in the testimony.<sup>239</sup> Also,

<sup>233</sup> *Citizens' &c. Transit Co. v. Dew*, 100 Tenn. 317; s. c. 40 L. R. A. 518; 45 S. W. Rep. 790.

<sup>234</sup> *Ante*, § 1382, *et seq.*

<sup>235</sup> *Meisch v. Rochester Elec. R. Co.*, 72 Hun (N. Y.) 604; s. c. 55 N. Y. St. Rep. 146; 25 N. Y. Supp. 214. To the same effect see *Furness v. Union R. Co.*, 4 Pa. Dist. R. 784; s. c. 8 Kulp 103; 1 Lack. L. News (Pa.)

332; 13 Lanc. L. Rev. (Pa.) 72.

<sup>236</sup> *Highland Ave. &c. R. Co. v. Smith*, 112 Ala. 642; s. c. 20 South. Rep. 1003.

<sup>237</sup> Vol I, § 518, *et seq.*

<sup>238</sup> *Commonwealth v. Brockton Street R. Co.*, 143 Mass. 501.

<sup>239</sup> *North Hudson County R. Co. v. Isley*, 49 N. J. L. 468; s. c. 10 Atl. Rep. 665. Other cases illustrating



where the circumstances under which the person was injured and the driver of the car acted are complicated, and the court can not see that the general knowledge and experience of men would at once condemn the conduct of either as careless, and there is substantial evidence tending to show negligence on the part of the defendant, the question must go to the jury.<sup>240</sup> The question of *contributory negligence* was also held a question for the jury where a *fireman* who, not having time fully to equip himself before the fire-wagon started, placed his leg between the rounds of the ladder to support himself, while adjusting his belt, when the wagon collided with a street car and caused the ladders to shut together and cut off his leg.<sup>241</sup>

§ 1409. **State of Evidence Taking the Question of Evidence of Negligence to the Jury.**—It has been held that *evidence of negligence*, sufficient to leave the decision of the question to the jury is furnished by the following conditions of fact:—Where an electric car overtook

this principle are: *Peterson v. St. Paul City R. Co.*, 54 Minn. 152; s. c. 55 N. W. Rep. 906. Under the facts of the following cases the question of the defendant's negligence and of the plaintiff's contributory negligence were properly submitted to the jury: *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459; s. c. 22 N. E. Rep. 1062; 27 N. Y. St. Rep. 549; 40 Am. & Eng. Rail. Cas. 254; *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199; 40 Atl. Rep. 945; *Witte v. Brooklyn City R. Co.*, 4 Misc. 286; s. c. 53 N. Y. St. Rep. 334; 23 N. Y. Supp. 1028; *Shea v. St. Paul City R. Co.*, 50 Minn. 395; s. c. 52 N. W. Rep. 902; *Saffer v. Westchester Elec. R. Co.*, 49 N. Y. Supp. 998; s. c. 22 Misc. 555. Error to submit to the jury a hypothesis of negligence in the construction of the guards in the front of the car wheels, in the absence of evidence as to the proper manner of constructing such guards: *Mt. Adams & C. R. Co. v. Cavagna*, 6 Ohio C. C. 606. State of facts under which it was error to submit the question of the negligence of the driver of the street car to the jury: *Thomas v. Citizens' Pass. R. Co.*, 132 Pa. St. 504; s. c. 19 Atl. Rep. 286; 20 Pitts. L. J. (N. S.) 437; *Killen v. Brooklyn Heights R. Co.*, 62 N. Y. Supp. 927; *Warren v. Union R. Co.*, 61 N. Y. Supp. 1009; *Schilling v. Metropolitan St. P. Co.*, 62 N. Y. Supp. 405; s. c. 47 App. Div. 500.

<sup>240</sup> *Kerrigan v. West End St. R. Co.*, 158 Mass. 305; s. c. 33 N. E. Rep. 523. Applying this principle, where there was a blockade of the street by wagons and street cars, and there was evidence that the driver of the car called out to the plaintiff, who was driving a wagon, to go ahead, and that both the wagon and the car then moved forward,—the plaintiff starting up in consequence of the request of the driver, after which the speed of the car increased, bringing it into collision with the wagon, and that if it had remained stationary for an instant there would have been no collision,—it was held that there was a question of negligence on the part of the defendant to go to a jury: *Kerrigan v. West End St. R. Co.*, 158 Mass. 305; s. c. 33 N. E. Rep. 523. Evidence of negligence has been found sufficient to take the case to the jury, where the motorman attempted to run his car past a girl nine years old, who was in the act of running away from it toward a part of the street which was obstructed to within three feet of the track: *Calumet & C. St. R. Co. v. Van Pelt*, 68 Ill. App. 582; s. c. 29 Chicago Leg. News 197; 2 Chic. L. J. Wkly. 110.

<sup>241</sup> *Magee v. West End St. R. Co.*, 151 Mass. 240; s. c. 23 N. E. Rep. 1102.



a woman who was having obvious difficulty with her horse, and the car was not stopped, nor its speed checked, nor the gong sounded, until the car overtook her and was alongside of her;<sup>242</sup> where the motorman of an electric street car let go the brake after applying it, without knowing whether the "dog" was set so as to hold it;<sup>243</sup> where the motorman failed to stop his car before colliding with a wagon which started to cross the track at a place other than a street crossing, while the car was some distance away;<sup>244</sup> where the motorman failed to diminish the speed of his car on seeing a person start to drive across the track when the car was forty or fifty feet from the crossing;<sup>245</sup> where the motorman ran into an ice wagon which started to cross the track when the car was standing still 133 feet away;<sup>246</sup> where the motorman failed to stop his car before striking a wagon which had turned out of the track 125 feet in front of the car;<sup>247</sup> where the conductor of an electric car allowed his trolley pole to remain off the wire at a place where a telephone wire crossed the trolley wire, so that the pole knocked the telephone wire loose and caused it to fall without its being observed by the conductor, killing the plaintiff's horse;<sup>248</sup> where the driver of an express wagon was thrown from his wagon and injured, in consequence of a defect in the track of a street railway, at a point where it crossed the track of a steam railway.<sup>249</sup>

§ 1410. **Circumstances under which Negligence will not be Imputed to the Street Railway Company.**—Briefly stated, there are decisions to the effect that negligence will not be imputed to the street railway company in the case of collisions between its cars and persons or vehicles on the highway, under the following circumstances:—In the absence of evidence that the driver of the car saw, or could have seen, the danger of a collision, or that he could have prevented it when the danger became apparent,—especially where the driver of the wagon pulled his horse towards the car in such a manner as to call the attention of a bystander to the danger of a collision;<sup>250</sup> where a pedestrian carelessly, recklessly, or on account of being absent-minded,

<sup>242</sup> *Benjamin v. Holyoke St. R. Co.*, 160 Mass. 3; s. c. 35 N. E. Rep. 95.

<sup>243</sup> *Etson v. Fort Wayne & C. R. Co.*, 114 Mich. 605; s. c. 4 Det. L. N. 692; 72 N. W. Rep. 598.

<sup>244</sup> *Lenkner v. Citizens' Traction Co.*, 179 Pa. St. 486; s. c. 32 Atl. Rep. 228; 28 Pitts. L. J. (N. S.) 11.

<sup>245</sup> *Brozek v. Steinway R. Co.*, 10 App. Div. 360; s. c. 41 N. Y. Supp. 1017.

<sup>246</sup> *McCormick v. Nassau & C. R. Co.*, 16 App. Div. 24; s. c. 44 N. Y.

Supp. 684; rehearing denied in 46 N. Y. Supp. 230; s. c. 18 App. Div. 333.

<sup>247</sup> *Schron v. Staten Island Elec. R. Co.*, 16 App. Div. 111; s. c. 45 N. Y. Supp. 124.

<sup>248</sup> *Kankakee Elec. R. Co. v. Whittemore*, 45 Ill. App. 484.

<sup>249</sup> *Cook v. Union R. Co.*, 125 Mass. 57.

<sup>250</sup> *North Side St. R. Co. v. Want*, 4 Tex. App. Cas. 297; s. c. 15 S. W. Rep. 40.



walks suddenly in front of a moving car and is injured before there is time to stop it;<sup>251</sup> where a boy, ten years of age, in running across the track but twenty feet in advance of a moving car, fell and was run over, in the absence of evidence that the driver could have stopped the car in time to avoid the catastrophe;<sup>252</sup> where a child came suddenly upon the track in front of the car from behind a wagon, which prevented the driver from seeing her, and the driver made every possible effort to stop the car in time so as to avoid injuring her, but failed;<sup>253</sup> where a collision between a car and a wagon was due to a *miscalculation of distance*, both on the part of the driver of the car and the injured person,—both being equally negligent, if it were negligence;<sup>254</sup> where the driver of a team, knowing that an electric car would soon pass, allowed it to stand beside the track until the horses became *unmanageable* and danced upon the track in front of the motor, in the absence of evidence that the motor could have been stopped after the engineer saw the horses upon the track;<sup>255</sup> where a woman saw the car approaching at a distance of about one hundred and twenty-five feet, but nevertheless attempted to cross the track and paid no further attention to the car, because she was watching a car approaching in the opposite direction, and the driver of the former car called to her several times and used every possible effort to stop his car and succeeded in doing so, but not until one of his horses struck her, knocking her down;<sup>256</sup> where the car was in perfect condition, suitably equipped, and operated with the use of proper signals, at a lawful rate of speed, by a motorman who kept a sharp lookout, but was unable to stop the car in time to prevent a collision with the vehicle of one who suddenly drove upon the track;<sup>257</sup> where the horse of the person injured, who was driving him, suddenly and without warning sprang across the track in front of a car, making a collision unavoidable;<sup>258</sup> and where a *bicyclist* emerged from behind a wagon at a cross-street and collided with the car, the motorman having momentarily turned his eyes toward the other side of the street, after having looked

<sup>251</sup> Driscoll v. Market Street Cable R. Co., 97 Cal. 553; s. c. 32 Pac. Rep. 591.

<sup>252</sup> Fenton v. Second Ave. R. Co., 126 N. Y. 625; s. c. 26 N. E. Rep. 967; 36 N. Y. St. Rep. 385. Compare Manahan v. Steinway & C. R. Co., 125 N. Y. 760; s. c. 35 N. Y. St. Rep. 813; 26 N. E. Rep. 736.

<sup>253</sup> Kennedy v. St. Louis R. Co., 43 Mo. App. 1.

<sup>254</sup> McKelvey v. Twenty-third St. R. Co., 5 Misc. (N. Y.) 424; s. c. 26 N. Y. Supp. 711; *post*, § 1450, *et seq.*

<sup>255</sup> Coughtry v. Willamette St. R. Co., 21 Or. 245; s. c. 27 Pac. Rep. 1031.

<sup>256</sup> Ewing v. Atlantic Ave. R. Co., 34 N. Y. St. Rep. 113; s. c. 11 N. Y. Supp. 626.

<sup>257</sup> Cawley v. LaCrosse City R. Co., 101 Wis. 145; s. c. 12 Am. & Eng. Rail. Cas. (N. S.) 453; 77 N. W. Rep. 179.

<sup>258</sup> McManigal v. South Side & C. R. Co., 181 Pa. St. 358; s. c. 37 Atl. Rep. 516. Similarly, see Lee v. Schuylkill & C. Traction Co., 13 Mont. Co. L. Rep. (Pa.) 91.



toward the side from which the bicycler came, the latter, at the time, being concealed by a wagon.<sup>259</sup> It is almost needless to add that a railway company can not be made liable for the death of a person due to mere *misadventure*, as where he accidentally falls upon the track in front of its car, there being no time to stop the car before running over him.<sup>260</sup> It has been held that a street railway company is not negligent in failing to stop the running of its trains because there is a *large crowd* in the street on which its tracks are laid, which is assembled to learn the result of a presidential election.<sup>261</sup>

§ 1411. **Some Questions of Evidence in these Actions.**—Under the rule which obtains in New York as to the burden of proof respecting contributory negligence,<sup>262</sup> the burden is on the plaintiff to show that his employé in charge of the team which was run upon by the defendant's electric car, was free from contributory negligence.<sup>263</sup> It is not admissible to prove that the driver of the street car which is alleged

<sup>259</sup> Gould v. Union Traction Co., 190 Pa. St. 198; s. c. 43 W. N. C. 521; 5 Am. Neg. Rep. 717; 42 Atl. Rep. 477.

<sup>260</sup> Dorman v. Broadway R. Co., 117 N. Y. 655, mem.; s. c. 23 N. E. Rep. 162, mem.; 27 N. Y. St. Rep. 841.

<sup>261</sup> Washington &c. R. Co. v. Wright, 7 App. D. C. 295; s. c. 23 Wash. L. Rep. 844; 28 Chicago Leg. News 155. Railway company was also exonerated from the charge of negligence under the facts of the following cases:—Stelk v. McNulta, 99 Fed. Rep. 138 (man lying on the track of an electric railway at night, run over and killed after being seen); Sauers v. Union Traction Co., 193 Pa. St. 602; s. c. 44 Atl. Rep. 917 (foot-passenger suddenly attempts to cross ahead of car, and motorman makes every effort to stop); Phillips v. People's Pass. R. Co., 190 Pa. St. 222; s. c. 5 Am. Neg. Rep. 719; 42 Atl. Rep. 686 (motorman not negligent in failing to stop car on seeing a runaway horse approaching the track); Knoker v. Canal &c. R. Co., 52 La. An. 806; s. c. 27 South. Rep. 279 (foot-passenger, standing near track at night, suddenly attempts to cross in front of an approaching car, and not sufficient time to stop car before striking him); Farrar v. New Orleans &c. R. Co., 52 La. An. 417; s. c. 26 South. Rep. 995 (old man in possession of faculties attempted to cross

in front of car, motorman slackened speed, sounded gong, halloed, and ran upon him); Wilcox v. Wilmington City R. Co., 1 Penne. (Del.) 245; s. c. 44 Atl. Rep. 686 (verdict directed for defendant because of a failure of evidence connecting defendant with the accident, although death by street car proven); Kessler v. Citizens' St. R. Co., 20 Ind. App. 427; s. c. 50 N. E. Rep. 891 (buggy turned without warning upon track thirty or forty feet in front of car and motorman did all he could to stop); Mason v. Metropolitan St. R. Co., 61 N. Y. Supp. 789; Cornell v. Metropolitan St. R. Co., 61 N. Y. Supp. 789 (driver of loaded covered truck cuts in on track forty or fifty feet in front of car advancing at full speed); Reiss v. Metropolitan St. R. Co., 58 N. Y. Supp. 1024 (driver of covered express wagon attempts to cross track between street crossings, with car advancing only one hundred feet away); Hirshman v. Dry Dock &c. R. Co., 61 N. Y. Supp. 304 (child ran suddenly upon track, so close to an approaching car that driver could not stop it in time to avoid injury); Adams v. Nassau St. &c. R. Co., 58 N. Y. Supp. 543 (child deliberately ran into car which was being prudently operated).

<sup>262</sup> Vol I, § 365.

<sup>263</sup> Hoffman v. Syracuse &c. R. Co., 63 N. Y. Supp. 442; s. c. 50 App. Div. 83.



to have run into the plaintiff's wagon was arrested therefor.<sup>264</sup> Where a witness states that he did not notice the speed of the car, it is not error to refuse to permit him to say whether it was running fast or slow.<sup>265</sup> It has been held that a statement by the motorman whose car collided with plaintiff's wagon and injured him, that he considered plaintiff's actions in driving a signal for him to come ahead, was inadmissible as being opinion or belief.<sup>266</sup> It was held permissible for a witness to state that the plaintiff "seemed to be very weak" after the accident,—such evidence being within the exception to the rule excluding opinions and conclusions, which permits evidence of appearances.<sup>267</sup> There is a grossly untenable holding to the effect that, in an action against an electric railway company for negligence, it is error to admit evidence that there was *no conductor upon the car* at the time of the accident, without laying a foundation therefor by evidence to the effect that a conductor is necessary for the safe management of an electric car.<sup>268</sup> The obvious error of this holding consists in the fact that the evidence in question forms a part of the *res gestae* and is necessary to a connected view of the circumstances surrounding the accident; and moreover, it ought to be left to a jury, on common experience, to say whether or not the absence of a conductor upon an electric car is negligence. In the same case, it is held irrelevant to prove that the motorman had run his car at a *high rate of speed on other occasions*,—confining the evidence in regard to the rate of speed to the occasion of the accident.<sup>269</sup> On the same theory, upon the question of contributory negligence, it has been held inadmissible to prove that the child which was run over, about two years old, had frequently played in the street attended only by his sister, about three years old.<sup>270</sup> Evidence that, while the car was in collision with the plaintiff's wagon, the gripman *called out*, "God damn you! Get out of the way,"—has been held admissible as part of the *res gestae*.<sup>271</sup> Evidence that, after the accident, the defendant *discharged* the motorman is immaterial.<sup>272</sup> It has been held error to permit a witness to

<sup>264</sup> Seipp v. Dry Dock &c. R. Co., 61 N. Y. Supp. 409.

<sup>265</sup> Garduhn v. Union R. Co., 64 N. Y. Supp. 210.

<sup>266</sup> Birmingham R. &c. Co. v. Franscomb (Ala.), 27 South. Rep. 508.

<sup>267</sup> Birmingham R. &c. Co. v. Franscomb (Ala.), 27 South. Rep. 508.

<sup>268</sup> Christensen v. Union Trunk Line, 6 Wash. 75; s. c. 32 Pac. Rep. 1018.

<sup>269</sup> Christensen v. Union Trunk

Line, 6 Wash. 75; s. c. 32 Pac. Rep. 1018.

<sup>270</sup> Smith v. Grand Street &c. R. Co., 11 Abb. N. Cas. (N. Y.) 62. It was reasoned that if such evidence were competent on the question of the knowledge of the mother, the offer should point explicitly to this purpose: Smith v. Grand Street &c. R. Co., *supra*.

<sup>271</sup> Lightcap v. Philadelphia Traction Co., 60 Fed. Rep. 212.

<sup>272</sup> Christensen v. Union Trunk Line, 6 Wash. 75; s. c. 32 Pac. Rep. 1018.



be asked where the conductor was after the car had stopped and while the deceased was under it, as the conductor's acts after the accident can not affect the question of careless running at the time of the accident.<sup>273</sup> But it is easy to see that, in some cases, the conduct of the conductor after the accident might be relevant on the question of his negligence before the accident.

§ 1412. **Some Other Unclassified Matters.**—The *unauthorized lease* by a street railway company of its properties and franchises will not absolve it from responsibility for an injury inflicted through the negligence of the lessee in the operation of the road;<sup>274</sup> and this conclusion is not affected by the fact that the lessee before the injuries complained of abandoned the old single track and put down a double track under authority conferred by the lease.<sup>275</sup> In an action against a street railway company for an injury predicated upon the negligence of its driver, an instruction that, in order to a recovery of *punitive damages*, the driver must be liable to a conviction for criminal negligence, should be refused.<sup>276</sup> On a principle already considered,<sup>277</sup> it has been well held, in a case where a person was injured while standing upon a sidewalk, by reason of a collision between the defendant's cable car and a wagon, that evidence that the driver of the wagon was guilty of contributory negligence, is immaterial.<sup>278</sup> It is not negligence, as matter of law, to run a street car in the opposite direction from that in which it is usually run.<sup>279</sup> Contributory negligence can not, as matter of law, be *imputed* to the plaintiff in an action, upon the sole ground that he and the driver, through whose fault the accident may have occurred, were engaged in a *partnership business*, where the evidence does not make it clear that they were so engaged at the time.<sup>280</sup>

<sup>273</sup> Wilcox v. Wilmington &c. R. Co., 1 Penne. (Del.) 245; s. c. 44 Atl. Rep. 686.

<sup>274</sup> Fort Worth St. R. Co. v. Ferguson, 9 Tex. Civ. App. 610; s. c. 29 S. W. Rep. 61.

<sup>275</sup> Fort Worth St. R. Co. v. Ferguson, 9 Tex. Civ. App. 610; s. c. 29 S. W. Rep. 61.

<sup>276</sup> Augusta &c. R. Co. v. Randall, 79 Ga. 304; s. c. 4 S. E. Rep. 674.

<sup>277</sup> Vol. I, § 75.

<sup>278</sup> Knoll v. Third Ave. R. Co., 62 N. Y. Supp. 16; s. c. 46 App. Div. 527.

<sup>279</sup> North Chicago St. R. Co. v. Irwin, 82 Ill. App. 146.

<sup>280</sup> Consolidated Traction Co. v. Hoimark, 60 N. J. L. 456; 9 Am. & Eng. Rail. Cas. (N. S.) 380; 38 Atl. Rep. 684; aff'g 59 N. J. L. 297; 36 Atl. Rep. 100.



## CHAPTER XLIII.

## FRIGHTENING HORSES IN STREET RAILWAY OPERATION.

## SECTION

1417. Street cars frightening horses.

1418. Frightening horses by sounding the gong.

1419. Frightening horses by other means.

1420. What the motorman should do when he sees a horse taking fright.

## SECTION

1421. Further of the duty of the gripman, motorman, etc., on seeing horse frightened.

1422. Contributory negligence of the driver whose horse is frightened.

§ 1417. **Street Cars Frightening Horses.**—This subject is elsewhere considered with reference to *steam* railways licensed to occupy the public streets or portions of them, or to lay their tracks near them.<sup>1</sup> The leading principle there laid down applies in the case of street railways. They are licensed by the legislature, or by the municipality under the authority of the legislature, to occupy the surfaces of the streets with their peculiar mode of transit; and this necessarily implies that they may lawfully do whatever is necessary to the enjoyment of this license, and to enable them to render to the public the services in return for which they have received their licenses or their franchises. They have as much right to run their cars on the streets as other citizens have to drive through the streets with their horses and carriages; and they are consequently not liable for damages caused by the horses of other persons being frightened at their cars, when operated in the usual and proper manner,—as where a car has run off the track and they are drawing it back upon the track in the proper and customary way;<sup>2</sup> or where a traction car is stopped at or near a crossing,

<sup>1</sup> *Post*, § 1908, *et seq.*

<sup>2</sup> *Hazel v. People's Pass. R. Co.*, 132 Pa. St. 96; s. c. 18 Atl. Rep. 1116; 25 W. N. C. 345; 47 Phila. Leg. Int. 119; 43 Am. & Eng. Rail. Cas. 400; *Wachtel v. East St. Louis &c. R. Co.*, 77 Ill. App. 465; *Doster v. Charlotte St. R. Co.*, 117 N. C. 651; s. c. 34 L. R. A. 481; 23 S. E. Rep. 449; *Kankakee R. Co. v. Lade*, 56 Ill. App. 454; *Bishop v. Belle City St. R. Co.*, 92 Wis. 139; s. c. 65 N. W. Rep. 733. As to the liability of street railway companies for frightening horses, see also *Hazel v. People's &c. R. Co.*, 132 Pa. St. 96;

*Steiner v. Philadelphia Traction Co.*, 134 Pa. St. 199; *Cornell v. Detroit Elec. R. Co.*, 82 Mich. 495; *Lincoln &c. Transit Co. v. Nichols*, 37 Neb. 332; s. c. 20 L. R. A. 853; *Lightcap v. Philadelphia Traction Co.*, 60 Fed. Rep. 212; *Ellis v. Lynn &c. R. Co.*, 160 Mass. 341; *Marion St. R. Co. v. Carr* 10 Ind. App. 200; *Benjamin v. Holyoke St. R. Co.*, 160 Mass. 3; *Citizens' St. R. Co. v. Lowe*, 12 Ind. App. 47; *Kankakee Elec. R. Co. v. Lade*, 56 Ill. App. 454; *Sutter v. Omnibus Cable Co.*, 107 Cal. 369; *Rome St. R. Co. v. McGinnis*, 94 Ga. 229.



or its bell is rung on approaching a crossing.<sup>3</sup> But it is a just conclusion that a municipal license to use the street of a populous city for the purpose of a street railway does not carry with it the privilege of using a kind of motor the very nature of which is to frighten ordinary horses upon the street,—such as a *steam engine*; and the opinion has been strongly expressed that the use of such a motor is *negligence per se*. At all events, it is a fact from which a jury may find negligence; and it was intimated that this would be so found if the charter of the company authorized the use of steam power.<sup>4</sup> The true theory is that the use of a moving steam engine on a populous city street is a *public nuisance*, and that the street railway company can not justify the commission of such a nuisance on account of a license from the city; since the city itself, being a trustee of its streets for the benefit of all the public, has no power to authorize the commission of a nuisance therein; but, on the contrary, is under the duty of preventing such nuisances, and is liable in damages for failing so to do.

§ 1418. **Frightening Horses by Sounding the Gong.**—But, although it is the privilege, and even the duty of the gripman upon a cable car to ring his gong with sufficient emphasis on approaching street crossings, or to warn people on the track in front of him, and although negligence is not imputable to him for so doing where he does not know or would not in the exercise of reasonable care discover that a horse is being frightened thereby,<sup>5</sup>—yet it may be negligence to *ring it violently* and without necessity near a frightened horse whose fright is observed by him;<sup>6</sup> and whether it will be so or not will ordinarily be a question for a jury.<sup>7</sup> Nor will the company be liable for injuries caused by horses being frightened and running away at the sounding of the gong, where the injury would not have occurred if the driver had not been so situated that he could not exert his ordinary force to restrain them.<sup>8</sup>

§ 1419. **Frightening Horses by Other Means.**—From what has preceded it must be concluded that a street railway company is not liable

<sup>3</sup> *Steiner v. Philadelphia Traction Co.*, 134 Pa. St. 199; s. c. 19 Atl. Rep. 491; 41 Am. & Eng. Rail. Cas. 535.

<sup>4</sup> *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332; s. c. 20 L. R. A. 853; 55 N. W. Rep. 872.

<sup>5</sup> *North Side St. R. Co. v. Tippens*, 4 Tex. App. Cas. 226; s. c. 14 S. W. Rep. 1067. It is held in the first case that a motorman seeing horses standing on the side of the street is entitled to act on the presumption that they will not become frightened by his act in propelling the car and

warning the public in the ordinary way: *North Side &c. R. Co. v. Tippens*, *supra*; *Henderson v. Greenfield &c. R. Co.*, 172 Mass. 542; s. c. 52 N. E. Rep. 1080; *Galesburg Electric Motor &c. Co. v. Manvill*, 61 Ill. App. 490.

<sup>6</sup> *Lightcap v. Philadelphia Traction Co.*, 60 Fed. Rep. 212.

<sup>7</sup> *Lightcap v. Philadelphia Traction Co.*, 60 Fed. Rep. 212.

<sup>8</sup> *East St. Louis &c. St. R. Co. v. Wachtel*, 63 Ill. App. 181.



from the mere fact of a horse taking fright at the appearance of one of its cars, either when standing still or in motion, or at the usual noise made in propelling such cars, or at the ordinary and proper sounding of the gong at street crossings or to warn persons in positions of danger with reference to the car, unless, after the horse takes fright, the driver, gripman, or motorman, does or omits to do something contrary to his duty of exercising reasonable care to the end of minimizing the danger arising from the fright of the horse;<sup>9</sup> nor will the company be liable because of the mere fact that a horse is frightened by a sudden and unusual noise made by passengers on the car;<sup>10</sup> nor by any other loud and unusual noise arising in the operation of the car, unless such noise was *unnecessary*, as well as unusual;<sup>11</sup> nor by any sudden movement of the car such as should be ascribed to pure accident, such as a sudden backward movement of the car caused by the engineer reversing the engine, not knowing that the brake, which had been applied by some unauthorized person, was on, when the conductor at the very moment loosened it, neither the engineer nor the conductor knowing what the other was about to do.<sup>12</sup> But where, in the operation of a street railway, injury is caused by a horse taking fright from a noise at once loud, unusual, and apparently unnecessary,—such as a noise produced by the grinding of a new pinion,—the negligence of the company may present a question of fact for the jury;<sup>13</sup> and so where a street car driver swings his team at right angles to the car immediately in front of an approaching vehicle without looking or listening for the same;<sup>14</sup> and where an electric car is run, having a sprinkler thereon upon which *black coats* are hung waving in the wind;<sup>15</sup> and where the motorman stops his car to allow a *funeral procession* to pass, but starts it forward before all the wagons

\* McDonald v. Toledo &c. St. R. Co., 74 Fed. Rep. 104; s. c. 43 U. S. App. 79; 1 Ohio Dec. Fed. 294; 29 Chicago Leg. News 35; 36 Ohio L. J. 49.

<sup>10</sup> Boatwright v. Chester &c. R. Co., 4 Pa. Super. Ct. 279; s. c. 40 W. N. C. 330; 6 Del. Co. Rep. 558.

<sup>11</sup> Hill v. Rome St. R. Co., 101 Ga. 66; s. c. 28 S. E. Rep. 631.

<sup>12</sup> Rome St. R. Co. v. McGinnis, 94 Ga. 229; s. c. 21 S. E. Rep. 707. This opinion seems to have been "a sudden backward movement," or something worse, on the part of the court. If the motorman remained at his post and did his duty, how could the brake be taken hold of and applied by unauthorized persons? And what excuse could there

be for the conductor and motorman to work independently of each other, neither knowing what the other was doing? On the subject of the liability of street railway companies for injury to horses from fright produced by an unnecessary or unusual noise or operation, see *Doster v. Charlotte St. R. Co.*, 117 N. C. 651, and note to same in 34 L. R. A. 481.

<sup>13</sup> Hill v. Rome St. R. Co., 101 Ga. 66; s. c. 28 S. E. Rep. 631.

<sup>14</sup> Sutter v. Omnibus Cable Co., 107 Cal. 369; s. c. 40 Pac. Rep. 484.

<sup>15</sup> McCann v. Consolidated Trac-tion Co., 59 N. J. L. 481; s. c. 38 L. R. A. 236; 7 Am. & Eng. Rail. Cas. (N. S.) 280; 36 Atl. Rep. 888.



have passed, and the horse attached to one of them becomes frightened and backs the wagon in front of the car,—the company may be liable.<sup>16</sup>

§ 1420. **What the Motorman should do when he Sees a Horse Taking Fright.**—Under such circumstances, it is the duty of the gripman or motorman to do what he reasonably can, in the management of his car, to diminish the fright of the horse; and if, seeing the frightened condition of the horse, instead of stopping his car, or ceasing to sound his gong, he continues to propel it forward and to make a loud clamor with his gong, causing the horse to become unmanageable and to throw the driver out of the carriage,—the latter, if in the exercise of reasonable care, may maintain an action against the railway company. This is a just deduction from the premise that the rights of a driver of a horse and of the owner of an electric car, meeting upon the highway, are equal, and that each must use the way with a reasonable regard for the safety and convenience of the other.<sup>17</sup> The obvious duty

<sup>16</sup> *Richter v. Cicero &c. St. R. Co.*, 70 Ill. App. 196.

<sup>17</sup> *Ellis v. Lynn &c. R. Co.*, 160 Mass. 341; s. c. 35 N. E. Rep. 1127. Substantially to the same effect, see *Muncie St. R. Co. v. Maynard*, 5 Ind. App. 372; s. c. 32 N. E. Rep. 343; *Benjamin v. Holyoke St. R. Co.*, 160 Mass. 3; s. c. 35 N. E. Rep. 95; *Marion St. R. Co. v. Carr*, 10 Ind. App. 200; s. c. 37 N. E. Rep. 952; *Owensboro City R. Co. v. Lyddane*, 41 S. W. Rep. 578; s. c. 19 Ky. L. Rep. 698 (not to be rep.); *Myers v. Brantford St. R. Co.*, 31 Ont. 209; *Citizens' R. Co. v. Hair* (Tex. Civ. App.), 32 S. W. Rep. 1050 (no off. rep.). *Contra*, to the effect that the motorman is not bound to stop his car merely because he sees that a horse is frightened by its noise, unless the circumstances are such as to show a *wanton* and *willful* disregard of the safety of the driver of the horse: *Chapman v. Zanesville Street R. Co.*, 27 Ohio L. J. 70. So it has been held not to be negligence on the part of an electric railway company not immediately to stop the train on seeing a frightened horse with its driver at its head near a crossing 350 to 400 feet distant, where the speed of the train is decreased and there is nothing to indicate to the employes that there is any particular danger: *Cornell v. Detroit &c. R. Co.*, 82 Mich. 495; s. c. 46 N. W. Rep. 791; 46 Am. & Eng. Rail. Cas. 201. In this case it appeared that plaintiff, while driv-

ing along the avenue on which was the car line, saw a train coming around a bend about 350 or 400 feet away; that he motioned for it to stop, and got out, and took his horse by the head. The cars were then about half way to him, and slowing up; and, the horse exhibiting signs of fear, he led it across the sidewalk into an open field. The horse dragged him about the field, and finally turned, and dragged him into the street, where he fell, and was injured, and the horse ran away. The cars were running at ordinary speed, the gong was sounded as they approached the bend, and they stopped before reaching plaintiff. The court, speaking through Mr. Justice Grant, said: "Defendant's servants in charge of the cars were not under obligations to immediately stop them. They had fulfilled their duty by commencing to run more slowly. If such companies were obliged to stop their cars at that distance upon seeing a horse, with his owner holding him by the head, in apprehension of fright, or in actual fright, they could not meet the demands or the requirements of public travel. The defendant had an equal right to the use of the street with its cars as plaintiff with his horse. Each was bound to exercise due care and caution; and this the defendant did. It was evidently the sight of the moving cars, not their speed, that frightened the horse. They were from 150 to 200



of the motorman, when he sees a horse frightened by his car or his gong, is to slacken the speed of his car and to desist from sounding the gong; and this, notwithstanding his general duty to the public to proceed forward and at the same time give the customary warnings of his approach.<sup>18</sup>

§ 1421. **Further of the Duty of the Gripman, Motorman, etc., on Seeing Horse Frightened.**—But the motorman is not chargeable with negligence merely because horses are frightened at the sound of his gong, unless they manifest such fright as to put their driver in apparent danger;<sup>19</sup> nor is it necessarily negligence in him to fail to slacken speed because a horse coming toward the car exhibits fright, unless his condition is such as to indicate that he will be uncontrollable if the car approaches so as to put the person in the vehicle in peril;<sup>20</sup> nor to fail to stop his car until a horse has passed which he sees frightened and unmanageable three hundred feet away;<sup>21</sup> nor to fail to stop or slacken speed upon seeing that a team at the side of the

feet distant when plaintiff and his horse went over the sidewalk into the common. It is difficult to see how the defendant's servants were under any legal obligation to act differently from what they did." *Cornell v. Detroit & C. R. Co.*, 82 Mich. 495; s. c. 46 N. W. Rep. 791; 46 Am. & Eng. Rail. Cas. 201. Special findings in a horse-frightening case, showing that the motorman endeavored to stop the car as soon as he saw the fright of the horses, and did so at a point eighty-four feet from the place of the accident, which findings were held to contradict the general verdict finding the company guilty of negligence: *Marion City R. Co. v. Bubo*, 23 Ind. App. 342; s. c. 55 N. E. Rep. 266.

<sup>18</sup> *Wachtel v. East St. Louis & C. R. Co.*, 77 Ill. App. 465; *Richter v. Cicero & C. R. Co.*, 70 Ill. App. 196; *Flewelling v. Lewiston & C. R. Co.*, 89 Me. 585; s. c. 36 Atl. Rep. 1056; *Lines v. Winnipeg & C. St. R. Co.*, 11 Manitoba 77 (liable for failing to slacken speed); *Lightcap v. Philadelphia Traction Co.*, 60 Fed. Rep. 212 (ringing gong violently and without necessity in presence of a frightened horse). Therefore a petition or complaint which, after stating that the plaintiff's team became frightened and began to run backwards when the defendant's car was 400 feet distant, placing the plaintiff in great danger of having her wagon upset and herself in-

jured, averred that, in place of stopping, defendant ran said car rapidly towards plaintiff, increasing the fright of the horses, and causing them to upset the wagon, whereby plaintiff was greatly injured; that plaintiff's team was well broken and gentle under all ordinary circumstances; and that said injuries occurred solely through the negligence of defendant in not stopping its car when the team became frightened,—stated a cause of action: *Fort Scott & C. Transit Co. v. Page* (Kan. App.), 59 Pac. Rep. 690.

<sup>19</sup> *Ellis v. Lynn & C. R. Co.*, 160 Mass. 341; s. c. 35 N. E. Rep. 1127 (continuing to sound gong after seeing a horse greatly frightened thereat); *East St. Louis & C. St. R. Co. v. Wachtel*, 63 Ill. App. 181.

<sup>20</sup> *Terre Haute & C. R. Co. v. Yant*, 21 Ind. App. 486; s. c. 51 N. E. Rep. 732; 1 Rep. 181; citing *Chapman v. Zanesville & C. R. Co.*, 27 Ohio L. J. 70; *Coughtry v. Willamette St. R. Co.*, 21 Or. 245; s. c. 27 Pac. Rep. 1031; *Cornell v. Detroit Elec. R. Co.*, 82 Mich. 495; *Doster v. Charlotte St. R. Co.*, 117 N. C. 651; s. c. 34 L. R. A. 481; 23 S. E. Rep. 449; *Steiner v. Philadelphia Traction Co.*, 134 Pa. St. 199; *Eastwood v. La Crosse City R. Co.*, 94 Wis. 163; s. c. 68 N. W. Rep. 651.

<sup>21</sup> *Citizens' St. R. Co. v. Lowe*, 12 Ind. App. 47; s. c. 39 N. E. Rep. 165.



track were uneasy, when the driver had control of them until the instant when they dashed on the track in front of the car.<sup>22</sup>

§ 1422. **Contributory Negligence of the Driver whose Horse is Frightened.**—Turning, on the other hand, to the question of the *contributory negligence* of the person injured, we find that it has been held that for a woman to drive a horse and carriage upon a street railway, at a public crossing, without looking to see whether a car was coming, or whether she was exercising due care in driving a horse that may have been an improper one for her to undertake to manage, are questions for the jury.<sup>23</sup> But where the plaintiff had driven his two-year old colt several times during the day near the cars without its being frightened, and that was the first day he had driven it, although it had been driven by others all summer and had not been frightened before, and the motorman could easily have observed its fright and slackened speed or stopped the car in time to prevent a collision,—the court could not say, as matter of law, that the plaintiff was guilty of contributory negligence.<sup>24</sup> On the other hand, one who deliberately drives a young horse into a place of danger near an electric railroad track, with a full knowledge of the situation and danger, for the express purpose of *testing the horse* as to his disposition to become frightened, is guilty of such contributory negligence as will prevent a recovery, where the horse becomes frightened at a train and runs away.<sup>25</sup>

<sup>22</sup> Flaherty v. Harrison, 98 Wis. 559; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 176; 74 N. W. Rep. 360; Molyneaux v. Southern &c. Elec. R. Co., 2 Mo. App. Rep. 687; Huffman v. Syracuse &c. Transit R. Co., 63 N. Y. Supp. 442; s. c. 50 App. Div. 83 (horse observed at a distance untied between the tracks and the gutter—no duty to slow up). As to the duty of the motorman on an electric car, with reference to frightened horses, see generally Cornell v. Detroit &c. R. Co., 82 Mich. 495; Chapman v. Zanesville St. R. Co., 27 Ohio L. J. 70; Muncie St. R.

Co. v. Maynard, 5 Ind. App. 372; Lightcap v. Philadelphia Traction Co., 60 Fed. Rep. 212; Ellis v. Lynn &c. R. Co., 160 Mass. 341; Marion St. R. Co. v. Carr, 10 Ind. App. 200; Citizens' St. R. Co. v. Lowe, 12 Ind. App. 47; Kankakee Elec. R. Co. v. Lade, 56 Ill. App. 454.

<sup>23</sup> Benjamin v. Holyoke St. R. Co., 160 Mass. 3; s. c. 35 N. E. Rep. 95.

<sup>24</sup> Marion St. R. Co. v. Carr, 10 Ind. App. 200; s. c. 37 N. E. Rep. 952.

<sup>25</sup> Cornell v. Detroit &c. R. Co., 82 Mich. 495; s. c. 46 N. W. Rep. 791; 46 Am. & Eng. Rail. Cas. 201.



## CHAPTER XLIV.

## STREET RAILWAY INJURIES TO CHILDREN.

## SECTION

1424. Degree of care to be exercised to avoid injuring children.

1425. Evidence of negligence in cases of injuries to children.

1426. Injuries produced by children running in front of the cars.

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1428. Care demanded in favor of children seen near the track.

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## SECTION

1430. Contributory negligence of the child.

1431. Circumstances under which contributory negligence has been imputed to children as matter of law.

1432. Contributory negligence of parents, etc., in allowing children to be on the street.

1433. Further of contributory negligence of parents in cases of street railway injuries to children.

1434. Various other holdings.

§ 1424. Degree of Care to be Exercised to Avoid Injuring Children.<sup>1</sup>—The degree of care which the law demands of a street railway company, especially where it makes use of an underground cable or of an electric wire for the propulsion of its cars, is, no doubt, in legal strictness, defined by the words “ordinary care.”<sup>2</sup> But the use of this expression, in instructing a jury, would obviously mislead them, in the absence of further explanation, by leading them to suppose that the street railway company discharges its duty to children on the streets by extending to them the care which ordinary persons use under ordinary circumstances. Such is not the law. The care here meant and demanded by the law is a degree of care proportioned to the danger to children, and, as in other cases, it increases with the increase of the risk of such danger.<sup>3</sup> It is therefore a correct use of language to characterize it as a *high degree of care and watchfulness*, and to say that the motorman of an electric car is bound to exercise a high degree of watchfulness in operating the car in a public street where he has reason to expect that little children are playing near the track.<sup>4</sup>

<sup>1</sup> See note to *Wallace v. City &c. R. Co.*, 25 L. R. A. 663.

<sup>2</sup> *Cunningham v. Los Angeles R. Co.*, 115 Cal. 561; s. c. 47 Pac. Rep. 452.

<sup>3</sup> Vol. I, § 25.

<sup>4</sup> *Bergen County Traction Co. v. Heitman*, 61 N. J. L. 682; s. c. 4 Am. Neg. Rep. 511; 11 Am. & Eng. Rail. Cas. (N. S.) 286; 40 Atl. Rep. 651.



Nor will this be a fixed measure of care under all circumstances, but will vary with time, place, and circumstance, increasing with the increase of the risks to be avoided. The law will, for example, demand greater care and vigilance in running an electric car over a *public street crossing* which is much frequented by children going to and returning from school, at a time when they may reasonably be expected to be using the crossing, than is demanded at other places.<sup>5</sup> As young children are notoriously less capable of caring for themselves than adults are, the law demands of such a company greater vigilance and caution in keeping its car well in hand and in controlling its movements so as to prevent injury to small children, than it demands in the case of adults.<sup>6</sup> One court has made the mistake of saying that a street railway company is not chargeable with a higher degree of vigilance to ascertain the presence of a child on its track than it is required to exercise in the case of an adult; but in the same case the court has well reasoned that when a young child is discovered approaching the track, with the apparent intention of crossing in front of a moving car, or is discovered on the track, the highest degree of diligence must be exercised to prevent injuring it.<sup>7</sup> As already seen,<sup>8</sup> a street railway company is bound to keep a constant *lookout* to the end of avoiding injury to persons on or near the track in dangerous proximity to the car, and where it runs over a person through the failure to perform this duty, its liability is the same, whether it *saw* or *might have seen* the person in time, by the exercise of reasonable promptness and exertion, to avert the injury; and this rule applies strongly in the case of children who, by reason of their childish habits while at play, are liable to emerge suddenly upon the track from behind buildings or other places of concealment.<sup>9</sup> The fact that the child may be on the street through its own negligence,<sup>10</sup> or the negligence of its parents, guardian, or custodian,<sup>11</sup> or that it may be playing some game on the street in violation of a municipal ordinance,<sup>12</sup> or otherwise violating the law,<sup>13</sup>—will not excuse the street railway company in running over it, or in failing to exercise reasonable care to avoid such a catastrophe. On the other hand, the company will not be liable for an *error of judgment* on the part of a competent motor-

<sup>5</sup> Wallace v. City &c. R. Co., 26 Or. 174; s. c. 25 L. R. A. 663; 37 Pac. Rep. 477.

<sup>6</sup> Passamaneck v. Louisville R. Co., 98 Ky. 195; s. c. 17 Ky. L. Rep. 763; 32 S. W. Rep. 620.

<sup>7</sup> San Antonio St. R. Co. v. Mechler, 87 Tex. 628; s. c. 30 S. W. Rep. 899; aff'g 29 S. W. Rep. 202.

<sup>8</sup> Ante, § 1382, *et seq.*

<sup>9</sup> Nelson v. Crescent City R. Co., 49 La. An. 491; s. c. 21 So. Rep. 635; Rice v. Crescent City R. Co., 51 La. An. 108; s. c. 24 South. Rep. 794.

<sup>10</sup> Post, § 1427.

<sup>11</sup> Post, §§ 1432, 1433.

<sup>12</sup> Budd v. Meriden Elec. R. Co., 69 Conn. 272; s. c. 37 Atl. Rep. 683.

<sup>13</sup> Vol. I, § 82.



man,—as, for example, in backing a car which has run over a boy in his attempt to save the boy from injury.<sup>14</sup>

**§ 1425. Evidence of Negligence in Cases of Injuries to Children.—**

It is scarcely necessary to suggest at the outset that the mere fact that a child has been killed or injured by a railway car does not of itself create an inference of negligence on the part of the company; since the fact is just as consistent with the conclusion that the injury took place through the indiscretion of the child as through the negligence of the employés of the company.<sup>15</sup> There must be evidence of negligence, either furnished by the testimony of eye-witnesses, or fairly deducible from the circumstances under which the accident took place. Under the following circumstances it was held either that there was evidence of negligence on the part of the street railway company to go to the jury, or that a verdict rendered in favor of the plaintiff would not be disturbed:—Where there was evidence tending to show that there was sufficient light to enable one to see the child half way across the street, which was much frequented by children, that the car could have stopped within two feet of the child, and that the driver was paying no attention to the track in front of him;<sup>16</sup> where the attention of the driver of the street car was attracted to the rear of the car and to one side, while the car was proceeding for a considerable distance down hill, at a rapid rate;<sup>17</sup> where the driver of a street car could have seen a *child nineteen months old* on the track in front of the car, if he had been attending to his duties, but failed to see or to heed it, and ran over it, under circumstances which the evidence left somewhat obscure;<sup>18</sup> where a street car ran over a child four years old, at a place where the street was clear of wagons for a considerable distance in front of the car, the driver not looking ahead, but looking at passengers on the platform, and the brake being out of order,—notwithstanding strong countervailing testimony that the child ran from behind a wagon directly in front of the horses of the car, and was run over before the car could possibly have been

<sup>14</sup> *Bittner v. Crosstown St. R. Co.*, 153 N. Y. 76; s. c. 46 N. E. 1044; rev'g 12 Misc. (N. Y.) 514; s. c. 67 N. Y. St. Rep. 367; 33 N. Y. Supp. 672. It is held, in a case in California, that the fact that the *motorman* in charge of an electric car by which a child eighteen months old was injured while on the track was *inexperienced* can not be taken into consideration in determining the question of negligence in failing to stop the car so as to avoid the injury, as the company is responsible in such

case for the want of ordinary care only: *Cunningham v. Los Angeles R. Co.*, 115 Cal. 561; s. c. 47 Pac. Rep. 452. But this is mere ignorance and foolishness.

<sup>15</sup> *Smith v. Kansas City & C. R. Co.*, (Kan.), 60 Pac. Rep. 1059.

<sup>16</sup> *Rosenkranz v. Lindell R. Co.*, 108 Mo. 9; s. c. 18 S. W. Rep. 890.

<sup>17</sup> *Weissner v. St. Paul City R. Co.*, 47 Minn. 468; s. c. 50 N. W. Rep. 606.

<sup>18</sup> *Galveston City R. Co. v. Hewitt*, 67 Tex. 473.



stopped;<sup>19</sup> where the driver had his head turned toward the inside of the car as a child started to cross the street, and did not look forward until admonished of her danger by the outcries of other persons;<sup>20</sup> where the car approached a street crossing at a very fast rate of speed without any alarm, while there were a number of boys on the track in full view of the motorman, one of whom was standing in the center of the track with his back towards the car;<sup>21</sup> where a motorman entirely released his brake on a down grade after bringing it almost to a stop, while a child under four years old was within ten feet of the car and five feet from the track, although the child had turned away from the track;<sup>22</sup> where a child three years old on the track in front of the car was not observed by the motorman because he was engaged in making change for a passenger;<sup>23</sup> where the driver, instead of keeping his team under control on approaching a crossing at which there were two women with babies in their arms, and seven small children whom he could have seen at a distance of forty feet, increased the speed of his horses and ran over one of the children;<sup>24</sup> where, in consequence of driving his car toward the crossing at a high rate of speed, it was driven upon a boy as he emerged from behind a wagon for the purpose of crossing the street;<sup>25</sup> where the motorman ran his car at the rate of ten miles an hour through a street crowded with children, and, with his eye fixed on one child, succeeded in striking another;<sup>26</sup> where the driver urged on his horses by striking them while a child five years old was standing in full view between the street car tracks, from twenty to forty feet from the car, apparently about to cross the track in front of the car.<sup>27</sup>

**§ 1426. Injuries Produced by Children Running in Front of the Cars.**—A frequent source of accident arises in those cases where children, in obedience to their childish impulses, attempt to run across a street in front of an approaching car when there is not space enough between them and the car to enable the driver, gripman, or motorman, by using his utmost exertion, to stop his car in time to avoid running upon them. In such cases, whether the primary cause of

<sup>19</sup> *Citizens' &c. Pass. R. Co. v. Foxley*, 107 Pa. St. 537.

<sup>20</sup> *Levy v. Dry Dock &c. R. Co.*, 58 Hun (N. Y.) 610, mem.; s. c. 35 N. Y. St. Rep. 769; 12 N. Y. Supp. 485.

<sup>21</sup> *Baltimore City &c. R. Co. v. Cooney*, 87 Md. 261; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 759; 39 Atl. Rep. 859.

<sup>22</sup> *Woeckner v. Erie &c. Motor Co.*, 176 Pa. St. 451; s. c. 38 W. N. C. 549; 35 Atl. Rep. 182.

<sup>23</sup> *Barnes v. Shreveport City R. Co.*, 47 La. An. 1218; s. c. 17 South. Rep. 782; *ante*, § 1405.

<sup>24</sup> *Wihnyk v. Second Ave. R. Co.*, 14 App. Div. 515; s. c. 43 N. Y. Supp. 1023.

<sup>25</sup> *West Chicago St. R. Co. v. Stoltzenberg*, 62 Ill. App. 420.

<sup>26</sup> *Buente v. Pittsburgh &c. Trac-tion Co.*, 2 Pa. Super. Ct. 185.

<sup>27</sup> *Gumby v. Metropolitan St. R. Co.*, 29 App. Div. 335; s. c. 51 N. Y. Supp. 553.



the calamity be regarded as the contributory negligence of the child, or the indiscretion of the child if too young to be chargeable with the consequence of contributory negligence, or mere accident or misfortune,—the street railway company will not be liable to pay damages, for it has done no wrong.<sup>28</sup> It has even been held that a street railway company is not liable for the death of a boy who ran in front of a car when it was so close upon him that a collision could not be prevented, even though the car was running at a negligent rate of speed.<sup>29</sup> So, the railroad company was exonerated from the imputation of negligence where, although the gripman saw a child five years old on the sidewalk before starting his car, yet after starting it the child, unexpectedly and without warning, ran from the pavement into the front end of it, so quickly that the gripman could not have stopped it prior to the accident;<sup>30</sup> where, the driver being at the rear of the car, driving boys off the car in pursuance of a city ordinance, a child two years old placed itself inside the foreleg of the mule drawing the car, in such a position that the driver could have seen it only by stooping, and he started the mule, which resulted in the killing of the child;<sup>31</sup> where a child eight years old, attempting to cross a street having two tracks, where there was no established crossing, passed behind a car going one way, and was almost immediately struck by a horse attached to a car going the other way on the other track, notwithstanding the efforts of the driver of the latter car to swing the

<sup>28</sup> *Baltimore &c. R. Co. v. Cooney*, 87 Md. 261; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 759; 39 Atl. Rep. 859 (child ran and fell, and was run over); *Greenberg v. Third Ave. R. Co.*, 35 App. Div. 619; s. c. 55 N. Y. Supp. 135; *Callary v. Easton Transit Co.*, 185 Pa. St. 176; s. c. 39 Atl. Rep. 813; *Mulcahy v. Electric Traction Co.*, 185 Pa. St. 427; s. c. 39 Atl. Rep. 1106; *Kierzenkowski v. Philadelphia Traction Co.*, 184 Pa. St. 459; s. c. 39 Atl. Rep. 220; 9 Am. & Eng. Rail. Cas. (N. S.) 533; *Ogier v. Albany R. Co.*, 88 Hun (N. Y.) 486; s. c. 34 N. Y. Supp. 867 (child suddenly emerging from behind a wagon upon the track); *McLaughlin v. New Orleans &c. R. Co.*, 48 La. An. 23; s. c. 18 South. Rep. 703; *Funk v. Electric Traction Co.*, 175 Pa. St. 559; s. c. 34 Atl. Rep. 861; *Culbertson v. Crescent City R. Co.*, 48 La. An. 1376; s. c. 20 South. Rep. 902; *Sciortino v. Crescent City R. Co.*, 49 La. An. 7; s. c. 21 So. Rep. 114.

<sup>29</sup> *Pletcher v. Scranton Traction*

*Co.*, 185 Pa. St. 147; s. c. 39 Atl. Rep. 837.

<sup>30</sup> *Chilton v. Central Traction Co.*, 152 Pa. St. 425; s. c. 31 N. W. C. 409; 23 Pitts. L. J. (N. S.) 413; 25 Atl. Rep. 606.

<sup>31</sup> *Hearn v. St. Charles St. R. Co.*, 34 La. An. 160, *Levy, J.*, dissenting. This case was well decided on the case stated by the plaintiff in his pleading, which proceeded on the negligence of the driver merely. The company provided no conductor for the car, and it was therefore its fault which drew the driver from his post of duty in front of the car. In the state of the issues, the court was only obliged to fix its attention upon the question whether or not the driver, in the position in which he was placed, was personally guilty of negligence; whereas, the question should have been whether the company was guilty of negligence. The driver may have acted reasonably under the circumstances, but nevertheless the company acted unreasonably in not providing a conductor.



horse aside and prevent the collision;<sup>32</sup> where a child, standing five feet away from the track, suddenly broke loose from its companion and ran in front of the car, the motorman using all the means at his command to stop it and prevent the accident;<sup>33</sup> where a child four years of age was a passenger on a street car, and was in the custody of a girl sixteen years of age, and was put off the car at its stopping place by the conductor, and the custodian followed it, and both reached the street in safety, and, while waiting for a car on a parallel track to pass, the child ran toward the passing car, came in contact with it, and was thrown down and injured.<sup>34</sup>

§ 1427. **Cases of this Kind where the Company was not Exonerated.**<sup>35</sup>—But many cases of this kind arise where the company is not exonerated,—as where the motorman failed to see a child less than two and a half years old until she was in front of and almost under the car, where a passenger saw her start across the street before the car started;<sup>36</sup> where the driver was urging his mule without seeing a child approaching the track, and a passenger noticed the child creeping towards the track, and spoke to the driver, who did not seem to heed him, and that, upon his again warning him, he became aware of the danger and turned on his brake, but too late to avoid the accident;<sup>37</sup> where the motorman failed to stop his car at once on seeing children running across the track one hundred feet in front of the car, where he brought the car under control;<sup>38</sup> where, under the circumstances last named, the motorman used the reverse handle instead

<sup>32</sup> *Baker v. Eighth Ave. R. Co.*, 62 Hun (N. Y.) 39; s. c. 41 N. Y. St. Rep. 353; 16 N. Y. Supp. 319.

<sup>33</sup> *Paducah Street R. Co. v. Adkins* (Ky. Super. Ct.), 14 Ky. L. Rep. 425. It seems that there was at one time a statute in Texas exonerating railroads from liability except in cases of *gross negligence*: Rev. Stat. Tex., art. 2889. This statute, which bears the finger-marks of some astute railroad lawyer, or of a railroad lobby, and which for a time disgraced the legislation of Texas, was construed in the following among other cases:—*Cotton Press Co. v. Bradley*, 52 Tex. 587; *International & C. R. Co. v. Cocke*, 64 Tex. 151; *Houston & C. R. Co. v. Cowser*, 57 Tex. 305; *Houston & C. R. Co. v. Myers*, 55 Tex. 115; *Dallas City R. Co. v. Beeman*, 74 Tex. 291; s. c. 11 S. W. Rep. 1102 (street car running over a child); *San Antonio Street R. Co. v. Caillouette*, 79 Tex.

341; s. c. 15 S. W. Rep. 390 (street car running over a child).

<sup>34</sup> *Schneidau v. New Orleans & C. R. Co.*, 48 La. An. 866; s. c. 19 South. Rep. 918.

<sup>35</sup> Compare § 1424, where this section is referred to.

<sup>36</sup> *Calumet & C. St. R. Co. v. Lewis*, 68 Ill. App. 598; aff'd in 168 Ill. 249; s. c. 48 N. E. Rep. 153.

<sup>37</sup> *San Antonio St. R. Co. v. Cailoutte*, 79 Tex. 341; s. c. 15 S. W. Rep. 390. There is a decision to the effect that the driver of a horse car which is proceeding slowly is not guilty of negligence in failing to stop the car immediately on seeing a child at a distance of eighteen feet apparently about to cross the track: *Lavin v. Second Ave. R. Co.*, 12 App. Div. 381; s. c. 42 N. Y. Supp. 512; following *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625.

<sup>38</sup> *Stabenau v. Atlantic Ave. R. Co.*, 155 N. Y. 511; aff'g s. c. 15 App. Div. 408; 44 N. Y. Supp. 36.



of the brake, on observing that one of the children had fallen when the car was close upon her;<sup>39</sup> where a child two and a half years old, after crossing the track a few feet in front of a car which was moving slowly, turned suddenly back upon the track while the car was yet fifty or one hundred feet distant, and was run over;<sup>40</sup> where the motorman saw a boy less than five years of age running toward the car as though he intended to take hold of it, and after motioning him back, and observing that he still continued to advance, did not stop until the child reached it and was thrown down and injured by the moving car,—the questions of negligence and contributory negligence being for the jury;<sup>41</sup> and where a motorman, when fifty or sixty yards away, saw children in the road on both sides of the track, and only a few feet from it, and the motorman knew that there was a school-house at that point, but nevertheless ran over a child by reason of failing at once to get his car under special control,—the question whether he did what was necessary under the circumstances being for the jury;<sup>42</sup> nor because the driver of a horse car failed to stop the car within a distance of from thirteen to eighteen feet from a child who had fallen upon the track.<sup>43</sup>

**§ 1428. Care Demanded in Favor of Children Seen Near the Track.**—This calls up for consideration the question of the care demanded on the part of the driver, gripman, or motorman, in favor of children whom he sees near the track. If he sees them approaching the track in dangerous proximity to it, it will be negligence in him to fail to slacken the speed of his car;<sup>44</sup> and, as he is bound to keep a constant *lookout*, negligence will be imputed to the company where he *might have seen* a child coming upon the track in time to have checked or stopped his car so as to avoid injuring the child, if he had been looking.<sup>45</sup> But, in general, he is not bound to take special precautions because children are at play in the vicinity of the track, where their proximity is not apparently dangerous, and where they evince no purpose of thrusting themselves into danger. For example, the gripman of a cable car, proceeding at the rate of twelve miles an hour, who sees children playing in the roadway of the street near the curbstone, is not bound to anticipate that one of them will run suddenly in front of his car, and is not blameworthy because he does not

<sup>39</sup> *Stabenau v. Atlantic Ave. R. Co.*, 155 N. Y. 511; *aff'g s. c.* 15 App. Div. 408; 44 N. Y. Supp. 36.

<sup>40</sup> *North Chicago St. R. Co. v. Hoffart*, 82 Ill. App. 539.

<sup>41</sup> *Mason v. Minneapolis St. R. Co.*, 54 Minn. 216; *s. c.* 55 N. W. Rep. 1122.

<sup>42</sup> *Oster v. Schuylkill Traction Co. (Pa.)*, 45 Atl. Rep. 1006.

<sup>43</sup> *Lavin v. Second Ave. R. Co.*, 12 App. Div. 381; *s. c.* 42 N. Y. Supp. 512.

<sup>44</sup> *Tholen v. Brooklyn City R. Co.*, 151 N. Y. 627; *aff'g s. c.* 10 Misc. (N. Y.) 283; 63 N. Y. St. Rep. 269, 273; 30 N. Y. Supp. 1081, 1085.

<sup>45</sup> *Nugent v. Metropolitan St. R. Co.*, 17 App. Div. 582; *s. c.* 45 N. Y. Supp. 596.



slacken speed in anticipation of such a possibility.<sup>46</sup> He is not bound to bring his car to a full stop, merely because he sees a child five or six years old *on the sidewalk*, to guard against a similar possibility.<sup>47</sup> Nor is he blameworthy for failing to anticipate that a boy more than eleven years old will, *after warning*, attempt to cross a street so nearly in front of the car that an accident can not be prevented.<sup>48</sup>

§ 1429. **Injuries to Children Climbing on Street Cars.**—Strange as it may seem, the judicial courts seem to be less tolerant of injuries to boys received while trespassing upon street cars than to injuries received by them from street cars when lawfully in the street. Notwithstanding the fact that the company may become responsible to third persons for injuries happening to them in consequence of the mischievous conduct of boys trespassing upon its cars;<sup>49</sup> yet, if the driver of a car finds a seven-year-old boy on his front platform and allows him to ride for a distance, it will be negligence to order him off, or to compel him to get off, without stopping the car.<sup>50</sup> One court has gone so far as to hold that if a boy eight years of age is allowed by the driver to get upon the car, he is, while upon it, entitled to the protection accorded to a *passenger*; so that if, owing to the careless-

<sup>46</sup> *Rack v. Chicago & C. R. Co.*, 173 Ill. 289; s. c. 50 N. E. Rep. 668; aff'g 69 Ill. App. 656; citing *Flannagan v. People's R. Co.*, 163 Pa. St. 102; *Fleishman v. Neversink & C. R. Co.*, 174 Pa. St. 510; s. c. 34 Atl. Rep. 119; *Chilton v. Central Traction Co.*, 152 Pa. St. 425; *Trumbo v. City St. Car Co.*, 89 Va. 780. But see *Oster v. Schuylkill Traction Co.* (Pa.), 45 Atl. Rep. 1006.

<sup>47</sup> *Gannon v. New Orleans & C. R. Co.*, 48 La. An. 1002; s. c. 20 South. Rep. 223.

<sup>48</sup> *McLaughlin v. New Orleans & C. R. Co.*, 48 La. An. 23; s. c. 18 South. Rep. 703. Circumstances under which not negligence to fail to sound gong to warn children *concealed behind pile of lumber*: *Perry v. Macon & C. St. R. Co.*, 101 Ga. 400; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 819; 29 S. E. Rep. 304.

<sup>49</sup> See, for example, *Dintruff v. Rochester & C. R. Co.*, 32 N. Y. St. Rep. 730; 10 N. Y. Supp. 402; aff'd without opinion, 124 N. Y. 647, *mem.* In this case, which was an action for an injury sustained by a street car running upon the plaintiff while on the street, it was held that evidence that the driver would have been able to control the horses and thus prevent the accident, but for the

fact that the rear brake had been mischievously interfered with by boys; that the usual mode of preventing such interference, the danger of which was matter of common knowledge to all familiar with the operation of street cars, was by tying the brake down; and that the defendant's superintendent knew that the brake of that particular car had been tied down at one time to prevent such interference,—was sufficient to take to the jury the question of negligence on the part of the company.

For a case where a boy intending to take passage, and having money to pay his fare, climbed upon the platform of a car, and the driver, mistaking him for a trespasser, forcibly ejected him, with a review of instructions applicable to such a case,—see *Citizens' Street R. Co. v. Wollooby*, 134 Ind. 563; s. c. 33 N. E. Rep. 627.

<sup>50</sup> *McCahill v. Detroit City R. Co.*, 96 Mich. 156; s. c. 55 N. W. Rep. 668. In such a case it is a question for the jury whether the driver is negligent in ordering the boy to get off *while the car is in motion*, or whether he should first stop the car and then give the order: *McCahill v. Detroit City R. Co.*, *supra*.



ness of the driver, and to the fact that the gate which the company is by statute required to maintain in order to prevent passengers from getting off by way of the front platform is not in place, the boy is killed in getting off, the company will be liable.<sup>51</sup> If the boy enters the car by invitation of its conductor, and is thrown from the platform by the carelessness of the driver, it is a case for damages.<sup>52</sup> Another court, inclining in the same direction, has held that, whether a boy seven years old, who is injured by a collision between a street car and an *ice wagon*, was guilty of contributory negligence in getting upon the platform of a car to obtain from the conductor a penny for turning a switch at his request, and in failing to look to see whether any wagon was coming,—is a *question for the jury*.<sup>53</sup> Another court holds that a street railway company is chargeable with negligence, where its motorman permits a boy thirteen years old to play on a car and to jump therefrom while it is in motion.<sup>54</sup> But another court held it error to submit the case to the jury where the action was for an injury sustained by a boy ten years old while he was attempting to get off the front platform of a car on which he was *stealing a ride*, and from which he had been repeatedly warned and put off by the driver, where there was no substantial evidence that the driver knew he was on the car when the accident occurred, but his attention was called to the people inside the car, which was crowded.<sup>55</sup>

§ 1430. **Contributory Negligence of the Child.**—At the outset it must be borne in mind that children of tender years are not deemed in law imputable with contributory negligence,—a subject already discussed at length.<sup>56</sup> They are not imputable with negligence, because they are not capable of care; and consequently the driver, gripman, or motorman of a street car may not, when he sees a child of tender years on the track in front of his car, indulge in the assumption which is permitted in case of adults,<sup>57</sup> that the child will leave the track before the car reaches it.<sup>58</sup> The courts have refused to impute contributory negligence, as matter of law, to children of the ages, with the experience, and under the circumstances named in the following

<sup>51</sup> Muelhausen v. St. Louis R. Co., 91 Mo. 332.

<sup>52</sup> New Jersey Traction Co v. Danbech, 57 N. J. L. 463; s. c. 31 Atl. Rep. 1038.

<sup>53</sup> Connolly v. Knickerbocker Ice Co., 114 N. Y. 104; s. c. 21 N. E. Rep. 101; 22 N. Y. St. Rep. 675.

<sup>54</sup> Pueblo Elec. R. Co. v. Sherman, 25 Colo. 114; s. c. 53 Pac. Rep. 322.

<sup>55</sup> Wrasse v. Citizens' Traction Co., 146 Pa. St. 417; s. c. 23 Atl. Rep.

417; distinguishing Pittsburgh & C. R. Co. v. Caldwell, 74 Pa. St. 421. Somewhat to the contrary, see Wright v. Cincinnati St. R. Co., 9 Ohio C. C. 503; s. c. 2 Ohio Dec. 308.

<sup>56</sup> Vol. I, § 306, *et seq.*; Mitchell v. Tacoma R. & C. Co., 13 Wash. 560; s. c. 43 Pac. Rep. 528.

<sup>57</sup> Ante, § 1389.

<sup>58</sup> Wallace v. City & C. R. Co., 26 Ore. 174; s. c. 25 L. R. A. 663; 37 Pac. Rep. 477.



cases:—Where a girl nine years old attempted to cross a street railway track after looking in both directions without seeing a car approaching;<sup>59</sup> where a girl eleven and a half years old, living near a street railway crossing, familiar with the running of the cars, went upon the track without looking or taking any precaution to discover the approach of a car, with the conclusion that she was not responsible in the same degree that an adult would be, and that whether she was guilty of negligence was a question for the jury;<sup>60</sup> where a boy ten years old attempted to cross an electric railway track in front of a car which was eighty feet away;<sup>61</sup> where a bright boy eight or nine years old attempted to cross a street at a point near a trolley car track, upon seeing a car fifty feet away;<sup>62</sup> where a boy nine years old decided to cross a street car track but twenty-four feet from him when he started, and a horse car was sixty-five feet distant;<sup>63</sup> where the same boy, on reaching the track, attempted to cross instead of going back, when the driver suddenly increased the speed of the car;<sup>64</sup> where a boy ten years old attempted to cross the track of an electric railway in a crowd of children, without looking to see whether a car was approaching, although he might have seen it if he had looked, and the car was travelling at a high rate of speed and without warning signals;<sup>65</sup> where a boy thirteen years old attempted to jump from a moving street car,—but otherwise if he had been previously warned of the danger of such an act;<sup>66</sup> where a boy seven years old, after crossing one street railway track, saw a car approaching on a parallel track and turned back and came in contact with a car approaching on the track which he had just crossed;<sup>67</sup> where a boy eight years old attempted to cross a crowded

<sup>59</sup> *Rosenberg v. West End St. R. Co.*, 168 Mass. 561; s. c. 47 N. E. Rep. 435.

<sup>60</sup> *Consolidated & C. R. Co. v. Wyatt*, 59 Kan. 772; s. c. 52 Pac. Rep. 98; 9 Am. & Eng. Rail. Cas. (N. S.) 756.

<sup>61</sup> *Kitay v. Brooklyn & C. R. Co.*, 23 App. Div. 228; s. c. 48 N. Y. Supp. 982.

<sup>62</sup> *Dowd v. Brooklyn & C. R. Co.*, 9 Misc. (N. Y.) 279; s. c. 29 N. Y. Supp. 745; 61 N. Y. St. Rep. 321.

<sup>63</sup> *Ellick v. Metropolitan St. R. Co.*, 15 App. Div. 556; s. c. 44 N. Y. Supp. 523.

<sup>64</sup> *Ellick v. Metropolitan St. R. Co.*, 15 App. Div. 556; s. c. 44 N. Y. Supp. 523.

<sup>65</sup> *Consolidated City & C. R. Co. v. Carlson*, 58 Kan. 62; s. c. 48 Pac. Rep. 635; 7 Am. & Eng. Rail. Cas. (N. S.) 274.

<sup>66</sup> *Pueblo Elec. R. Co. v. Sherman*, 25 Colo. 114; s. c. 53 Pac. Rep. 322.

Where a child seven years and a half old attempted to run across a street railway track in front of an approaching car, and might have crossed safely if the car had been travelling at a safe rate of speed: *Young v. Atlantic Ave. R. Co.*, 10 Misc. 541; s. c. 64 N. Y. St. Rep. 124; 31 N. Y. Supp. 441. Circumstances under which a boy twelve years of age, walking upon a street car track, was held not guilty of contributory negligence *per se*, the question being one for the jury: *Howland v. Union St. R. Co.*, 150 Mass. 86; s. c. 22 N. E. Rep. 434.

<sup>67</sup> *Block v. Harlem Bridge & C. R. Co.*, 28 N. Y. St. Rep. 495; s. c. 9 N. Y. Supp. 164. The writer has twice seen dogs killed in the same way,—running from in front of one car and under the wheels of another approaching on the other track in the opposite direction. See also *post*, §§ 1461, 1462.



city street, diagonally, in front of a moving street car, which had been proceeding very slowly behind a covered wagon, which, just before the accident, turned out of the track to the right, and the motor-man, while engaged in an altercation with the driver of the wagon, and, while looking to the right, suddenly increased the speed of the car, which shot forward, running upon the boy,—it being a question for the jury whether the boy might have crossed in safety in the exercise of such care and discretion as was reasonably to be expected from a boy of his age.<sup>68</sup>

§ 1431. **Circumstances under which Contributory Negligence has been Imputed to Children as Matter of Law.**—On the other hand, contributory negligence as matter of law has been imputed to children of the ages, the experience, and under the circumstances following:—Where a child seven and a half years old suddenly ran upon a street railway track between two street crossings and started to run across, and the driver of the car called out to her, and she answered that she could get across, and the driver supposed that his warning would be sufficient, and ran on to her;<sup>69</sup> where a girl fourteen years old, familiar with street cars, darted suddenly across the street in the rear of a passing car, without looking for a car approaching on the other track, and was killed by it;<sup>70</sup> where a bright boy eleven years old took his station at night on the off side of the down-town track of a street railroad, waiting to take passage on a car on the up-town track, without looking up the track for an approaching car but twelve or fifteen feet away, and tripped and fell, and was struck by such car;<sup>71</sup> where a boy nine years old jumped from a wagon immediately in front of an electric car after being warned to look out for it, and was struck by the car and killed;<sup>72</sup> where a boy eight years old attempted to run in front of an electric car which was in plain sight and which could have been plainly heard;<sup>73</sup> where a boy more than eleven years old was rolling a hoop in the street and while doing so attempted to cross an electric railway in front of an approaching car without paying any

<sup>68</sup> *Costello v. Third Ave. R. Co.*, 161 N. Y. 317; s. c. 55 N. E. Rep. 897; reversing 49 N. Y. Supp. 868; s. c. 26 App. Div. 48. That a boy six or seven years old is not, as a matter of law, negligent in attempting to pass in front of a street car fifty feet distant, although he is injured thereby as a result of falling on the track,—see *Lhowe v. Third Ave. R. Co.*, 14 Misc. 612; s. c. 71 N. Y. St. Rep. 451; 36 N. Y. Supp. 463.

<sup>69</sup> *Flanagan v. People's Pass. R.*

*Co.*, 163 Pa. St. 102; s. c. 29 Atl. Rep. 743: a case badly decided.

<sup>70</sup> *Thompson v. Buffalo R. Co.*, 145 N. Y. 196; s. c. 64 N. Y. St. Rep. 591; 39 N. E. Rep. 709. Compare *post*, §§ 1461, 1462.

<sup>71</sup> *O'Rourke v. New Orleans City R. Co.*, 51 La. An. 755; s. c. 25 South. Rep. 323.

<sup>72</sup> *Mullen v. Springfield St. R. Co.*, 164 Mass. 450; s. c. 41 N. E. Rep. 664.

<sup>73</sup> *Morey v. Gloucester St. R. Co.*, 171 Mass. 164; s. c. 50 N. E. Rep. 530.



attention to its approach;<sup>74</sup> where a *deaf and dumb boy* fourteen years old, possessing average intelligence and good eyesight, attempted to cross an electric railway without looking for an approaching car;<sup>75</sup> where a boy ten years old attempted to cross a street car track after dark, not at a crossing, and in front of an approaching car not more than ten feet away and going at the usual rate of speed;<sup>76</sup> where a boy nine and a half years old, playing in the street, ran across the track of a trolley road and was struck and injured by a passing car, which, as he testified, he neither saw nor heard, there being no obstacle to his seeing it if he had looked before going upon the track;<sup>77</sup> where a girl eight years old, of ordinary intelligence, of good eyesight and accustomed to go upon the street unattended, was observed twenty-one feet from the track looking in the direction of an approaching car one hundred feet away, on a bright day, with nothing to obstruct her view, but who nevertheless stepped upon the track and was killed;<sup>78</sup> and where a boy eleven years old attempted to cross the track immediately in front of a car in plain sight without paying any attention thereto, and was run over and injured.<sup>79</sup>

§ 1432. **Contributory Negligence of Parents, etc., in Allowing Children to be on the Street.**<sup>80</sup>—As already seen,<sup>81</sup> the law does not generally impute the negligence of the parents, guardians, or custodians to children for allowing them to go upon the public street;<sup>82</sup> but such

<sup>74</sup> *McLaughlin v. New Orleans & C. R. Co.*, 48 La. An. 23; s. c. 18 South. Rep. 703.

<sup>75</sup> *Thompson v. Salt Lake & C. Transit Co.*, 16 Utah 281; s. c. 52 Pac. Rep. 92; 10 Am. & Eng. Rail. Cas. (N. S.) 563. And where a boy eight years old attempted to run diagonally across a cable railway in front of an approaching car, which he could have seen if he had looked for it, and which struck him as soon as he stepped upon the track: *Costello v. Third Ave. R. Co.*, 26 App. Div. 48; s. c. 49 N. Y. Supp. 868. Similarly, see *Bello v. Metropolitan St. R. Co.*, 2 App. Div. 313; s. c. 73 N. Y. St. Rep. 18; 37 N. Y. Supp. 969; aff'g s. c. 14 Misc. (N. Y.) 279; s. c. 70 N. Y. St. Rep. 252; 35 N. Y. Supp. 831.

<sup>76</sup> *De Ioia v. Metropolitan St. R. Co.*, 37 App. Div. 455; s. c. 56 N. Y. Supp. 22.

<sup>77</sup> *Brady v. Consol. Traction Co.* (N. J. L.), 45 Atl. Rep. 805.

<sup>78</sup> *Weiss v. Metropolitan St. R. Co.*, 33 App. Div. 221; s. c. 53 N. Y. Supp. 449.

<sup>79</sup> *Ledman v. Dry Dock & C. R. Co.*, 28 App. Div. 197; s. c. 50 N. Y. Supp. 895. Evidence under which it was proper to refuse an instruction which assumed that there was nothing in the situation to justify a girl nine years old in the belief that an approaching car would be brought under control before arriving at the cross-walk: *Hicks v. Nassau Electric R. Co.*, 62 N. Y. Supp. 597; s. c. 47 App. Div. 479.

<sup>80</sup> Compare § 1324, where this section is referred to.

<sup>81</sup> Vol. I, § 324, *et seq.*

<sup>82</sup> *Passamaneck v. Louisville R. Co.*, 98 Ky. 195; s. c. 17 Ky. L. Rep. 763; 32 S. W. Rep. 620 (child got on track while in care of nurse); *West Chicago St. R. Co. v. Scanlan*, 68 Ill. App. 626; s. c. 2 Chic. L. J. Wkly. 113; aff'd in 168 Ill. 34; s. c. 48 N. E. Rep. 149 (child left at home in charge of sister while parents at work); *Martineau v. Rochester R. Co.*, 146 N. Y. 376; aff'g s. c. 81 Hun. (N. Y.) 263; 62 N. Y. St. Rep. 722; 30 N. Y. Supp. 778 (child two and a half years old permitted



conduct is generally regarded as no more than *evidence of negligence* to be considered by the jury,—and then, as a rule, only in case of children of tender years. Moreover, the fact that a parent, guardian, or other custodian of a child permits it to escape upon the street where it receives injury through the negligence of another, does not, in most jurisdictions, bar a right of action for the injury on the part of the child,<sup>83</sup> though it will have this effect with respect to an action brought by the parent who is guilty of the negligence.<sup>84</sup> With these premises in view, it may be concluded that the mere fact that the parents of the child have been negligent in suffering it to be upon the street, will not excuse a street railway company for killing or injuring it, if the accident could have been avoided by the exercise of ordinary care on the part of such company.<sup>85</sup>

§ 1433. **Further of Contributory Negligence of Parents in Cases of Street Railway Injuries to Children.**<sup>86</sup>—Contributory negligence has been imputed to parents in allowing a child but *two years of age* to escape upon the track of a street railway where it was killed;<sup>87</sup> to a mother in allowing a child *twenty months of age* to escape from her eyes, while talking to a neighbor in her door, and get upon the street railway track, meeting the same fate.<sup>88</sup> On the contrary, it was held that the evidence did not warrant an instruction upon the theory of contributory negligence, where the mother of a child but fourteen

to cross track); *Mitchell v. Tacoma R. & Co.*, 9 Wash. 120; s. c. 37 Pac. Rep. 341.

<sup>83</sup> *Barnes v. Shreveport City R. Co.*, 47 La. An. 1218; s. c. 17 South. Rep. 782; *Bergen County Traction Co. v. Heitman*, 61 N. J. L. 682; s. c. 4 Am. Neg. Rep. 511; 11 Am. & Eng. Rail. Cas. (N. S.) 286; 40 Atl. Rep. 651.

<sup>84</sup> Vol. I, § 330; *Johnson v. Reading City R. Co.*, 160 Pa. St. 647; s. c. 34 W. N. C. 203; 28 Atl. Rep. 1001.

<sup>85</sup> *Czezewzka v. Benton-Belfontaine R. Co.*, 121 Mo. 201; s. c. 25 S. W. Rep. 911; *Passamaneck v. Louisville R. Co.*, 98 Ky. 195; s. c. 17 Ky. L. Rep. 763; 32 S. W. Rep. 620; *Fox v. Oakland & Co. St. R. Co.*,

118 Cal. 55; s. c. 50 Pac. Rep. 25; 9 Am. & Eng. Rail. Cas. (N. S.) 825; *Mitchell v. Tacoma R. & Co.*, 9 Wash. 120; s. c. 37 Pac. Rep. 341. In an action against a street railway company by an administrator, for the negligent killing of a child, an instruction that the child's mother, who was with her, should have exercised care "at the time of the ac-

cident," was held not objectionable as relieving her from the exercise of a like care *just prior to the accident*: *West Chicago St. R. Co. v. Egan*, 74 Ill. App. 442. An instruction that if the deceased child, through her own or her mother's negligence, was placed in a dangerous situation, a recovery might be had if the employes of the defendant, by the exercise of ordinary care and prudence, might have known of such dangerous situation and have avoided the injury,—was held erroneous, as authorizing a recovery although there was contributory negligence on the part of the plaintiff,—in *West Chicago St. R. Co. v. Egan*, 74 Ill. App. 442. But the decision is erroneous: *Ante*, § 1382, *et seq.*

<sup>86</sup> Compare § 1324, where this section is referred to.

<sup>87</sup> *Campagnie & Co. Passengers v. Dufresne*, M. L. Rep. 7 Q. B. 214; reversing s. c. M. L. 7 S. C. 10.

<sup>88</sup> *Johnson v. Reading City Pass. R. Co.*, 160 Pa. St. 647; s. c. 34 W. N. C. 203; 28 Atl. Rep. 1001.



months old testified that she put the child out of her arms, at her side in a store door, to wait on a customer, and that, upon doing so, she heard a cry, and, upon looking out of the door, she saw the child under the car, and that it had never been out there before.<sup>89</sup> It is not negligence *per se* for a girl eight years of age to be upon the track of a street railway at a place other than that where pedestrians usually cross the street; because all persons have a right to cross the public street at any place. Nor is such a child necessarily precluded from recovering damages because she is injured while at play upon a street occupied in part by the tracks of a street railway company.<sup>90</sup>

§ 1434. **Various Other Holdings.**—It has been held that to leave a platform car with no machinery about it or any brake, on a side track of a street railway, in such condition that it may be moved by the united strength of several children, is not negligence which will render the company liable for an injury to a child playing with it;<sup>91</sup> that a street railway company may become liable for an injury to a child by reason of permitting it to attempt to enter a car except under proper safeguards;<sup>92</sup> that, in order to a recovery for the death of a child by being run over by a street car, the negligence of the defendant being predicated upon a *defective brake*, it must be made to appear that the accident could have been avoided if the brake had been in good condition.<sup>93</sup>

<sup>89</sup> *San Antonio St. R. Co. v. Cailoute*, 79 Tex. 341; s. c. 15 S. W. Rep. 498.

<sup>90</sup> *Mitchell v. Tacoma &c. R. Co.*, 9 Wash. 120, 132; s. c. 37 Pac. Rep. 341; citing *Ponaho v. Vulcan Iron Works*, 75 Mo. 401; *McGuire v. Spence*, 91 N. Y. 303. That a parent who leaves his four-year-old child playing on the pavement, and goes away where he can not watch the child, and it is killed by a car passing along the street, is guilty of contributory negligence and can not recover damages.—see *Schwartz v. United Traction Co.*, 30 Pitts. Leg. J. (N. S.) 153.

<sup>91</sup> *Kaumeier v. City Electric R. Co.*, 116 Mich. 306; s. c. 4 Det. L. N. 1160; 40 L. R. A. 385; 74 N. W. Rep. 481.

<sup>92</sup> *New Jersey Traction Co. v. Danbech*, 57 N. J. L. 463; s. c. 31 Atl. Rep. 1038.

<sup>93</sup> *Gannon v. New Orleans City R. Co.*, 48 La. An. 1002; s. c. 20 South. Rep. 223. Many other decisions relating to injuries to children by street cars have been considered in Vol. I, § 289, *et seq.* They will not, therefore, be further considered in detail in this chapter, but will be merely cited: *Railroad Co. v. Glad-*

*mon*, 15 Wall. (U. S.) 401; *Ihl v. Forty-second Street R. Co.*, 47 N. Y. 317; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49; s. c. 3 Keyes (N. Y.) 429; 1 Abb. App. Dec. (N. Y.) 556; *Jetter v. New York &c. R. Co.*, 2 Keyes (N. Y.) 154; s. c. 2 Abb. App. Dec. (N. Y.) 458; *Burke v. Broadway &c. R. Co.*, 34 How. Pr. 239; s. c. 49 Barb. (N. Y.) 529; *Squire v. Central Park &c. R. Co.*, 1 Jones & Sp. (N. Y.) 437; *Pendril v. Second Ave. R. Co.*, 2 Jones & Sp. (N. Y.) 481; s. c. 43 How. Pr. (N. Y.) 399; *Oldfield v. New York &c. R. Co.*, 14 N. Y. 310; s. c. 3 E. D. Smith (N. Y.) 103; *Government Street R. Co. v. Hanlon*, 53 Ala. 70; *Allen v. Atlanta Street R. Co.*, 54 Ga. 503; *Citizens' R. Co. v. Carey*, 56 Ind. 396; *Boland v. Missouri R. Co.*, 36 Mo. 484; *Covington St. R. Co. v. Packer*, 9 Bush. (Ky.) 455; *Barksdall v. New Orleans &c. R. Co.*, 23 La. An. 180; *Wright v. Malden &c. R. Co.*, 4 Allen (Mass.) 283; *Baltimore &c. R. Co. v. The State*, use of Fryer, 30 Md. 47; *Baltimore &c. R. Co. v. McDonnell*, 43 Md. 534; *Mentz v. Second Avenue R. Co.*, 3 Abb. App. Dec. (N. Y.) 274; s. c. 2 Robt. 356.



## CHAPTER XLV.

CONTRIBUTORY NEGLIGENCE OF THE TRAVELLER.<sup>1</sup>

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<sup>1</sup>The contributory negligence of children and of parents with respect to their children, rests upon pecu-

liar grounds, and has therefore been considered in the preceding chapter.



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- not liable unless it observed the exposed position of the person injured in time to have averted the calamity.
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§ 1437. **General Considerations: Degree of Care—Proximate and Remote Cause.**—So far as the law can define the measure of care required of a person using the streets to avert danger to himself from the operation of railways thereon, it is *reasonable or ordinary care*.<sup>2</sup> What this measure of care is has been stated in a general way in the preceding volume.<sup>3</sup> In legal theory and so far as a general definition can express the rule of law, the care demanded of the traveller and of the street railway company is the same.<sup>4</sup> The traveller in crossing street car tracks must exercise some vigilance, and not assume unnecessary danger.<sup>5</sup> As in other cases,<sup>6</sup> this is a care proportionate to the danger to be avoided; it will vary according to circumstances; it will be such care as may reasonably be expected of persons of ordi-

<sup>2</sup> *Seagriff v. Brooklyn &c. R. Co.*, 31 App. Div. 595; s. c. 52 N. Y. Supp. 236; *Chicago City R. Co. v. Fennimore*, 78 Ill. App. 478; s. c. 3 Chic. L. J. Wkly. 520; *McLaughlin v. New Orleans &c. R. Co.*, 48 La. An. 23; s. c. 18 South. Rep. 703; *Cain v. Macon &c. St. R. Co.*, 97 Ga. 298; s. c. 22 S. E. Rep. 918.

<sup>3</sup> Vol. I, § 23, *et seq.*

<sup>4</sup> *Burgess v. Salt Lake City R. Co.*, 17 Utah 406; s. c. 53 Pac. Rep. 1013.

<sup>5</sup> *Ponsano v. St. Charles St. R. Co.*, 52 La. An. (Pt. I) 245; s. c. 26 South. Rep. 820.

<sup>6</sup> Vol. I, § 25.



nary prudence under like circumstances; or, to vary the definition, such care and vigilance as reasonably prudent and cautious persons exercise under the like circumstances.<sup>7</sup> The law does not expect the same degree of care and attention from a person travelling along or across a street upon which an *electric road* is operated, as when travelling along, upon, or across an ordinary *steam road*,—the danger being obviously less in the former than in the latter case.<sup>8</sup> So, a higher degree of care is required of those attempting to cross the track of a railway whose cars are operated by electricity than is required of those about to cross the track of a horse railway.<sup>9</sup> As a great degree of care and attention is demanded of street railway companies propelling their cars rapidly by the dangerous agency of electricity,<sup>10</sup> so the use of this agency in propelling street cars demands a corresponding increase in the care to be used by travellers in protecting themselves from danger, and causing unnecessary hindrance to the operation of this public agency.<sup>11</sup> Here, as in other cases,<sup>12</sup> the negligence of the person killed or injured will bar a recovery of damages on account of his death or injury, where it was a proximate cause of the accident, although the street railway company may have been also chargeable with negligence;<sup>13</sup> otherwise the doctrine of contributory negligence must be obliterated from the books. If the proposition is turned around, the street railway company will be liable to pay damages where its negligence was the proximate cause of the accident, although the person killed or injured may have been guilty of *some* negligence.<sup>14</sup> But this is not the doctrine of those courts which deny recovery where the negligence of the person killed or injured contributed “in any degree”<sup>15</sup> to the catastrophe; but under this rule the traveller must be entirely free from negligence, no matter how gross the negligence of the street railway company may be, the same not amounting to willfulness or malice.<sup>16</sup> This rule is unsound and un-

<sup>7</sup> Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197; s. c. 35 Ohio L. J. 140; 43 N. E. Rep. 207; 32 L. R. A. 276; West Chicago St. R. Co. v. Nilson, 70 Ill. App. 171.

<sup>8</sup> Hall v. Ogden City & C. R. Co., 13 Utah 243; s. c. 44 Pac. Rep. 1046; 4 Am. & Eng. Rail. Cas. (N. S.) 77; Hawthorne v. Cincinnati St. R. Co., 2 Ohio Dec. 548; Holmgren v. St. Paul & C. R. Co., 61 Minn. 85; s. c. 63 N. W. Rep. 270.

<sup>9</sup> Hawthorne v. Cincinnati St. R. Co., 2 Ohio Dec. 548.

<sup>10</sup> *Ante*, §§ 1378, 1384.

<sup>11</sup> Seik v. Toledo & C. St. R. Co., 16 Ohio C. C. 393; 9 Ohio C. D. 51.

<sup>12</sup> Vol. I, §§ 168, 216.

<sup>13</sup> Maxwell v. Wilmington & C. City R. Co., 1 Marv. (Del.) 199; s. c. 40 Atl. Rep. 945; citing Prawn v. Vermont & C. R. Co., 4 Vt. 487; s. c. 58 Am. Dec. 191; Johnson v. Superior & C. R. Co., 91 Wis. 233; s. c. 64 N. W. Rep. 753; Cain v. Macon & C. St. R. Co., 97 Ga. 298; s. c. 22 S. E. Rep. 918.

<sup>14</sup> Maxwell v. Wilmington & C. R. Co., 1 Marv. (Del.) 199; s. c. 40 Atl. Rep. 945; Vol. I, § 259, *et seq.*

<sup>15</sup> Vol. I, § 170.

<sup>16</sup> Luedecke v. Metropolitan St. R. Co., 60 N. Y. Supp. 999.



just. The sound and just rule is that, whether a recovery can be had for an injury inflicted by a street railway company through the negligence of its motormen depends upon the solution of the question whether the traveller might have avoided the consequence of the negligence of the motorman,—not by the exercise of great or extraordinary care—but by the exercise of ordinary care.<sup>17</sup> As stated by another court, although the traveller may have been negligent in exposing himself to the danger of a collision with the car, yet this will not prevent a recovery of damages unless his negligence *materially contributed to the accident*;<sup>18</sup> but this statement of the rule of contributory negligence has been challenged by some courts.<sup>19</sup> Moreover, the negligence of the street railway company, although gross, will not render the contributory negligence of the traveller immaterial,<sup>20</sup> unless it be so gross as to amount to willfulness or wantonness in the view of some courts,<sup>21</sup> or, in view of others, to imply a willful intention to inflict injury.<sup>22</sup>

**§ 1438. Duty of Traveller to Look and Listen on Approaching a Street Railway Track.**—The rule is well settled that it is the duty of a person approaching a *steam* railway crossing upon the highway to look up and down the track before attempting to cross, and failure to do so will constitute negligence *per se*, entitling the defendant to judgment notwithstanding the defendant is also guilty of negligence.<sup>23</sup> This rule, as has been seen,<sup>24</sup> is not applied where pedestrians approach a street crossing and come into collision with *ordinary vehicles*,<sup>25</sup> but

<sup>17</sup> *Cain v. Macon & C. R. Co.*, 97 Ga. 298; s. c. 22 S. E. Rep. 918. Vol. I, § 171.

<sup>18</sup> *Citizens' St. R. Co. v. Albright*, 14 Ind. App. 433; 42 N. E. Rep. 238; rehearing denied in 14 Ind. App. 438; s. c. 42 N. E. Rep. 1028.

<sup>19</sup> Vol. I, § 170. In one or two States there is a statutory rule under which contributory negligence does not bar a recovery, but goes only in mitigation of damages. Such a rule in Tennessee applicable in its terms to steam railroad companies, is held not to apply in a common law action against an electric railway company: *Saunders v. City & C. R. Co.*, 99 Tenn. 130; s. c. 2 Chic. L. J. Wkly. 522; 41 S. W. Rep. 1031.

<sup>20</sup> *Boesen v. Chicago & C. Transp. Co. (Ill.)*, 31 Chic. Leg. N. 371.

<sup>21</sup> Vol. I, § 206, *et seq.*

<sup>22</sup> *De Lon v. Kokomo & C. St. R. Co.*, 22 Ind. App. 377; s. c. 53 N. E.

Rep. 848. One court has reasoned that one who is driving a team, or one who is riding with him, is not bound, under all circumstances, to take the same precaution before driving upon a street railway track as is required of pedestrians: *Consolidated Traction Co. v. Behr*, 59 N. J. L. 477; s. c. 37 Atl. Rep. 142. But the conclusion should be exactly the opposite, since a foot-passenger can handle himself better and get out of the way more readily than a driver can handle his team and get out of the way.

<sup>23</sup> *Post*, § 1642; *Ernst v. Hudson & C. R. Co.*, 39 N. Y. 61; *Wilcox v. Rome & C. R. Co.*, 39 N. Y. 358; *Railroad Co. v. Houston*, 95 U. S. 697; s. c. 6 Cent. L. J. 132; 5 Reporter 164.

<sup>24</sup> *Ante*, § 1329.

<sup>25</sup> *Moebus v. Hermann*, 108 N. Y. 349; s. c. 15 N. E. Rep. 415.



in such cases the question of contributory negligence is generally left to the jury. But in regard to street railroads, and especially those whose cars are propelled at a considerable rate of speed, by underground cables or overhead electric wires, the general disposition of the courts now is to apply the rule which is applied in respect of steam railways, and to hold that the failure of the traveller, unless excused by special circumstances, to use his faculties by looking and listening for the approach of cars, before he attempts to cross a street railway, is negligence *per se*, such as will, if the evidence is undisputed, authorize the court to direct a nonsuit or to give a peremptory instruction to the jury to find for the defendant.<sup>26</sup>

<sup>26</sup> Kelly v. Hendrie, 26 Mich. 255, 261; Davidson v. Denver Tramway Co., 4 Colo. App. 283; s. c. 35 Pac. 920; Taylor v. Missouri & C. R. Co., 86 Mo. 457 (Black, J., dissenting); Thomas v. Citizens' & C. R. Co., 132 Pa. St. 504; s. c. 19 Atl. Rep. 286; 25 W. N. C. 399; 47 Phila. Leg. Int. 223; 20 Pitts. L. J. (N. S.) 437; Everett v. Los Angeles & C. R. Co., 115 Cal. 105; s. c. 34 L. R. A. 350; Hall v. West End St. R. Co., 168 Mass. 461; s. c. 47 N. E. Rep. 124; Omslaer v. Pittsburgh & C. Traction Co., 168 Pa. St. 519; Henderson v. Detroit & C. St. R. Co., 116 Mich. 368; s. c. 74 N. W. Rep. 525; Blaney v. Electric Traction Co., 184 Pa. St. 524; s. c. 39 Atl. Rep. 294; Carson v. Federal St. & C. R. Co., 147 Pa. St. 219; s. c. 15 L. R. A. 257; 1 Pa. Adv. R. 105; 11 Rail. & Corp. L. J. 155; 23 Atl. Rep. 369; 50 Am. & Eng. Rail. Cas. 462; Ward v. Rochester & C. Elec. R. Co., 43 N. Y. St. Rep. 84; s. c. 63 Hun (N. Y.) 624; 17 N. Y. Supp. 427; Hickman v. Union Depot R. Co., 47 Mo. App. 65; Ehrisman v. East Harrisburg City R. Co., 150 Pa. St. 180; s. c. 24 Atl. Rep. 596; Wheelahan v. Philadelphia Traction Co., 150 Pa. St. 187; s. c. 24 Atl. Rep. 688; Schulte v. New Orleans & C. R. Co., 44 La. An. 509; s. c. 10 South. Rep. 811; Smith v. Citizens' R. Co., 52 Mo. App. 36; Meyer v. Lindell R. Co., 6 Mo. App. 27; Schausten v. Toledo & C. St. R. Co., 7 Ohio Dec. 389; Smith v. Electric Traction Co., 6 Pa. Dist. Rep. 471; s. c. 40 W. N. C. 486; Sweeney v. Scranton Traction Co., 5 Lack. L. News (Pa.) 86; Blakeslee v. Consolidated St. R. Co., 105 Mich. 462; s. c. 63 N. W. Rep. 401; 2 Det. L. N. 154; Hickey v. St.

Paul City R. Co., 60 Minn. 119; s. c. 61 N. W. Rep. 893; Shea v. St. Paul City R. Co., 50 Minn. 395; Waston v. Minneapolis St. R. Co., 53 Minn. 551; Witzel v. Third Ave. R. Co., 3 Misc. (N. Y.) 561; Boerth v. West Side R. Co., 87 Wis. 288; Cincinnati St. R. Co. v. Whitcomb, 66 Fed. Rep. 915; Nicholsburg v. Second Ave. R. Co., 11 Misc. (N. Y.) 432; Kerr v. Atlantic Ave. R. Co., 10 Misc. (N. Y.) 264; Fritz v. Detroit & C. St. R. Co., 105 Mich. 50; Lang v. Metropolitan St. R. Co., 26 Misc. (N. Y.) 754; s. c. 57 N. Y. Supp. 249; Reynolds v. Third Ave. R. Co., 8 Misc. (N. Y.) 313; s. c. 59 N. Y. St. Rep. 276; 28 N. Y. Supp. 734; Dieck v. New Orleans & C. R. Co., 51 La. An. 262; s. c. 25 South. Rep. 71; Danger v. London St. R. Co., 30 Ont. Rep. 493; Borschall v. Detroit R. Co., 115 Mich. 473; s. c. 4 Det. L. N. 938; 73 N. W. Rep. 551; Young v. Citizens' St. R. Co., 148 Ind. 54; s. c. 44 N. E. Rep. 927; rehearing denied in 47 N. E. Rep. 142; Curry v. Rochester R. Co., 90 Hun (N. Y.) 230; s. c. 70 N. Y. St. Rep. 146; 35 N. Y. Supp. 543; Snider v. New Orleans & C. R. Co., 48 La. An. 1; s. c. 18 South. Rep. 695; Highland Ave. & C. R. Co. v. Sampson, 112 Ala. 425; s. c. 20 South. Rep. 566; Healey v. Brooklyn & C. R. Co., 18 App. Div. 623; s. c. 45 N. Y. Supp. 393; Cawley v. LaCrosse & C. R. Co., 101 Wis. 145; s. c. 12 Am. & Eng. Rail. Cas. (N. S.) 453; 77 N. W. Rep. 179; Culbertson v. Metropolitan St. R. Co., 140 Mo. 35; s. c. 36 S. W. Rep. 834. To the contrary, that the rule which makes looking and listening before crossing a steam railway a condition of the exercise of ordinary care does not ap-



## § 1439. This Duty Demanded both of Drivers and Pedestrians.—

The law expects this obvious measure of prudence on the part of the drivers of vehicles which can not be quickly maneuvered so as to escape collision with street cars.<sup>27</sup> This rule is of especial application with respect to street railways operated by underground cables, or by electricity;<sup>28</sup> and especially in the case of electric railways;<sup>28a</sup> and the same rule of prudence with respect to the street crossings of cable or electric railways is imposed upon *pedestrians*, though varying more or less according to circumstances.<sup>29</sup> The obligation of *looking* under such circumstances has been applied to *deaf persons*, as well as to others, provided they possess good eyesight.<sup>30</sup> This duty is obviously not discharged by looking at a point distant from the street, from which an approaching car can not be seen, and then driving heedlessly upon the street without further looking.<sup>31</sup> Within qualified limits, a person may rightfully act on the presumption that another person will act rightly, and not expose him to danger through negligence or wantonness.<sup>32</sup> But this rule is very sparingly extended to persons who approach places of such obvious danger

ply with equal force to one crossing the track of a street railway in a city street,—see Consolidated Traction Co. v. Haight, 59 N. J. L. 577; s. c. 37 Atl. Rep. 135.

<sup>27</sup> Shea v. St. Paul & C. R. Co., 50 Minn. 395; Watson v. Minneapolis St. R. Co., 53 Minn. 551; Witzel v. Third Ave. R. Co., 3 Misc. (N. Y.) 561; Boerth v. West Side R. Co., 87 Wis. 288; Cincinnati St. R. Co. v. Whitcomb, 66 Fed. Rep. 915; Nicholsburg v. Second Ave. R. Co., 11 Misc. (N. Y.) 432; Kerr v. Atlantic Ave. R. Co., 10 Misc. (N. Y.) 264; Fritz v. Detroit & C. R. Co., 105 Mich. 50.

<sup>28</sup> Wheelahan v. Philadelphia Traction Co., 150 Pa. St. 187; Sonnenfeld & Co. v. People's R. Co., 59 Mo. App. 668; Smith v. Citizens' R. Co., 52 Mo. App. 36; Hamilton v. Third Ave. R. Co., 6 Misc. (N. Y.) 382; Cross v. California St. R. Co., 102 Cal. 313; Rohe v. Third Ave. R. Co., 10 Misc. (N. Y.) 740.

<sup>28a</sup> Carson v. Federal St. & C. R. Co., 147 Pa. St. 219; s. c. 15 L. R. A. 257; Ward v. Rochester Elec. R. Co., 43 N. Y. St. Rep. 84; Hickman v. Union Depot R. Co., 47 Mo. App. 65; Clancy v. Troy & C. R. Co., 88 Hun (N. Y.) 496.

<sup>29</sup> Ehrisman v. East Harrisburg & C.

R. Co., 150 Pa. St. 180; s. c. 17 L. R. A. 448; Schulte v. New Orleans & C. R. Co., 44 La. An. 509; Omaha St. R. Co. v. Loehneisen, 40 Neb. 37; Riegelman v. Third Ave. R. Co., 9 Misc. (N. Y.) 51; Holmgren v. Twin City & C. Transit Co., 61 Minn. 85; Weiser v. Broadway & C. St. R. Co., 10 Ohio C. C. 14. Compare Hickey v. St. Paul & C. R. Co., 60 Minn. 119; Sonnenfeld Millinery Co. v. People's R. Co., 59 Mo. App. 668; Omslaer v. Pittsburg & C. Traction Co., 168 Pa. St. 519; Jager v. Coney Island & C. R. Co., 84 Hun (N. Y.) 307.

<sup>30</sup> Hall v. West End St. & C. R. Co., 168 Mass. 461; s. c. 47 N. E. Rep. 124.

<sup>31</sup> Snider v. New Orleans & C. R. Co., 48 La. An. 1; s. c. 18 South. Rep. 695. Obviously, the person approaching the crossing upon which a car might turn from a cross street, is not excused from looking at the proper time and place, by the fact that he looked *two minutes before* and saw no car: Healey v. Brooklyn & C. R. Co., 18 App. Div. 623; s. c. 45 N. Y. Supp. 393. See also Cawley v. LaCrosse & C. R. Co., 101 Wis. 145; s. c. 12 Am. & Eng. Rail. Cas. (N. S.) 453; 77 N. W. Rep. 179.

<sup>32</sup> Vol. I, §§ 190, 191; *post*, § 1612.



as street railways, without making fair use of their faculties to see whether a car is approaching. Even where there is a flagman at the crossing of a cable railway, a person approaching the crossing will not be justified in driving upon the tracks without looking or listening for trains, in reliance upon a signal from the flagman, which is properly given when trains are approaching.<sup>33</sup> According to this view, if the traveller, on approaching a street railway crossing, with an unobstructed view, fails so to exercise his faculties by looking and listening, and if the car driver, motorman, or gripman is likewise negligent in failing to give the customary *signal*, and both proceed forward to the point of contact,—this, it has been reasoned, makes a case of *concurrent negligence*, concurring in point of fault and concurring in point of time, in which case the law is well settled that the person suffering damage can not recover.<sup>34</sup> The rule which requires the traveller on approaching a street railway crossing to look out for approaching cars before attempting to cross, is very clear in case of a car kept well in hand by a competent motorman and sounding the appropriate signals, especially where the motorman does all in his power after seeing the danger of the traveller, to stop the car and avert the accident, even though the car is travelling at an excessive rate of speed.<sup>35</sup> Some courts seem to have restrained the rule which requires the traveller to look and listen, to cases where the approaching car is moving at a lawful rate of speed;<sup>36</sup> but one view makes the negligence of the traveller bar a recovery for damages, although the railway company is also negligent, as where its car is approaching the crossing at an excessive rate of speed and without giving the proper signals.<sup>37</sup>

§ 1440. **This Rule Applied even to Children.**—This rule has been applied by some courts, with considerable severity, to children of tender years,—in one case to a child of *ten years old*.<sup>38</sup> Another

<sup>33</sup> As to the duty to look or listen before crossing street railway track,—see also *Thomas v. Citizens' &c. R. Co.*, 132 Pa. St. 504; *Warner v. People's St. R. Co.*, 141 Pa. St. 615; *Shea v. St. Paul &c. R. Co.*, 50 Minn. 395; *Pyne v. Broadway &c. R. Co.*, 46 N. Y. St. Rep. 662; *Ehrisman v. East Harrisburg &c. R. Co.*, 150 Pa. St. 180; s. c. 17 L. R. A. 448; *Carson v. Federal St. &c. R. Co.*, 147 Pa. St. 219; s. c. 15 L. R. A. 257; *Ward v. Rochester Elec. R. Co.*, 43 N. Y. St. Rep. 84; *Hickman v. Union Depot R. Co.*, 47 Mo. App. 65.

<sup>34</sup> *Smith v. Citizens' R. Co.*, 52 Mo. App. 36, 41. And similarly see

*Reynolds v. Third Avenue R. Co.*, 8 Misc. (N. Y.) 313; s. c. 59 N. Y. St. Rep. 276; 28 N. Y. Supp. 734.

<sup>35</sup> *Borschall v. Detroit R. Co.*, 115 Mich. 473; s. c. 4 Det. L. N. 938; 73 N. W. Rep. 551.

<sup>36</sup> *Newark Pass. R. Co. v. Bloch*, 55 N. J. L. 605; s. c. 22 L. R. A. 374; 56 Am. & Eng. Rail. Cas. 590; 27 Atl. Rep. 1067; *Evansville St. R. Co. v. Gentry*, 147 Ind. 408; 37 L. R. A. 378; 5 Am. & Eng. Rail. Cas. (N. S.) 500; 44 N. E. Rep. 311.

<sup>37</sup> *Danger v. London St. R. Co.*, 30 Ont. Rep. 493.

<sup>38</sup> *Sheets v. Connolly St. R. Co.*, 54 N. J. L. 518; s. c. 24 Atl. Rep. 483.



court went so far as to demand this duty of looking and listening, as matter of law, from a child seven years old; but this decision was reversed, the court of last resort holding that whether a child of that age was capable of exercising such care was a question for a jury.<sup>39</sup>

§ 1441. **Duty to "Stop, Look, and Listen."**—The severe rule that on approaching a steam railway crossing the traveller is to stop, look, and listen,<sup>40</sup> does not apply with the same strictness to a traveller approaching a street railway crossing;<sup>41</sup> though there are decisions which imply the contrary.<sup>42</sup> And the principle is now said to be well established in New Jersey, and must be applied, that it is not negligence *per se*, or negligence in law, for a person driving a vehicle, on approaching a street railway crossing over which he intends to cross, to fail to look for an approaching street car, in order to avoid danger from it.<sup>43</sup> We shall soon see that, in the view of many courts, it is not negligence as matter of law, but a question for the jury, for a traveller approaching a street railway crossing, not to look and listen. Where this doctrine obtains, it must be concluded, for stronger reasons, that it will not be negligence as matter of law for him to fail to "*stop, look, and listen.*"<sup>44</sup>

§ 1442. **Look from what Place—at what Point of View.**—Moreover, as in the case of a traveller approaching a steam railway crossing,<sup>45</sup> the traveller will not be deemed to have discharged his duty of exercising reasonable care for his own safety, unless he looks or listens for an approaching car at some point on his approach to the crossing where looking and listening would be available, if there is such a place. If his view is obstructed for a portion of the distance so that looking would not be available, then he must look as soon as he reaches

<sup>39</sup> *Stone v. Dry Dock &c. R. Co.*, 46 Hun (N. Y.) 184; s. c. 11 N. Y. St. Rep. 537; reversed in 115 N. Y. 104.

<sup>40</sup> *Post*, § 1648.

<sup>41</sup> *Newark &c. R. Co. v. Bloch*, 55 N. J. L. 605; s. c. 22 L. R. A. 374; 56 Am. & Eng. Rail. Cas. 590; 27 Atl. Rep. 1067; *Evansville St. R. Co. v. Gentry*, 147 Ind. 408; s. c. 37 L. R. A. 378; 5 Am. & Eng. Rail. Cas. (N. S.) 500; 44 N. E. Rep. 311; *Trout v. Altoona &c. R. Co.*, 13 Pa. Super. Ct. 17.

<sup>42</sup> *Hoelzel v. Crescent City R. Co.*, 49 La. An. 1302; s. c. 38 L. R. A. 708; 22 So. Rep. 330; *Manayunk &c. Co. v. Union Traction Co.*, 7 Pa. Super. Ct. 104; s. c. 42 W. N. C. 45; *Wheelahan v. Philadelphia Traction*

*Co.*, 150 Pa. St. 187. Thus, the Supreme Court of Canada hold that the driver of a cart struck by a street car while crossing the track is not guilty of contributory negligence because he does not look to see if a car is approaching, if in fact it is far enough away to enable him to cross *in case it is proceeding moderately and prudently*: *Toronto R. Co. v. Gosnell*, 24 Can. S. C. 582.

<sup>43</sup> *Dennis v. North Jersey St. R. Co.* (N. J. L.), 45 Atl. Rep. 807.

<sup>44</sup> *Weiser v. Broadway &c. St. R. Co.*, 10 Ohio C. C. 14; s. c. 2 Ohio Dec. 463.

<sup>45</sup> *Post*, § 1637, *et seq.*



a point, before going upon the track, which commands a view of it up and down, failing in which, if a car runs upon him, the accident will be ascribed to his own negligence.<sup>46</sup>

§ 1443. **Doctrine that Failure to Look and Listen not Negligence Per Se.**—Some of the cases support the conclusion that the failure of the traveller, on approaching a street railway crossing to look and listen, is not negligence *per se*, but is merely *evidence of negligence* to be considered by the jury under all the circumstances of the case.<sup>47</sup> In one of these cases it was held proper to charge the jury that “if, at the time the plaintiff started to cross the street, and left the sidewalk, the situation and surrounding circumstances were such as to require a person, in the exercise of ordinary prudence, to look up Broadway to ascertain whether there was a car approaching, and he failed to do so, then he was negligent; and if such negligence contributed to his injury, he can not recover.”<sup>48</sup> Another court has suggested that this obligation to look and listen does not apply with equal force to one crossing the track of a street railway in a city street, as in the case of one crossing a steam railway track.<sup>49</sup> Another court has suggested that the traveller approaching such a crossing is not obliged as matter of law to stop, look, and listen, unless there is some circumstance which will demand that exertion from him in the exercise of

<sup>46</sup> Kelly v. Wakefield &c. St. R. Co. (Mass.), 56 N. E. Rep. 285. It has been held that a traction company can not avoid liability for injuries to one struck at a crossing by one of its cars, upon the ground that the person injured *did not stop at the right place to look and listen* before attempting to cross the tracks, in the absence of evidence showing that there was any place where he could have obtained a better view of the tracks than the place at which he did stop: Downey v. Pittsburgh &c. Traction Co., 161 Pa. St. 131; s. c. 34 W. N. C. 380; 28 Atl. Rep. 1019.

<sup>47</sup> Post, § 1640; Shea v. St. Paul City R. Co., 50 Minn. 395; s. c. 52 N. W. Rep. 902; Chicago City R. Co. v. Robinson, 127 Ill. 9; s. c. 18 N. E. Rep. 772; North Chicago St. R. Co. v. Nelson, 79 Ill. App. 229; s. c. 3 Chic. L. J. Wkly. 582; Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197; s. c. 32 L. R. A. 276; 35 Ohio L. J. 140; 43 N. E. Rep. 207; Read v. Brooklyn &c. R. Co., 32 App. Div. 503; s. c. 53 N. Y. Supp. 209; Con-

solidated Traction Co. v. Scott, 58 N. J. L. 682; s. c. 33 L. R. A. 122; 34 Atl. Rep. 1094; 55 Am. St. Rep. 620; 4 Am. & Eng. Rail. Cas. (N. S.) 371; Brozek v. Steinway R. Co., 10 App. Div. 360; s. c. 41 N. Y. Supp. 1017; West Chicago St. R. Co. v. Huhnke, 82 Ill. App. 404; Schausten v. Toledo &c. St. R. Co., 18 Ohio Cir. Ct. 691; Cincinnati St. R. Co. v. Whitcomb, 66 Fed. Rep. 915; s. c. 1 Ohio Dec. Fed. 5; Robbins v. Springfield St. R. Co., 165 Mass. 30; s. c. 42 N. E. Rep. 334; Capital Traction Co. v. Lusby, 26 Wash. L. Rep. 163; s. c. 12 App. D. C. 295. Compare Richmond Traction Co. v. Hildebrand (Va.), 34 S. E. Rep. 888.

<sup>48</sup> Pyne v. Broadway &c. R. Co., 46 N. Y. St. Rep. 662; s. c. 19 N. Y. Supp. 217.

<sup>49</sup> Read v. Brooklyn &c. R. Co., 32 App. Div. 503; s. c. 53 N. Y. Supp. 209; Consolidated Traction Co. v. Scott, 58 N. J. L. 682; s. c. 55 Am. St. Rep. 620; 33 L. R. A. 122; 34 Atl. Rep. 1094; 4 Am. & Eng. Rail. Cas. (N. S.) 371.



ordinary prudence;<sup>50</sup> and still another court has gone so far as to excuse the failure of a traveller to look, who attempted to cross an electric railway in front of a car approaching at the rate of twelve miles an hour, when the car was only forty or fifty feet distant when the crossing was attempted,<sup>51</sup>—a holding which seems untenable. Some of these cases rather support the proposition that the traveller will be excused under special circumstances from the imputation of negligence because of failing to look and listen; and none of the cases assert that circumstances may not exist which will excuse the traveller in taking these precautions. In one case the plaintiff, a *boy eight years of age*, approached the street railway crossing with sufficient time to cross the track without danger from the approaching car, but stumbled and fell and was run over by the car. Here it was held that the rule of law requiring reasonable care on his part did not extend so far as to require him to anticipate the possibility of an accidental fall at an ordinary crossing, and consequently his failure to look to see whether a car was approaching was immaterial; since if he had seen it his action would have been the same, without any imputation of negligence.<sup>52</sup> Another court has qualified the duty of the traveller to look and listen on approaching a street railway, with the observation that he is required “to extend his observation only to the distance within which vehicles proceeding at customary and reasonably safe speed would threaten his safety.”<sup>53</sup> Nor is contributory negligence imputed to a passenger, as matter of law, where he *alights from one car* of the railroad company under such circumstances as warrant him in believing that due care will be exercised by the company for his safety in preventing cars from running over him on parallel tracks.<sup>54</sup> So, the driver of a team, who, on approaching a street railway track to cross it, sees a car approaching at such a distance as apparently to make it safe to cross, is not negligent *per se* in attempting to cross without looking a second time, as the car has no priority of way at the crossing.<sup>55</sup>

<sup>50</sup> Cincinnati St. R. Co. v. Whitcomb, 66 Fed. Rep. 915; s. c. 1 Ohio Dec. Fed. 5.

<sup>51</sup> Brozek v. Steinway R. Co., 10 App. Div. 360; s. c. 41 N. Y. Supp. 1017.

<sup>52</sup> Mentz v. Second Avenue R. Co., 3 Abb. App. Dec. (N. Y.) 274; affirming s. c. 2 Rob. (N. Y.) 356.

<sup>53</sup> Newark Pass. R. Co. v. Bloch, 55 N. J. L. 605; s. c. 27 Atl. Rep. 1067; 22 L. R. A. 374; 56 Am. & Eng. Rail. Cas. 590.

<sup>54</sup> Omaha St. R. Co. v. Loehneisen,

40 Neb. 37; s. c. 58 N. W. Rep. 535.

<sup>55</sup> Watson v. Minneapolis St. R. Co., 53 Minn. 551; s. c. 55 N. W. Rep. 742. So, it has been held that a woman who before starting to cross a street on which there is an electric railway, looks in both directions and does not see a car, and attempts to cross in front of a heavy wagon, but is stopped for a time by another wagon, after which she proceeds without looking for a car, in order to get out of the way of the heavy wagon which is approaching



§ 1444. **Traveller Bound to Make a Fair Use of his Faculties According to his Circumstances.**—The sum of the decisions under this head is that a traveller approaching a street railway track and intending to enter upon it, whether at a street crossing or elsewhere, is bound to make a fair use of his faculties by looking and listening in the direction from which a car may be expected to approach, in order to avoid being run over, and that a failure to do so will be contributory negligence, preventing him from recovering damages in case he is hurt, or preventing damages from being recovered for his death, in case he is killed;<sup>56</sup> and whether he has made such a use of his faculties will be a question for the court or the jury, according to the state of the evidence.<sup>57</sup> The sum of it is, that the traveller is not bound at his peril to know, before attempting to cross the street railway track, that a collision will not occur between his vehicle and an approaching car, but that he is only required to make such observations and to acquire such information as would convince a reasonable man in the like situation, that a passage could be made in safety.<sup>58</sup>

her without stopping, and is struck by a car coming from the direction opposite to that of the wagon,—is not, as matter of law, guilty of contributory negligence, but the question of negligence is for the jury: *Connelly v. Trenton Pass. R. Co.*, 56 N. J. L. 700; s. c. 29 Atl. Rep. 438. So, it has been held that a pedestrian is not, as matter of law, guilty of contributory negligence in attempting to rapidly cross a street after looking in both directions from the curb without seeing an approaching car: *Hickman v. Nassau Elec. R. Co.*, 58 N. Y. Supp. 858.

<sup>56</sup> *Wheelahan v. Philadelphia Trac-tion Co.*, 150 Pa. St. 187; *Schulte v. New Orleans &c. R. Co.*, 44 La. An. 509; *Sheets v. Connolly St. R. Co.*, 54 N. J. L. 518; *Smith v. Citizens' R. Co.*, 52 Mo. App. 36; *Newark &c. R. Co. v. Bloch*, 55 N. J. L. 605; s. c. 22 L. R. A. 374; 27 Atl. Rep. 1067; *Omaha St. R. Co. v. Loehneisen*, 40 Neb. 37; *Connelly v. Trenton &c. R. Co.*, 56 N. J. L. 700; *Boerth v. West Side R. Co.*, 87 Wis. 288; *Cincinnati St. R. Co. v. Whitcomb*, 66 Fed. Rep. 915; *Weiser v. Broadway &c. St. R. Co.*, 10 Ohio C. C. 14; *Hawthorne v. Cincinnati St. R. Co.*, 2 Ohio Dec. 548; *Hickey v. St. Paul &c. R. Co.*, 60 Minn. 119; *Sonnenfeld Millinery Co. v. People's R. Co.*, 59 Mo. App. 668; *Fritz v. Detroit &c. St. R. Co.*, 105 Mich. 50.

<sup>57</sup> In the following cases it was for the jury: *Kostuch v. St. Paul City R. Co.* (Minn.), 81 N. W. Rep. 215; *Ryan v. Detroit &c. St. R. Co.* (Mich), 82 N. W. Rep. 278 (old man, attempting to drive across a track in a city street, struck by a car which he could easily have seen if he had looked—case badly decided). In the following cases, according to the decisions of subordinate courts, it was for the court: *Trout v. Altoona &c. Elec. R. Co.*, 13 Pa. Super. Ct. 17 (driver familiar with crossing, knew it to be dangerous, but did not look until his horse was on the track); *Schausten v. Toledo &c. St. R. Co.*, 18 Ohio Cir. Ct. 691 (traveller turned his buggy on tracks at night on which he knew that cars passed frequently, and failed to look or listen—instruction proper that if traveller knew, or could have ascertained the danger of crossing the tracks, and yet, suddenly drove on them without looking or listening, or endeavoring to learn whether a car was approaching, there could be no recovery).

<sup>58</sup> *Lawler v. Hartford St. R. Co.* (Conn.), 43 Atl. Rep. 545; *Saunders v. City &c. R. Co.*, 99 Tenn. 130; s. c. 2 Chic. L. J. Wkly. 522; 41 S. W. Rep. 1031.



§ 1445. **Rule where Traveller could have Seen Car if he had Looked.**—As we shall see hereafter, when dealing with the subject of injuries to travellers at steam railway crossings, where the physical facts make it certain that the traveller could have seen the approaching car in time to have averted the injury to him if he had looked, he will not be heard to say that he *looked, but did not see*: no such self-stultification will be permitted in a judicial proceeding; but he will be held to have seen what was obvious, and if he did not heed it, his conduct will present the case of a person thrusting himself rashly into danger, in which case he can not make his own rashness and folly the ground of recovering damages from another.<sup>59</sup>

§ 1446. **Rule where a Traveller Voluntarily Disables Himself from Using His Faculties.**—Where a traveller voluntarily disables himself from using his faculties on approaching a street railway crossing, contributory negligence will be imputed to him precisely as though, being free to use his faculties, he had neglected to use them,<sup>60</sup>—as where a woman afflicted with deafness wears a sun bonnet which obstructs her sight and, with this on, attempts to cross the street railway track, without looking to the right or left;<sup>61</sup> or where the driver of a carriage approached a street railway crossing with the curtains of his carriage drawn so that he could not look to the right or left;<sup>62</sup> or where a person joined a crowd assembled in the street to hear the news of a presidential election, and was struck by a car, the approach of which he did not hear, where his failure to hear it was due to the crowd, of which he had voluntarily become a party, and not to the negligence of the company;<sup>63</sup> or where one voluntarily drives upon a street railway track seated in a covered wagon, which obstructs his view on either side, and also obstructs his hearing, so that he is struck by the car, although it rapidly sounds its bell before he attempts to cross.<sup>64</sup> But the mere fact that the driver of a cart, seated in the middle of his cart, did not see an *upturned rail* which had become loose at the end toward which he was driving, and which stood up from two to four

<sup>59</sup> Trout v. Altoona &c. Elec. R. Co., 13 Pa. Super. Ct. 17; Bennett v. Detroit &c. St. R. Co. (Mich.), 82 N. W. Rep. 518. But see Ryan v. Detroit &c. St. R. Co. (Mich.), 82 N. W. Rep. 278, where this principle seems to have been disregarded.

<sup>60</sup> Vol. I, §§ 196, 340, 341; *post*, §§ 1659, 1660.

<sup>61</sup> Schulte v. New Orleans &c. R. Co., 44 La. An. 509; s. c. 10 South. Rep. 811.

<sup>62</sup> Thomas v. Citizens' &c. R. Co.,

132 Pa. St. 504; s. c. 19 Atl. Rep. 286; 25 W. N. C. 399; 47 Phila. Leg. Int. 223; 20 Pitts. L. J. (N. S.) 437.

<sup>63</sup> Washington &c. R. Co. v. Wright, 7 App. D. C. 295; s. c. 23 Wash. L. Rep. 844; 28 Chicago Leg. News 155.

<sup>64</sup> Boerth v. West Side R. Co., 87 Wis. 288; s. c. 53 N. W. Rep. 376. So, where one voluntarily walks behind a wagon which prevents him from seeing a car approaching on the other track: Bethel v. Cincinnati St. R. Co., 15 Ohio C. C. 381; s. c. 8 Ohio C. D. 310.



feet with its point turned toward him, was not a sufficient circumstance to withdraw the question of his negligence from the jury.<sup>65</sup>

**§ 1447. Rule Where the View and Hearing of the Traveller are Obstructed.**—If the view of the traveller as he approaches a street railway crossing is obstructed, he manifestly ought to rely to a greater extent upon his sense of hearing; and if both are obstructed he ought manifestly to proceed upon the track very slowly, or to stop, alight, and go upon the track in advance of his team and ascertain whether there is danger, before attempting to cross. In other words, the mere fact that he can neither see nor hear an approaching car does not justify him in driving upon the track and taking his chances, although manifestly the motorman of a car ought, at a crossing where the view is obstructed by buildings, to proceed with greater caution than where the view is open for a considerable distance. But contributory negligence will be imputed to the traveller who enters upon the street railway track at a crossing without stopping, where his view of the track is obscured by obstructions for which the company is not responsible, and his hearing is obstructed by a wagon loaded with iron in front of him.<sup>66</sup> His negligence will be the more culpable if he fails to avail himself of an unobstructed view of the track for two hundred feet, at a point somewhat distant from the track, although the view is obstructed immediately before reaching the track.<sup>67</sup>

**§ 1448. Right of Traveller to Act on the Assumption that the Railway Company will Act without Negligence.**<sup>68</sup>—A pedestrian, in the exercise of his legal rights upon the highway, is, within qualified limits, entitled to act upon the assumption that all persons traversing the highway will obey the law in reference thereto.<sup>69</sup> He is not negligent in not anticipating an accident which may leave him helpless, and is not bound to refrain from crossing the track because a car

<sup>65</sup> *Bradwell v. Pittsburgh &c. Pass. R. Co.*, 153 Pa. St. 105; s. c. 25 Atl. Rep. 623; affirming s. c. on former appeal 139 Pa. St. 404. Another court has held, with obvious impropriety, that it is not negligence *per se* for the driver of a loaded wagon, in the summer time, to lie down on his load wrapped up in a blanket, but that the question whether such conduct involves a want of ordinary care is for a jury: *Parish v. Eden*, 62 Wis. 272. This was a case where the driver was killed by his wagon being overturned through a defect in the highway.

<sup>66</sup> *Omslaer v. Pittsburgh &c. Trac-tion Co.*, 168 Pa. St. 519; s. c. 26 Pitts. L. J. (N. S.) 15; 32 Atl. Rep. 50. Compare *post*, §§ 1670, 1671.

<sup>67</sup> *Van Patten v. Schenectady St. R. Co.*, 80 Hun (N. Y.) 494; s. c. 62 N. Y. St. Rep. 378; 30 N. Y. Supp. 501. Compare *Baumann v. Metropolitan St. R. Co.*, 21 Misc. 658; s. c. 47 N. Y. Supp. 1094.

<sup>68</sup> This section is cited in §§ 1653, 1658, 1697. See further Vol. I, § 191; *post*, § 1612.

<sup>69</sup> *Jetter v. New York &c. R. Co.*, 2 Keyes (N. Y.) 154; s. c. 2 Abb. App. Dec. (N. Y.) 458.



is likely to strike him in case he should fall on the track by some such accident, and lie there, unable to rise; because such a result is out of the usual course of events, and not such as a pedestrian is bound, in the exercise of ordinary care, to anticipate and provide for.<sup>70</sup> Likewise the driver of a vehicle is not expected to guard against an unlooked-for movement of a street car which he is following, at a reasonably safe distance behind,—as, where the plaintiff was following a street car full of passengers up a steep ascent, and the car, through the carelessness of the driver, suddenly *slid backwards upon the plaintiff's horses*, which were about twenty feet behind, and injured them, in spite of the best efforts of the plaintiff to get them out of the way.<sup>71</sup> So, if a *passenger* is required or permitted to transfer at a given point, from one car to another, he is entitled to act upon the assumption that he will be allowed to do so in safety, and if he is run over by another car of the same company while doing so, he will have an action for damages;<sup>72</sup> and the rule is the same where, in alighting from the car of the defendant, he is run over by another car of the defendant approaching on another track.<sup>73</sup> It has been held that a driver approaching a street railway crossing is justified in assuming that an approaching car is coming at a lawful and proper rate of speed, unless his senses admonish him to the contrary, and is hence not negligent in driving upon the track when, if the car had been approaching at a lawful rate of speed, he would have cleared the track without injury;<sup>74</sup> that he is not negligent in failing to observe that an approaching car is coming at twice its usual rate of speed, or in assuming that the driver will obey the customary signals of one standing near who desires to take the car, which will require the car to come to a stop before passing the crossing;<sup>75</sup> that foot passengers have a right to assume that electric cars will slow down on approaching a street crossing.<sup>76</sup> But he may not act upon the assumption that if he reaches the crossing first he will be entitled to the right of way, and it will be the duty of the motorman to avoid colliding with him, so that, with full knowledge

<sup>70</sup> *Mentz v. Second Avenue R. Co.*, 3 Abb. App. Dec. (N. Y.) 274; s. c. 2 Robt. 356; *Baxter v. Second Avenue R. Co.*, 3 Robt. 510; s. c. 30 How. Pr. 219.

<sup>71</sup> *Cook v. Metropolitan R. Co.*, 98 Mass. 361.

<sup>72</sup> For a complaint setting up such a cause of action which was held not bad as disclosing contributory negligence, see *Citizens' St. R. Co. v. Merl*, 134 Ind. 609; s. c. 33 N. E. Rep. 1014.

<sup>73</sup> *Omaha St. R. Co. v. Loehneisen*, 40 Neb. 37; s. c. 58 N. W. Rep. 535.

<sup>74</sup> *Metropolitan St. R. Co. v. Hammett*, 13 App. D. C. 370; s. c. 26 Wash. L. Rep. 762.

<sup>75</sup> *Lang v. Houston & C. R. Co.*, 75 Hun (N. Y.) 151; s. c. 58 N. Y. St. Rep. 594; 27 N. Y. Supp. 90.

<sup>76</sup> *Young v. Atlantic Ave. R. Co.*, 10 Misc. (N. Y.) 541; s. c. 64 N. Y. St. Rep. 124; 31 N. Y. Supp. 441.



of the situation, he places himself in a position of manifest danger.<sup>77</sup> So, if he is driving along an electric railway track he is not entitled to depend upon the duty of the motorman coming up behind him to give him timely warning,<sup>78</sup> but must keep his head craned backward, while at the same time he is looking forward.<sup>79</sup>

§ 1449. **Care Required of Travellers in other Respects on Approaching Street Railway Crossings.**—In addition to the duty of looking and listening, the traveller is bound to exercise reasonable care for his own safety in other respects. If he sees a car approaching near at hand at a rapid rate of speed, he *must not attempt to drive across the track in front of it*, taking his chances of escaping injury.<sup>80</sup> For example, one who, on approaching a street railway track at night, when about fifty feet from it, saw a trolley car approaching two hundred and fifty feet away, but nevertheless, upon reaching the track, without again seeing the car, attempted to cross diagonally and was struck before he could get across, was precluded by his contributory negligence from recovering damages, because he acted recklessly in view of his knowledge of the danger.<sup>81</sup>

<sup>77</sup> *Smith v. Electric Traction Co.*, 187 Pa. St. 110; s. c. 40 Atl. Rep. 966; 42 W. N. C. 351.

<sup>78</sup> *Devine v. Brooklyn &c. R. Co.*, 34 App. Div. 248; s. c. 54 N. Y. Supp. 626.

<sup>79</sup> As to the extent to which a driver may depend upon the duty of the motorman to give warning, see also *Manayunk &c. Co. v. Union Traction Co.*, 7 Pa. Super. Ct. 104; 42 W. N. C. 45; *Hunter v. Third Ave. R. Co.*, 21 Misc. (N. Y.) 1; s. c. 46 N. Y. Supp. 1010; aff'g 20 Misc. 432; s. c. 45 N. Y. Supp. 1044.

<sup>80</sup> So held where the car was approaching at the rate of ten miles an hour and was but forty feet away when the traveller undertook to cross in front of it, and it was held contributory negligence *per se*: *Hamilton v. Third Ave. R. Co.*, 6 Misc. (N. Y.) 382; s. c. 56 N. Y. St. Rep. 397; 26 N. Y. Supp. 754. The doctrine of the text is supported by the following cases: *Rauscher v. Philadelphia Traction Co.*, 176 Pa. St. 349; s. c. 38 W. N. C. 479; 35 Atl. Rep. 138. Car approaching at ten miles an hour: *Rohe v. Third Ave. R. Co.*, 10 Misc. 740; s. c. 64 N. Y. St. Rep. 500; 31 N. Y. Supp. 797. Car close upon him and motorman sounding gong continuous-

ly: *Webster v. New Orleans &c. R. Co.*, 51 La. An. 299; s. c. 25 South. Rep. 77. Cable car only twenty feet away: *Coyle v. Third Ave. R. Co.*, 18 Misc. (N. Y.) 9; s. c. 40 N. Y. Supp. 1131; rev'g s. c. 17 Misc. (N. Y.) 282; s. c. 40 N. Y. Supp. 362. Car approaching in full view at ten miles an hour only forty feet away: *Hamilton v. Third Ave. R. Co.*, 6 Misc. (N. Y.) 382; s. c. 56 N. Y. St. Rep. 397; 26 N. Y. Supp. 754. Pedestrian struck just as he set foot on track, by a street car well lighted and carrying a headlight and plainly visible, there being no obstructions: *Watkins v. Union Traction Co.*, 194 Pa. St. 564; s. c. 45 Atl. Rep. 321. Woman went to edge of track, saw car approaching, saw dasher in front of her and was at the side of the car, when struck thereby: *Walsh v. Hestonville &c. Pass. R. Co.*, 194 Pa. St. 570; s. c. 45 Atl. Rep. 322. Complaint alleging that plaintiff was struck by defendant's electric car, while she was on the track, "upon which she had just stepped," states no cause of action: *Richmond Traction Co. v. Hildebrand (Va.)*, 34 S. E. Rep. 888.

<sup>81</sup> *Jewett v. Paterson R. Co.*, 62 N. J. L. 424; s. c. 41 Atl. Rep. 707.



§ 1450. **Contributory Negligence not Imputable to an Error of Judgment as to the Distance, Speed, etc.**<sup>82</sup>—Negligence will not necessarily be imputed to a driver or footman approaching a street railway crossing, merely because he makes a *mistake of judgment* as to the distance or the speed of the approaching car, or the length of time it will take him to cross the track.<sup>83</sup> For example, a mere *error of judgment* on the part of a pedestrian in attempting to cross a street ahead of a car is not necessarily imputable to him as contributory negligence, but will ordinarily leave the question with the jury; and if they find that he took reasonable care, but made a mistake as to the safest course to pursue, they will not, under proper instructions, cut off his right of recovery on that ground.<sup>84</sup>

§ 1451. **Further as to Errors of Judgment.**<sup>85</sup>—On a principle elsewhere much considered,<sup>86</sup> and for even stronger reasons, a mere error of judgment will not impute contributory negligence to the plaintiff where he acts erroneously under an impulse of sudden peril brought about by the negligence of the street railway company.<sup>87</sup> Contrary to the doctrine of this paragraph and to the general rule on the sub-

<sup>82</sup> Compare §§ 1381, 1410, 1669, where this section is referred to. See also Vol. I, §§ 81, 195; *post*, §§ 1616, 1624.

<sup>83</sup> *Lang v. Houston & C. R. Co.*, 75 Hun (N. Y.) 151; s. c. 58 N. Y. St. Rep. 574; 27 N. Y. Supp. 90; *Hergert v. Union R. Co.*, 25 App. Div. 218; s. c. 49 N. Y. Supp. 307; *Read v. Brooklyn & C. R. Co.*, 32 App. Div. 503; s. c. 53 N. Y. Supp. 209; *Fandel v. Third Ave. R. Co.*, 15 App. Div. 426; s. c. 44 N. Y. Supp. 462. *Contra*, and therefore unsound: *Sutherland v. Cleveland & C. R. Co.*, 148 Ind. 308; s. c. 47 N. E. Rep. 624; 8 Am. & Eng. Rail. Cas. (N. S.) 424; *Petri v. Third Ave. R. Co.*, 63 N. Y. Supp. 315; s. c. 30 Misc. 254.

<sup>84</sup> *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459; s. c. 22 N. E. Rep. 1062; 27 N. Y. St. Rep. 549; 40 Am. & Eng. Rail. Cas. 254. The instruction was: "A mere error of judgment does not necessarily amount to carelessness. If the plaintiff took reasonable care, and then made a mistake as to the safest course to pursue in crossing the street," he was not guilty of contributory negligence for that reason. This instruction was held correct: *McClain v. Brooklyn City R. Co.*, *supra*. On the principle of the text, it has been

held that although one who was injured by a street car thought he had so stopped his wagon as to leave room for the car to pass, and the driver also thought that he had room to pass, and both were mistaken, the person injured can recover, if he exercised proper prudence and the driver did not: *Gumb v. Twenty-third Street R. Co.*, 30 N. Y. St. Rep. 253; s. c. 9 N. Y. Supp. 316. See also *Buhrens v. Dry Dock & C. R. Co.*, 53 Hun (N. Y.) 571; s. c. 25 N. Y. St. Rep. 191; 6 N. Y. Supp. 224. Compare *Spaulding v. Jarvis*, 32 Hun (N. Y.) 621.

<sup>85</sup> This section is cited in § 1669.

<sup>86</sup> Vol. I, § 195, *et seq.*

<sup>87</sup> *Gibbons v. Wilkes-Barre & C. St. R. Co.*, 155 Pa. St. 279; s. c. 26 Atl. Rep. 417; *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332. For example, one court has refused to impute contributory negligence as matter of law to one riding in a wagon, who failed to jump from the wagon before it came into collision with a street car, although his companions jumped, where no collision would have occurred if the wagon had moved a few inches further: *Bush v. St. Joseph & C. R. Co.*, 113 Mich. 513; s. c. 4 Det. L. N. 377; 71 N. W. Rep. 851.



ject, it has been held that a woman was, as matter of law, guilty of contributory negligence, precluding a recovery of damages from being struck by a train on a public crossing, where, not being in a position of sudden peril, she deliberately calculated the distance of the approaching train and mistakenly believed that she had time to cross before its arrival.<sup>88</sup> But the reader will observe that this was the case of a steam railway train, which could not readily stop; and the case seems rather to refer itself to the principle governing a great class of injuries at steam railway crossings, where a recovery of damages is denied in cases of travellers seeing the approach of a train, and deliberately thrusting themselves into danger by attempting to cross in front of it.<sup>89</sup> A subordinate court in New York has, however, held that a traveller ought not to recover damages resulting from his wagon being struck by a cable car, where he saw the car in time to stop his wagon, before driving upon the track, but miscalculated the distance and attempted to drive in front of it.<sup>90</sup> In such a case, it is not necessary that the element of contributory negligence should enter into the question at all. It is quite enough that the *mistake of judgment* of the traveller, accompanied by his voluntary act in thrusting himself in front of a car, so near that it can not be stopped in time to avoid running upon him, is the *proximate cause* of the accident. But, plainly, if he goes in front of the car in consequence of such a mistake of judgment, the railway company ought to be held liable, if its servants could have avoided running upon him, by the exercise of reasonable care and exertion on their part.<sup>91</sup> And this rule manifestly does not apply to the case of a person who, attempting to escape an impending peril from drays and wagons, throws himself in front of a moving street car whose owners and its servants are not guilty of negligence.<sup>92</sup>

§ 1452. **Errors of Judgment Continued.**<sup>93</sup>—It will at once occur to the mind that such cases generally present *questions for the jury*.

<sup>88</sup> Sutherland v. Cleveland &c. R. Co., 148 Ind. 308; s. c. 43 N. E. Rep. 624; 8 Am. & Eng. Rail. Cas. (N. S.) 424.

<sup>89</sup> *Post*, § 1665, *et seq.*

<sup>90</sup> Petri v. Third Ave. R. Co., 63 N. Y. Supp. 315; s. c. 30 Misc. (N. Y.) 254.

<sup>91</sup> Vol. I, § 230, *et seq.*

<sup>92</sup> Trowbridge v. Danville Street-car Co. (Va.), 19 S. E. Rep. 780 (no off. rep.). A pedestrian crossing a street, who, after getting between

the rails of a street car track, is obliged to stop to permit a car on the other track to pass, is not, as a matter of law, guilty of contributory negligence in failing to avoid a rapidly approaching wagon, where he runs from it as rapidly as possible as soon as he discovers it, although by running in another direction he might have avoided injury: Canton v. Simpson, 2 App. Div. 561; s. c. 38 N. Y. Supp. 13.

<sup>93</sup> This section is cited in § 1669.



Thus, where the plaintiff was driving upon a main track of a street railway, and a car was suddenly moved which had been standing on a spur track, it was held proper to submit to the jury the question whether, under the circumstances, the safer and more prudent course for the plaintiff to have pursued to avoid collision was to attempt to get off the main track, or to quicken his speed and pass the intersection of the main track to the spur track, before the car could reach the intersection.<sup>94</sup> But the law does not excuse acts of plain rashness and folly by placing them within the category of mere errors of judgment. For example, one who jumps in front of an electric car when it is but a short distance away, and when he has seen it in ample time to get out of the way, will not be permitted to make his folly and rashness the ground of recovering damages for the injury which he thereby visits upon himself.<sup>95</sup> This principle is frequently applied where a car is seen approaching in the distance, and the traveller would be able to cross in safety in front of it, if it had been approaching at the usual rate of speed; or where he misjudges the time it would take for the car to arrive on the crossing, in view of the fact that it is running at an unusual, extraordinary, or unlawful rate of speed; and where, if it had been running at the usual, proper, or lawful speed, the traveller might have crossed in safety.<sup>96</sup> The principle also applies where the crossing could safely be made if the motorman had exercised ordinary care and had possessed *reasonable control of his car*, and managed it properly,<sup>97</sup> unless his want of care or lack of control of his car was apparent to the traveller.<sup>98</sup> As already seen,<sup>99</sup> the rule works both ways; so that the misjudgment, mistake, or mismeove of a competent motorman in manipulating the appliances devised to stop the car, after he has reasonable ground to apprehend a collision, where the collision would not have occurred but for such misjudgment, mistake, or mismeove,—will not render the company liable to the person injured if he was guilty of contributory negligence in remaining

<sup>94</sup> *Orange &c. R. Co. v. Ward*, 47 N. J. L. 560; s. c. 4 Cent. Rep. 825.

<sup>95</sup> *Jager v. Coney Island &c. R. Co.*, 84 Hun (N. Y.) 307; s. c. 65 N. Y. St. Rep. 539; 32 N. Y. Supp. 304. As where he looks both ways and sees a cable car close at hand, and a wagon coming from the opposite direction, at such a distance as leads him to believe that he will be able to cross before the wagon reaches him: *McDonnell v. Henry Elias Brew. Co.*, 16 App. Div. 223; s. c. 44 N. Y. Supp. 652. This injury was from a collision with the wagon.

<sup>96</sup> *Callahan v. Philadelphia Trac-*

*tion Co.*, 184 Pa. St. 425; s. c. 41 W. N. C. 509; 39 Atl. Rep. 222; *Jackson v. Pittsburgh &c. Traction Co.*, 159 Pa. St. 399; s. c. 24 Pitts. L. J. (N. S.) 403; 33 W. N. C. 481; 28 Atl. Rep. 257; *Consolidated Traction Co. v. Lamberston*, 59 N. J. L. 297; s. c. 36 Atl. Rep. 100; *aff'd* 38 Atl. Rep. 638, 684.

<sup>97</sup> *Zimmermann v. Union R. Co.*, 3 App. Div. 219; s. c. 38 N. Y. Supp. 362.

<sup>98</sup> *Saunders v. City &c. R. Co.*, 99 Tenn. 130; s. c. 2 Chic. L. J. Wkly. 522; 41 S. W. Rep. 1031.

<sup>99</sup> *Ante*, § 1381.



in the situation of danger through his failure to look out for the car, or to get off the track after discovering it.<sup>100</sup>

§ 1453. **Driving or Walking along a Street Railway Track.**—A street railway company whose track is laid along a public street and on the surface thereof, is not, as a steam railway company is,<sup>101</sup> entitled to the exclusive use of its track; but the public have a right to use that portion of the roadway occupied by its track for the purposes of ordinary travel. In this regard their right is undoubtedly subordinate to the right of the street railway company in such a sense that they are obliged to yield the right of way on the approach of a car, since the car travelling on a fixed track can not yield the right of way to them.<sup>102</sup> Such being the right of the public to use every portion of the street, subject to the rights of the street railway company, the courts unite in the view that it is *not negligence per se* for a person to drive or walk along a street railway track,<sup>103</sup> while conceding that

<sup>100</sup> Lockwood v. Belle City St. R. Co., 92 Wis. 97; s. c. 65 N. W. Rep. 866.

<sup>101</sup> Post, § 1705.

<sup>102</sup> Ante, § 1374; Newark Pass. R. Co. v. Bloch, 55 N. J. L. 605; s. c. 27 Atl. Rep. 1067, where the relative rights of the general travelling public and the street railway company are intelligently discussed. Compare Omaha Street R. Co. v. Duvall, 40 Neb. 29; s. c. 58 N. W. Rep. 531. See also Winter v. Federal & C. Co., 153 Pa. St. 26; s. c. 19 L. R. A. 232; 23 Pitts. L. J. (N. S.) 302; 31 W. N. C. 565; 25 Atl. Rep. 1028, where there is a similar discussion, with the conclusion that the substitution of electric and underground cables for horses as a motive power for street cars, demands increased care on the part of the persons using the street as an ordinary highway.

But it is not a sound view, as held by the Supreme Court of Louisiana, that where a foot-passenger elects to use the planked roadway of a street railway company to avoid travelling in the muddy dirt road, he does so at his peril; and if he is run over and maimed, he can not recover damages, "even though the driver may have been in fault in not averting the collision and the consequent disaster." Childs v. New Orleans City R. Co., 33 La. An. 154, 158. The rule of law, morals, and

humanity is exactly the reverse: Ante, § 1374. An earlier decision in the same State shows an inclination to apply the same rules to pedestrians on the track of a street railway which has been applied on the track of a steam railway: Johnson v. Canal & C. R. Co., 27 La. An. 53,—decided by a divided court with a vigorous dissenting opinion. But this is a gross misconception, as the steam railway company has, except at highway grade crossings, the exclusive right to its track, and the street railway company is merely licensed to use the highway in common with the travelling public in general. See Shea v. Potrero & C. R. Co., 44 Cal. 414, where this distinction is taken, and where the relative rights of pedestrians and street railroad companies in the use of the street are clearly pointed out.

<sup>103</sup> Will v. West Side R. Co., 84 Wis. 42; s. c. 54 N. W. Rep. 30; Mullen v. Central Park & C. R. Co., 49 N. Y. St. Rep. 80; s. c. 21 N. Y. Supp. 101; 1 Misc. (N. Y.) 216; Bernhard v. Rochester R. Co., 68 Hun (N. Y.) 369; s. c. 51 N. Y. St. Rep. 880; 22 N. Y. Supp. 821; Swain v. Fourteenth Street R. Co., 93 Cal. 179; s. c. 28 Pac. Rep. 829; Rascher v. East Detroit & C. R. Co., 90 Mich. 413; s. c. 51 N. W. Rep. 463; Bindbeutel v. Street R. Co., 43 Mo. App. 463; Gibbons v. Wilkesbarre & C. R.



it may be *evidence of negligence* to go to a jury under the circumstances of particular cases.<sup>104</sup>

§ 1454. **Further of Driving or Walking along a Street Railway Track.**—It has been held not negligence as matter of law to ride on the top of a *load of hay* hauled by horses along a street in which a street railway is operated:<sup>105</sup> and this is perfectly clear, provided the load of hay keeps off the tracks. It has even been held that persons driving vehicles on a street on which a dummy railroad track is laid have the right to drive on the railroad tracks, where the condition of the highway is such that they can not be driven elsewhere.<sup>106</sup> If it is not negligence as matter of law to drive along a street railway track in front of a car approaching from behind, for stronger reasons it will not be negligence to drive along such a track when a car is coming in the opposite direction.<sup>107</sup> The person so making use of a street railway track must obviously be on the alert, and use reasonable diligence to discover a car approaching him and get off the track and out

Co., 155 Pa. St. 279; s. c. 26 Atl. Rep. 417; *Ehrisman v. East Harrisburg R. Co.*, 150 Pa. St. 180; *Arnesen v. Brooklyn City R. Co.*, 149 N. Y. 590; aff'g s. c. 9 Misc. 270; 61 N. Y. St. Rep. 324; 29 N. Y. Supp. 748; *North Chicago St. R. Co. v. Zeiger*, 78 Ill. App. 463; *Citizens' R. Co. v. Hair* (Tex. Civ. App.), 32 S. W. Rep. 1050 (no off. rep.); *Kessler v. Brooklyn Heights R. Co.*, 3 App. Div. 426; s. c. 38 N. Y. Supp. 799; *Camden & C. R. Co. v. Preston*, 59 N. J. L. 264; s. c. 35 Atl. Rep. 1119; *Fishbach v. Steinway R. Co.*, 11 App. Div. 152; s. c. 42 N. Y. Supp. 883; *Thatcher v. Central Traction Co.*, 166 Pa. St. 66; 25 Pitts. L. J. (N. S.) 321; 36 W. N. C. 84; 30 Atl. Rep. 1048; *Harper v. Philadelphia Traction Co.*, 175 Pa. St. 129; s. c. 38 W. N. C. 349; 34 Atl. Rep. 356; *Bush v. St. Joseph & C. R. Co.*, 113 Mich. 513; s. c. 4 Det. L. N. 377; 71 N. W. Rep. 851; *McGrane v. Flushing & C. R. Co.*, 13 App. Div. 177; s. c. 43 N. Y. Supp. 385; *Smith v. Philadelphia Traction Co.*, 3 Pa. Super. Ct. 129; s. c. 40 W. N. C. 501; *Central Pass. R. Co. v. Chatterson*, 17 Ky. L. Rep. 5; s. c. 29 S. W. Rep. 18 (no off. rep.). As where he is familiar with the roadway and is on a line of track where all cars must approach from the rear, and is driving down grade: *Johnson v. Brooklyn & C. R. Co.*, 34 App. Div. 271; s. c. 54 N. Y. Supp.

547. Not negligence as matter of law in driving along a street railway track to stoop down and pick up an article which has fallen from the wagon, during which time the horse swerves, leading to a collision with the car: *Davidson v. Schuylkill Traction Co.*, 4 Pa. Super. Ct. 86. As to the duty of the street railway company to a person driving in front of a car,—see *Hicks v. Citizens' R. Co.*, 124 Mo. 115, and note to same in 25 L. R. A. 508; also later cases, *Baltimore Traction Co. v. Appel*, 80 Md. 603; *Thatcher v. Central Traction Co.*, 166 Pa. St. 66.

<sup>104</sup> It has even been held that a cab driver may stop upon a street railway track to receive instructions from his master, where, by reason of snow-banks on either side, he can not drive out of the track, if he does not see or have any warning of an approaching car: *Mullen v. Central Park & C. R. Co.*, 49 N. Y. St. Rep. 80; s. c. 21 N. Y. Supp. 101; 1 Misc. (N. Y.) 216.

<sup>105</sup> *Citizens R. Co. v. Hair* (Tex. Civ. App.), 32 S. W. Rep. 1050 (no off. rep.).

<sup>106</sup> *Kessler v. Brooklyn & C. R. Co.*, 3 App. Div. 426; 38 N. Y. Supp. 799.

<sup>107</sup> *Smith v. Philadelphia Traction Co.*, 3 Pa. Super Ct. 129; s. c. 40 W. N. C. 501.



of the way of such car.<sup>108</sup> It is his plain duty to listen for signals of approaching cars and to look behind him from time to time, so that when a car is seen, he may turn off and allow it to pass without unduly slackening its ordinary speed.<sup>109</sup> If he sees an electric car approaching from behind, not more than one hundred and twenty-five feet away, at a greater rate of speed than that of his own vehicle, he will be guilty of contributory negligence in failing to drive off the track without loss of time, and in attempting to take a long, slanting turn off the track.<sup>110</sup> But his failure to clear the track will not charge him with contributory negligence where it was the result of the wheels of his vehicle slipping on the rails;<sup>111</sup> or where he was prevented from pulling out of the track by a wagon which was following a car on the parallel track, in the absence of any improper conduct on the part of the driver of such wagon, where the car which ran upon him from behind was approaching at a reckless rate of speed;<sup>112</sup> nor will the fact that he, in violation of his duty, failed to drive out of the tracks upon being notified of the approach of the car by the customary signals justify the motorman in running him down.<sup>113</sup> It is quite clear that where the car approaches the person thus driving from behind, and without warning, contributory negligence will not bar his recovery of damages for the injury, where it appears that he looked back shortly before the collision and saw that the track was clear.<sup>114</sup> So, it was held that the driver of a *sprinkling cart*, who drove with one wheel on the street railway track, but who frequently turned to see that no car was coming, and listened for a bell, was not guilty of negligence contributing to his injury by being thrown from the cart by the collision of a car with it from behind, where the only warning of the approaching car was given seven hundred feet away, after which the car approached with accelerated speed, which there was no attempt to slacken until within two or three car lengths of the wagon, when by reason of a defective appliance the driver was unable to stop

<sup>108</sup> Breary v. Traction Co., 5 Pa. Dist. R. 95; Thatcher v. Central Traction Co., 166 Pa. St. 66; s. c. 25 Pitts. L. J. (N. S.) 321; 36 W. N. C. 84; 30 Atl. Rep. 1048.

<sup>109</sup> Adolph v. Central Park &c. R. Co., 76 N. Y. 530 (Andrews, Earl, and Danforth, JJ., dissenting).

<sup>110</sup> Morrissey v. Bridgeport Traction Co., 68 Conn. 215; s. c. 35 Atl. Rep. 1126.

<sup>111</sup> Bush v. St. Joseph &c. R. Co., 113 Mich. 513; s. c. 4 Det. L. N. 377; 71 N. W. Rep. 851.

<sup>112</sup> Harper v. Philadelphia Trac-

tion Co., 175 Pa. St. 129; s. c. 38 W. N. C. 349; 34 Atl. Rep. 356.

<sup>113</sup> Camden &c. R. Co. v. Preston, 59 N. J. L. 264; s. c. 35 Atl. Rep. 1119. See also North Chicago St. R. Co. v. Zeiger, 78 Ill. App. 463.

<sup>114</sup> Arnesen v. Brooklyn &c. R. Co., 149 N. Y. 590; aff'g s. c. 61 N. Y. St. Rep. 324; 29 N. Y. Supp. 748; 9 Misc. 270. Much to the same effect, see Fishbach v. Steinway R. Co., 11 App. Div. 152; s. c. 42 N. Y. Supp. 883.



the car, but neither rang the bell, nor used an effective appliance which was at hand.<sup>115</sup>

§ 1455. **Driving or Walking along a Street Railway Track, Continued.**—It has been well reasoned that a person may lawfully drive along or upon the tracks of an electric street railway, but should not carelessly or willfully obstruct the cars; and that when one approaches he should turn off from the track so as to allow it to pass, and in a reasonable manner respect the paramount rights of the corporation; but that, on the other hand, the company must recognize his right and not carelessly run him down, but must give him the necessary time and a reasonable opportunity to move off from the tracks, and must allow him to pass.<sup>116</sup> The sound doctrine seems to be that the fact that the driver of a vehicle makes use of the tracks of a trolley company, so as unlawfully to obstruct the passage of a car thereon, will not preclude him from recovering damages for an injury received from it, which might have been avoided by the exercise of ordinary care on the part of those in control of it.<sup>117</sup> If the driver of a vehicle, driving along a horse railroad track, attempts to avoid a rapidly approaching car by turning off the track, but, being hindered by the sliding of his wheel in the groove of the rail, is struck by the car while being driven with unchecked speed,—this will plainly be evidence to be considered by a jury, both on the question of the negligence of the defendant and the contributory negligence of the plaintiff.<sup>118</sup> So, where a person driving a heavily loaded wagon on the track of an electric street railway company, saw a car approaching and attempted to leave the track, but was unable to do so on account of the slippery condition of the rails, and the motorman saw him endeavoring to leave the track, and perceived his difficulty in doing so, in time, by the exercise of reasonable exertion on the part of the motorman, to have

<sup>115</sup> *Abrahams v. Los Angeles Traction Co.*, 124 Cal. 411; s. c. 57 Pac. Rep. 216.

<sup>116</sup> *Bernhard v. Rochester R. Co.*, 68 Hun (N. Y.) 369; s. c. 51 N. Y. St. Rep. 880; 22 N. Y. Supp. 82. That it is not negligence *per se* for the driver of a *police patrol wagon* to drive along and upon the track of a street railway,—see *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179; s. c. 28 Pac. Rep. 829. That it is negligence to leave a crowd and drive over a street car track knowing that a car is about to start forward upon it: *Central Pass. R. Co. v. Chatterson* (Ky. Super. Ct.), 14

Ky. L. Rep. 663. Not negligence *per se* to drive one's team *along the side* of a street railway, although the space between the railway track and the wall on the margin of the street is so narrow that a horse gets frightened at a car coming at a high rate of speed, and runs into the car: *Gibbons v. Wilkesbarre & C. R. Co.*, 155 Pa. St. 279; s. c. 26 Atl. Rep. 417.

<sup>117</sup> *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577; s. c. 37 Atl. Rep. 135.

<sup>118</sup> *Lyman v. Union & C. R. Co.*, 114 Mass. 83.



stopped his car without a collision, but failed to do so,—it was held error to direct a verdict for the defendant.<sup>119</sup> But, on the contrary, where the driver of a wagon drove along with his wheels in one of the tracks of a street railway, although there was plenty of room outside, and although his view of an approaching car was unobstructed, and the driver proceeded upon the supposition that he would turn out and give the right of way, and, on discovering his failure to do so, used his best exertions to check his car and prevent a collision,—it was held that the jury were rightly instructed that the plaintiff could not recover if the accident was due to his own negligence, but that, notwithstanding the plaintiff's negligence, the driver of the defendant was bound to do what he reasonably could to prevent injuring him.<sup>120</sup> So, one who, while driving along the track of an electric railway, attempts to cross to a narrow passage on the other side of the track, constituting a temporary road around an excavation, without looking for the approach of a car which he knows is about to pass, with knowledge that it is a dangerous place, and undertakes to cross back when the car is within a few feet of his wagon,—is guilty of contributory negligence which will prevent his recovery, and if the motorman does all in his power to stop the car after seeing the danger, the railway company is not imputable with negligence.<sup>121</sup> It has been held that a woman, driving a gentle horse under perfect control, was guilty of contributory negligence as matter of law, in driving off the end of a culvert twenty one feet distant from a street railway track, without noticing where she was driving, upon approach of a street car which does not frighten the horse.<sup>122</sup> On the other hand, the mere failure of one driving along a street in which there is an electric street railway, to look for approaching cars, will not prevent a recovery for injuries sustained from his horse becoming frightened by an overtaking car, and springing to one side.<sup>123</sup>

§ 1456. **Duty of Traveller Driving on Track to Heed Signals.**—If a person driving in the street elects to use that portion of the street occupied by the tracks of a street railway, and fails so to exercise his faculties as to hear and heed the usual signal given by a car approaching him from behind, the same being sufficient to afford a warning to

<sup>119</sup> Will v. West Side R. Co., 84 Wis. 42; s. c. 54 N. W. Rep. 30.

<sup>120</sup> Glazebrook v. West End St. R. Co., 160 Mass. 239; s. c. 35 N. E. Rep. 553.

<sup>121</sup> Christensen v. Union Trunk Line, 6 Wash. 75; s. c. 32 Pac. Rep. 1018. Where a man, *marching in a procession*, is run into by a street

car, the same rule of contributory negligence applies as in the case of an ordinary traveller on the street: Brown v. Broadway & C. R. Co., 50 N. Y. Super. Ct. 106.

<sup>122</sup> Tasker v. Farmingdale, 91 Me. 521; s. c. 40 Atl. Rep. 544.

<sup>123</sup> Benjamin v. Holyoke St. R. Co., 160 Mass. 3; s. c. 35 N. E. Rep. 95.



one in his situation exercising reasonable care, so that before the driver, motorman, or gripman perceives that he does not hear the signal, there is not time to check his car and avoid injuring him,—he will not be allowed to recover damages.<sup>124</sup> In such a case the car driver, gripman, or motorman may fairly act on the assumption that the driver of the vehicle ahead of him will heed the signal and turn out of his way in time to avoid being injured, until the contrary becomes apparent. But, after the contrary becomes apparent, if he fails to make reasonable exertions toward checking or stopping his car the company will be responsible for the damages resulting from the collision, on a principle elsewhere explained.<sup>125</sup>

**§ 1457. Driver of Foot-Passenger on Street Railway Track Bound to Keep a Lookout Behind.**—One driving or walking along and upon a street railway track will not be exonerated from the charge of contributory negligence if he depends for his safety upon the duty of the driver, motorman, or gripman in charge of any car approaching in his rear, to give him the customary audible signals; but although, in order to control his team and avoid collisions with other teams and with foot-passengers, he may be required to keep his eyes in front of him, he will be obliged at the same time to crane his neck to the rear for the purpose of discovering whether some street car is approaching him, whose driver, gripman, or motorman is guilty of negligence in failing to sound the customary warning.<sup>126</sup> It seems that one who drives along a street railway track is not excused from the duty of looking back to watch the approach of a car behind him, by the fact that he is riding in a covered carriage so that he could not see if he looked back.<sup>127</sup> Nor, it seems, will he be excused from keeping a lookout for cars approaching from behind, by the fact that, before driving upon the track, he saw no car and had no reasonable ground to suppose that there would be a car which would find it necessary to pass along the track where he was driving.<sup>128</sup> But while the law is thus complacent toward street railway companies as against ordinary

<sup>124</sup> *Adolph v. Central Park & C. R. Co.*, 76 N. Y. 530; affirming s. c. 11 Jones & Sp. (N. Y.) 199; s. c. on former appeal 65 N. Y. 554; *Winter v. Crosstown St. R. Co.*, 8 Misc. (N. Y.) 362; s. c. 59 N. Y. St. Rep. 598; 28 N. Y. Supp. 695; *Seik v. Toledo & C. St. R. Co.*, 16 Ohio C. C. 393; 9 Ohio C. D. 51.

<sup>125</sup> *Ante*, § 1389; *post*, § 1601.

<sup>126</sup> *Adolph v. Central Park & C. R. Co.*, 76 N. Y. 530 (*Andrews, Earl, and Danforth, JJ.*, dissenting);

*Tirien v. St. Paul City R. Co.*, 70 Minn. 532; s. c. 73 N. W. Rep. 412; distinguishing *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551; *Hill v. Metropolitan St. R. Co.*, 62 N. Y. Supp. 596; s. c. 30 Misc. 440; *Bryant v. Metropolitan St. R. Co.*, 59 N. Y. Supp. 595.

<sup>127</sup> *Seik v. Toledo & C. St. R. Co.*, 9 Ohio C. D. 51; 16 Ohio C. C. 393.

<sup>128</sup> *Seik v. Toledo & C. St. R. Co.*, 9 Ohio C. D. 51; s. c. 16 Ohio C. C. 393.



travellers, it seems that it is more gracious toward "*wheelmen*;" for it has been held that one riding a *bicycle* upon the slot between the rails of a cable car track, is not, as a matter of law, bound to keep a lookout behind him, but has the right to expect the usual warning from a car approaching in his rear.<sup>129</sup>

§ 1458. **Injuries Received while Walking along a Street Railway Track.**—Looking at this question more especially with reference to pedestrians, it is to be observed that a person proceeding on foot has, in strictness, the right to use the whole highway from margin to margin, including the roadway between the sidewalks set apart especially for vehicles, and so much of the roadway as is appropriated by the tracks of the street railway company. At the same time, his proper passage-way is ordinarily the sidewalk. On the other hand, there may be times, especially after a fall of sleet, where his only safe passage-way will be the roadway, on which the glare ice is broken and beaten down by the hoofs of horses and the wheels of vehicles. But while he has, in legal strictness, the right to use any part of the highway for the purpose of passage, the roadway, and especially so much of the roadway as is occupied by street railway tracks, is not his proper place for the purpose of traversing the street lengthwise. If, therefore, he assumes, without special reason, to walk along a street railway track, he becomes a species of intruder; and while he may not be wantonly, or even negligently, run down by a street car without the company incurring liability,—yet the fact of his making a footway of a street railway track imposes upon him the obligation of especial care to the end of keeping out of the way of passing cars, and not impeding their progress and interrupting public travel. These views prepare us for decisions such as the following:—That a woman who, with the entire street open to her, walks on a street railway track, knowing that a car is coming behind her, and that she can not hear its approach, is guilty of such contributory negligence as will prevent a recovery for an injury;<sup>130</sup> that a man is guilty of contributory negligence in walking upon an electric street railway track without looking or listening for a car from one direction after leaving the curb, which is fourteen feet from the track;<sup>131</sup> that one who voluntarily walks *at night* on a street railroad track, with full knowledge that a car may come up behind him at any moment, can not recover damages for an injury, where,

<sup>129</sup> *Rooks v. Houston &c. R. Co.*, 10 App. Div. 98; s. c. 29 Chicago Leg. News 118; 41 N. Y. Supp. 824.

*Transit Co.*, 186 Pa. St. 193; s. c. 40 Atl. Rep. 322.

<sup>131</sup> *McGee v. Consolidated St. R. Co.*, 102 Mich. 107; s. c. 26 L. R. A. 300; 60 N. W. Rep. 293.



by the exercise of ordinary care, he can learn of the approach of the car, and the driver can not, by reasonable diligence, avoid the accident.<sup>132</sup> But the conduct of one who was a *little deaf* in walking along the track of an electric railway or on a space two feet wide between it and a side ditch, in the same direction in which the cars were running, *where there was no sidewalk or path*, was not deemed contributory negligence.<sup>133</sup> Another court condoned the conduct of a foot-traveller who was injured by being struck by an electric car while walking in the only path intended for foot-travellers, and in which it was customary for people to walk, near the railroad tracks, where the night was dark and he had taken precaution to look back for approaching cars, and who, when struck, was from two hundred to three hundred feet from where he last looked back, and the car was running at the rate of *twenty or twenty-five miles an hour* at the time of the accident, with *only a small kerosene lamp for a headlight*.<sup>134</sup>

§ 1459. **Driving Too Near Street Railway Track.**—Since it is *not negligence per se* to drive upon the track of a street railway company, for stronger reasons it is *not negligence per se* to drive along the public street *by the side of the track*; though it may be *negligence in fact*, according to the view of the jury, if the driver of the vehicle places himself in such a position as to be injured or run over by a street car.<sup>135</sup> If both the driver of the vehicle and the driver of the street car miscalculate the distance between them, whereby a collision results, then they are equally in fault, and the plaintiff can not recover.<sup>136</sup> If the owner of a private vehicle sees fit, in a case of danger, to take his chances as to *passing between an approaching street car and a wagon* standing beside the curbstone, he does so at his peril. The driver of a street car is not entitled to make such an experiment;<sup>137</sup> neither should the private individual be.<sup>138</sup> When a vehicle and a railway car are going side by side in the same direction, with a clear space of nearly two feet between them, in case of a collision, the presumption of negligence is altogether against the driver of the cart,

<sup>132</sup> *Smith v. Crescent City R. Co.*, 47 La. An. 833; s. c. 17 So. Rep. 302.

<sup>133</sup> *Buttelli v. Jersey City & C. Electric R. Co.*, 59 N. J. L. 302; s. c. 2 Chic. L. J. Wkly. 202; 36 Atl. Rep. 700.

<sup>134</sup> *Carlson v. Lynn & C. R. Co.*, 172 Mass. 388; s. c. 5 Am. Neg. Rep. 365; 52 N. E. Rep. 520. See also *McQuade v. Metropolitan St. R. Co.*, 17 Misc. 154.

<sup>135</sup> *Brooks v. Lincoln St. R. Co.*,

22 Neb. 816; s. c. 36 N. W. Rep. 529; *Le Blanc v. Lowell & C. St. R. Co.*, 170 Mass. 564; s. c. 49 N. E. Rep. 279.

<sup>136</sup> *Spaulding v. Jarvis*, 32 Hun (N. Y.) 621.

<sup>137</sup> *Albert v. Bleecker St. R. Co.*, 2 Daly (N. Y.) 389.

<sup>138</sup> *Barker v. Hudson & C. R. Co.*, 4 Daly (N. Y.) 274; *Mercier v. New Orleans & C. R. Co.*, 23 La. An. 264.



and not against that of the car; for the reason that the former can deviate from the track, while the latter can not.<sup>139</sup>

§ 1460. **Walking Too Near Street Railway Track.**—Since, as already seen,<sup>140</sup> the general travelling public have the right to use that part of the street which is occupied by the tracks of a street car company, they are not necessarily chargeable with negligence for so doing. It follows, for stronger reasons, that negligence is not imputable, as matter of law, to a foot-passenger from the mere fact of his walking so near the tracks of a street railway as to be endangered by coming into collision with the cars running thereon. But, plainly, such an act may in particular cases, and under particular circumstances, be such contributory negligence as will preclude a recovery of damages. When, therefore, the driver of a wagon about to cross a street railway where the track rounded a corner, miscalculating the distance of a car which was in the act of rounding the corner, went too near it, and was struck by the handle upon its rear dasher, and the car was not negligently managed, and there was no defect in its equipment or in the track,—it was held that there was no evidence of negligence to go to a jury.<sup>141</sup> Another court has held that where a woman, for convenience in walking, negligently and without looking for approaching cars, entered a passage only wide enough for cars to pass, through a snowdrift, with vertical walls or banks on each side, and was struck while standing between the track and wall to allow the cars to pass, she could not recover for the injuries received.<sup>142</sup>

§ 1461. **Contributory Negligence where Cars Approach Each Other on Parallel Tracks.**<sup>143</sup>—This is such a frequent source of accident, that where a person leaving one car *as a passenger* incurs the risk of stepping on the other parallel track in front of another car coming in the opposite direction, the duty of the conductor upon the car which

<sup>139</sup> *Suydam v. Grand St. & C. R. Co.*, 41 Barb. (N. Y.) 375; s. c. 17 Abb. Pr. (N. Y.) 304.

<sup>140</sup> *Ante*, § 1374, *et seq.*

<sup>141</sup> *Widmer v. West End St. R. Co.*, 158 Mass. 49; s. c. 32 N. E. Rep. 899.

<sup>142</sup> *Warner v. People's St. R. Co.*, 141 Pa. St. 615; s. c. 21 Atl. Rep. 737; 28 W. N. C. 3; 48 Phila. Leg. Int. 338; 22 Pitts. L. J. (N. S.) 68. The decision proceeds upon the ground of the paramount right of the street railway company to the use of its track, as against foot-passengers, and that it was not to be

deprived of this right by the fact of having, by throwing aside the snow, made its track more convenient for footmen than it otherwise would have been. It ignores the principle that, although a foot-passenger may expose himself to danger on a railroad track, the railroad company can not justify running him down if it can avoid the catastrophe by the exercise of ordinary care: *Ante*, §§ 1382, 1388.

<sup>143</sup> Compare §§ 1430, 1431, 1626, 1651, 1652, where this section is referred to.



he is leaving, to give him warning of the particular danger, is obvious; since nothing less can discharge the high degree of care which the law imposes upon carriers of passengers. But we are now dealing with cases where persons in the ordinary use of the street as drivers of vehicles, riders of bicycles, or foot-passengers, are injured in this way; and it is to be regretted that, notwithstanding the great liability to mistakes of judgment incident to the confusion of noises which exists when two cars approach each other on parallel tracks, the courts seem less tolerant of contributory negligence in this situation than in any other. It is contributory negligence, as matter of law, to attempt to cross a street railway track immediately behind a car which has just passed, without looking to see whether any car is approaching on the further track;<sup>144</sup> for a pedestrian to leave the sidewalk without looking for cable trains going in one direction, and, passing behind a car going in the other direction, to step immediately in front of a train on the far track;<sup>145</sup> for a woman of mature years, familiar with the surroundings at a street railway crossing, to go behind a passing car upon one of two parallel tracks and get struck by a car approaching from the opposite direction, the tracks being five feet apart and there being no obstacle to prevent her from seeing the car which struck her, if she had looked for it after the first car passed;<sup>146</sup> to pass hurriedly around the rear end of an electric car from which the person has just alighted, without looking or listening to find out whether a car is approaching on the other track;<sup>147</sup> for one intending to enter a street car, who sees a car approaching on the parallel track fifty or seventy-five feet away at the rate of about five miles an hour, to fail to keep off that track;<sup>148</sup> to attempt to cross a street railway track, at a point other than a crossing, immediately behind a moving car on the track nearest to him, so as not to be able to see a car approaching from the opposite direction on the parallel track;<sup>149</sup> to make a similar attempt without looking for a car coming in the other direction;<sup>150</sup> for

<sup>144</sup> *Blaney v. Electric Traction Co.*, 184 Pa. St. 524; s. c. 41 W. N. C. 555; 39 Atl. Rep. 294.

<sup>145</sup> *Thorsell v. Chicago City R. Co.*, 82 Ill. App. 375.

<sup>146</sup> *McCarthy v. Detroit &c. St. R. Co.* (Mich.), 79 N. W. Rep. 631.

<sup>147</sup> *Smith v. City &c. R. Co.*, 29 Ore. 539; s. c. 46 Pac. Rep. 136; 5 Am. & Eng. Rail. Cas. (N. S.) 163; rehearing denied in 29 Ore. 546; s. c. 46 Pac. Rep. 780; *Baltimore Traction Co. v. Helms*, 84 Md. 515; s. c. 36 L. R. A. 215; 36 Atl. Rep. 119; *Stowers v. Citizens' St. R. Co.*, 21 Ind. App. 434; s. c. 1 Repr. 559; 52

N. E. Rep. 710. For a similar accident in the *night-time*, where the questions of negligence and contributory negligence were held questions for the jury, see *Dobert v. Troy &c. R. Co.*, 91 Hun (N. Y.) 28; s. c. 36 N. Y. Supp. 105; 71 N. Y. St. Rep. 392.

<sup>148</sup> *Davenport v. Brooklyn &c. R. Co.*, 100 N. Y. 632; s. c. 1 Cent. Rep. 506.

<sup>149</sup> *Greengard v. St. Paul &c. R. Co.*, 72 Minn. 181; s. c. 75 N. W. Rep. 221.

<sup>150</sup> *Burgess v. Salt Lake &c. R. Co.*, 17 Utah 406; s. c. 53 Pac. Rep. 1013.



one who, after seeing two cars approaching each other from opposite directions on the parallel tracks, to undertake to cross both tracks at a point between the two cars, not at a crossing;<sup>151</sup> for one driving along a street railway track with which he is familiar, after seeing a car ahead of him waiting on a side track for another car coming in the opposite direction from behind, to turn across the track in the middle of a block without looking or listening for the approaching car;<sup>152</sup> for one to attempt to cross a street railway at a crossing, when a car is so near him as barely to afford time for him to avoid it, who is struck by another car approaching on the parallel track from the opposite direction, so near that prudence would have dictated that he should not attempt to cross in front of it, even in the absence of the other car;<sup>153</sup> for a woman standing between the double tracks of a street railway, where there is sufficient room to insure her safety from cars passing in either direction, intent on observing a car coming from one direction, to step back in front of another car coming from the opposite direction only ten or fifteen feet away, after observing it;<sup>154</sup> for one, without taking ordinary precautions for his own safety, to attempt to drive across an electric railway track in front of a rapidly approaching car, and, on finding that he is unable to do so, to attempt to turn in the direction in which the car is going, but who, because of the slipping of his horse, collides with the car coming from the opposite direction, and is thrust from his wagon under the first car;<sup>155</sup> and also under the facts of another case which is noted in the margin.<sup>156</sup> The true theory of most of these cases is that there is no negligence in either party, but the accident is to be ascribed to the mere misfortune or misadventure of the person injured.

§ 1462. **Circumstances under which it was not Contributory Negligence to Leave one Track and Encounter a Car Coming on Another.**<sup>157</sup>—Several judicial decisions, more or less contradictory to those collected in the preceding section, hold that it is not contributory negligence as matter of law to drive at dusk upon a horse railway

<sup>151</sup> *Meyer v. Pittsburgh &c. Traction Co.*, 189 Pa. St. 414; s. c. 42 Atl. Rep. 41.

<sup>152</sup> *Davidson v. Denver Tramway Co.*, 4 Colo. App. 283; s. c. 35 Pac. Rep. 920.

<sup>153</sup> *Hurdle v. Washington &c. R. Co.*, 8 App. D. C. 120; s. c. 24 Wash. L. Rep. 132.

<sup>154</sup> *Bailey v. Market St. &c. R. Co.*, 110 Cal. 320; s. c. 42 Pac. Rep. 914.

<sup>156</sup> *Graff v. Detroit &c. St. R. Co.*,

109 Mich. 77; s. c. 3 Det. L. N. 12; 67 N. W. Rep. 815; 5 Am. & Eng. R. Cas. (N. S.) 447.

<sup>155</sup> *Boston &c. Express Co. v. Metropolitan St. R. Co.*, 14 Misc. (N. Y.) 25; s. c. 35 N. Y. Supp. 134; 69 N. Y. St. Rep. 378; rehearing denied 14 Misc. (N. Y.) 571; s. c. 35 N. Y. Supp. 1103.

<sup>157</sup> Compare §§ 1430, 1431, 1626, 1651, where this section is referred to.



track immediately after a car has passed in one direction which hides the view of a car approaching on the parallel track;<sup>158</sup> nor for a foot-passenger to take an exposed position on a cross-walk between two lines of track, with the intention of boarding an approaching car, where he is struck by one proceeding from the opposite direction, when the failure of the defendant's motorman to check the speed of his car on nearing the crossing is the proximate cause of the accident;<sup>159</sup> nor for a woman to pass around the rear end of a street car from which she has just alighted, for the purpose of crossing the street, although, in so doing she goes upon the other track in front of another car, which strikes her before she gets across;<sup>160</sup> nor for a driver proceeding easterly, to turn upon the west bound track of an electric railway in order to avoid cars approaching on the east bound track, where the space between the east bound track and the curbstone is occupied by a standing wagon;<sup>161</sup> nor for the same driver to turn upon the west bound track where the necessity for so doing continues, until such time as it becomes dangerous by reason of an approaching car upon that track;<sup>162</sup> nor for one attempting to cross a street upon which there are two street railway tracks, to *step back* upon a street car track in front of an approaching car which he has not seen, although he looked along the track just before leaving the sidewalk, to avoid a car upon the other track, by which he was unexpectedly confronted;<sup>163</sup> nor for one who is prevented from driving further on a right-hand track of an electric railway because of an iron manhole, and who can not drive to the right because that side of the street is blocked with wagons, to turn to the left across the other track, although there is a car approaching some distance away;<sup>164</sup> nor for one driving on a street car track to turn upon the parallel track for the purpose of passing a covered wagon in front of him, while a car is approaching thereon one hundred and twenty-five feet away, which he has been unable to see or hear, where he listens before driving

<sup>158</sup> *Thoresen v. La Crosse City R. Co.*, 94 Wis. 129; s. c. 6 Am. & Eng. Rail. Cas. (N. S.) 101; s. c. 68 N. W. Rep. 548. Compare *post*, §§ 1479, 1480.

<sup>159</sup> *Boentgen v. New York & C. R. Co.*, 36 App. Div. 460; s. c. 5 Am. Neg. Rep. 421; 55 N. Y. Supp. 847; rev'g 50 N. Y. Supp. 331.

<sup>160</sup> *Wallen v. North Chicago R. Co.*, 82 Ill. App. 103. Compare *West Chicago St. R. Co. v. Shiplett*, 85 Ill. App. 683 (plaintiff knocked down by defendant's horse approaching on a parallel track at a trot).

<sup>161</sup> *Murphy v. Nassau Elec. R. Co.*, 19 App. Div. 583; s. c. 46 N. Y. Supp. 283.

<sup>162</sup> *Murphy v. Nassau & C. Elec. R. Co.*, 19 App. Div. 583; s. c. 46 N. Y. Supp. 283.

<sup>163</sup> *McCormick v. Brooklyn City R. Co.*, 150 N. Y. 584; aff'g s. c. 10 Misc. (N. Y.) 8; s. c. 62 N. Y. St. Rep. 647; 30 N. Y. Supp. 529.

<sup>164</sup> *Lenkner v. Citizens' Traction Co.*, 179 Pa. St. 486; s. c. 36 Atl. Rep. 228; 28 Pitts. L. J. (N. S.) 11.



out.<sup>165</sup> The Supreme Court of New Jersey has been liberal in favor of the rights of ordinary drivers, by holding that one driving a horse and vehicle on a street which is traversed by parallel electric railway tracks has the right to use the tracks upon which such cars are propelled whenever the necessary or customary use of the street requires or permits him to do so; and it is not contributory negligence *per se* for him to turn from one track into and upon the other track, to allow a car to pass, if, in so doing, or in endeavoring to turn back again, he is struck by a car running upon the other track; and the fact that he *turns to the left* to allow the car to pass is not of itself contributory negligence.<sup>166</sup> The view is that such conduct may or may not be negligence according to the facts and exigencies of the particular case, and that, as there is no rule of law speaking precisely on such a question, it is more fit to be decided by twelve men according to their common experience than by the single judicial scholar on the bench. It can not escape attention, however, that drivers upon the streets of cities which are traversed by parallel street railway tracks, either know or ought to be held bound to know that they are liable to encounter cars coming in both directions, and that to drive so near behind one car as to be unable to see the approach of a car coming in an opposite direction on the other track, is of itself negligence, on the principle, already considered,<sup>167</sup> that one who voluntarily and unnecessarily places himself in a position from which he can not see an approaching car, is liable precisely as though, having been able to see it, he had not looked, or, having seen it, he had taken no heed of it. In such a case one who turns upon the parallel track and is struck by the car coming in the opposite direction, ought not ordinarily to be allowed to recover damages, unless time enough supervenes after he emerged upon that track for the motorman of the other car to check speed and avoid injuring him; otherwise the law permits his own folly and rashness to be made the ground of his recovering damages from an innocent party.

**§ 1463. Contributory Negligence of Persons Working on the Streets.**—Quite a number of judicial decisions can be collected to the effect that men working upon that part of the public street which is traversed by a street railway, whose attention is necessarily concentrated upon their work, and who can not at the same time and continuously keep their eyes upon their work, and upon the watch for approaching cars, are as much bound to exercise their faculties to avoid injury from a street car as is an ordinary traveller.<sup>168</sup> And if

<sup>165</sup> *Schron v. Staten Island Elec. R. Co.*, 16 App. Div. 111; s. c. 45 N. Y. Supp. 124.

<sup>166</sup> *State v. Reeves*, 58 N. J. L. 573; s. c. 34 Atl. Rep. 128.

<sup>167</sup> Vol. I, § 194, *et seq.*

<sup>168</sup> *Young v. Citizens' St. R. Co.*, 148 Ind. 54; s. c. 47 N. E. Rep. 142; rehearing denied in 44 N. E. Rep. 927.



they fail to see or hear the approach of a car and to exercise ordinary care and prudence in getting out of its way, they will be precluded from recovering damages for being run over, on the ground of being guilty of contributory negligence,<sup>169</sup> although the person driving the car failed to give the customary warning by ringing the bell or sounding the gong;<sup>170</sup> or where, the track being in plain sight for a long distance, although the signals were given, the workman could not hear them because he was deaf.<sup>171</sup> These decisions fail to make a just balance of the relative position of the parties to such an accident. They fail to take into consideration the fact that the street railway company is driving the instrument of danger; that such accidents almost always take place during working hours in broad daylight; that the fact that gangs of men are at work at particular places on the track is generally known to those in charge of the cars; that it is the obvious duty of the driver, gripman, or motorman in such a case to get his car well in hand upon approaching workmen in front of him on the track, to slacken speed, to sound the customary warnings and repeat them as often as necessary, and to avoid making the inattention of men absorbed in their work a justification for running upon them and killing them. Decisions of the kind above mentioned discredit the judges who render them, and form a distinct blot upon American jurisprudence. Public justice is better satisfied in most cases if the question of contributory negligence is left under all the facts of the case to the jury. With this just conception of the relative position of the parties to such an accident, it has been held that a person engaged in superintending the unloading of material from a wagon, which is standing by the side of a street railway track, is not, as a matter of law, guilty of contributory negligence precluding a recovery for injuries received by being struck by a car which approached without warning, in standing partly upon the track with his back toward the car and without looking behind him, although he knew of the danger, where it was necessary for him to assume such a position in directing the work.<sup>172</sup> A similar conclusion was reached with respect to a street paver, employed to pour hot tar into the cracks between the paving stones, which tar had to be poured into the cracks when very hot, and the duty of the person being such that he had to get his head down within two

<sup>169</sup> *McKeown v. Cincinnati St. R. Co.*, 2 Ohio Leg. News 388; *McKelvey v. Twenty-third St. R. Co.*, 5 Misc. (N. Y.) 424; s. c. 26 N. Y. Supp. 711.

676; *McKeown v. Cincinnati St. R. Co.*, 2 Ohio Leg. News 388.

<sup>171</sup> *Lyons v. Bay Cities & C. R. Co.*, 115 Mich. 114; s. c. 4 Det. L. N. 797; 73 N. W. Rep. 139.

<sup>170</sup> *Eddy v. Cedar Rapids & C. R. Co.*, 98 Iowa 626; s. c. 67 N. W. Rep.

<sup>172</sup> *Davis v. People's R. Co.*, 67 Mo. App. 598.



feet of the tracks in order to see that the tar entered the cracks and did not overflow them; although if he had kept his eyes at the same time along the track and upon his work, he could have seen for fifteen hundred feet the approach of the car which ran upon him.<sup>173</sup> But it has been held, with some reason, that one engaged at *sweeping a cross-walk* which was intersected by parallel street railway tracks, who, when warned of an approaching car by a policeman, steps backward without looking, so that he is struck by a car on another track, is precluded by his own want of care from recovering damages against the street railway company.<sup>174</sup>

§ 1464. **Running over Drunken Persons.**<sup>175</sup>—The general rule is that a person who *voluntarily disables himself by the use of intoxicants* so that he can not care for his own safety is imputable with contributory negligence, and if the incapacity thereby produced contributes directly to his being run over by a street car, he can not recover damages.<sup>176</sup> In such a case, it has been held error, in an appropriate state of the evidence, to refuse to instruct the jury that if they should believe that the deceased was intoxicated, and would not have been injured if he had been sober, the plaintiff could not recover.<sup>177</sup> But, as elsewhere seen,<sup>178</sup> this doctrine must always be taken with the qualification, often overlooked by the judges, but nevertheless well founded both in principle and authority, that a man is not to be carelessly or wantonly run over, because, by his own fault, he has exposed himself to danger on that part of the highway occupied by a street railway company. He is not a trespasser, and he is not doing anything which endangers them, but they are driving the instrument of danger, and are consequently under the obligation to keep a vigilant lookout to the end of not injuring persons on the highway.<sup>179</sup> If, therefore, they run upon him when they see him in his exposed condition, or when by the keeping of a reasonably vigilant lookout they might have seen him, in time to avert the injury by the exercise of reasonable care in giving him warning or in checking or stopping their car, and fail to do it, they are liable in damages.<sup>180</sup>

<sup>173</sup> *Lewis v. Binghamton R. Co.*, 35 App. Div. 12; s. c. 57 N. Y. Supp. 452. Not contributory negligence as matter of law to attempt to remove a plank, one end of which was on the track, while a car was approaching,—especially where the car had stopped some distance away and he did not know that it was moving toward him: *Morrissey v. Westchester R. Co.*, 18 App. Div. 67; s. c. 45 N. Y. Supp. 444.

<sup>174</sup> *Daly v. Detroit &c. St. R. Co.*, 105 Mich. 193; s. c. 2 Det. L. N. 61; 63 N. W. Rep. 73.

<sup>175</sup> This section is cited in § 1660.

<sup>176</sup> Vol. I, §§ 340, 341; *Chicago City R. Co. v. Lewis*, 5 Ill. App. 242.

<sup>177</sup> *Bradley v. Second Ave. R. Co.*, 8 Daly (N. Y.) 289.

<sup>178</sup> Vol. I, § 230, *et seq.*, especially § 246.

<sup>179</sup> *Ante*, § 1382, *et seq.*

<sup>180</sup> Vol. I, § 236.



Ignoring this principle, it has been held that where a pedestrian, in the night-time, overcome by the influence of liquor, falls, in a drunken stupor, upon the track of a street railway company, and is afterwards run over and killed by a passing car, the representative of the deceased can not recover damages for the killing, unless the driver of the car, *after the deceased was discovered*, could, by the exercise of reasonable care and prudence, have prevented the accident.<sup>181</sup> One who is somewhat intoxicated, but able to walk, is not, as matter of law, guilty of contributory negligence in attempting to cross a street railway track in front of a cable car which is *standing still* on the track when he steps upon it.<sup>182</sup>

§ 1465. **Running over Blind, Deaf, and Aged Persons.**<sup>183</sup>—A man whose eyesight and hearing are impaired is not, for that reason, as a matter of law, guilty of negligence in attempting to cross a street railway track while unattended.<sup>184</sup> If a person is deaf, so that his sense of hearing will not admonish him of the approach of a car, he is obviously for that reason alone the more bound to make use of his eyesight; and if he fails to do so, and in consequence of such failure is run over by an approaching car which he could have seen if he had looked, he can not recover damages.<sup>185</sup>

§ 1466. **Leaving Teams Standing in the Vicinity of Street Railway Tracks.**<sup>186</sup>—If we take as a premise the conceded doctrine that the public have a right to use that part of the public street occupied by the tracks of a street railway company, in common with the rest of the street, and that it is the duty of the company through its agents and servants, to exercise such watchful care as may prevent accidents

<sup>181</sup> Button v. Hudson &c. R. Co., 18 N. Y. 248.

<sup>182</sup> West Chicago St. R. Co. v. Ransstead, 70 Ill. App. 111; s. c. 2 Chic. L. J. Wkly. 271.

<sup>183</sup> This section is cited in § 1658.

<sup>184</sup> Robbins v. Springfield Street R. Co., 165 Mass. 30; s. c. 42 N. E. Rep. 334. Compare *post* § 1617, *et seq.*

<sup>185</sup> Hall v. West End St. R. Co., 168 Mass. 461; s. c. 47 N. E. Rep. 124. An instruction that the plaintiff's deafness could not lessen the degree of care required of him, and that notwithstanding such deafness he was bound to exercise the same caution which every prudent man would exercise under the same or similar circumstances, was not deemed subject to the criticism that

he was not required to use more care than a man who could hear, but the same degree is required of him: Atlanta &c. St. R. Co. v. Bates, 103 Ga. 333; s. c. 30 S. E. Rep. 41. It has been held that a woman seventy-two years old is not, as a matter of law, guilty of contributory negligence in attempting to cross a street railway track in front of an approaching car which is from ninety to one hundred feet distant at the time she steps upon the track upon which the car was running: Walls v. Rochester R. Co., 154 N. Y. 771; *aff'd* s. c. 92 Hun (N. Y.) 581; 72 N. Y. St. Rep. 250; 36 N. Y. Supp. 1102.

<sup>186</sup> This section is cited in § 1479.



or injury to persons who may thus find themselves in front of their cars upon their tracks,—if we regard the doctrine of the leading case of *Davis v. Mann*<sup>187</sup> as sound law,—we must conclude that, although the owner of a team and vehicle may leave it exposed to danger on the tracks of a street railway company, this does not justify them in driving their cars upon it, if they can avoid such a result by the exercise of that reasonable care which the law puts upon them in exercising their license or franchise in using the highway for the purpose of gain. Nevertheless, we find decisions to the following effect:—That one who leaves a horse and wagon unguarded upon the track of an electric street railway, in a narrow and unlighted alley, on a dark night, is precluded by his contributory negligence from recovering damages in case the servants of the railway company drive one of their cars upon the horse and wagon, although they are also negligent;<sup>188</sup> that the driver of a wagon who, in unloading a safe therefrom, unnecessarily places his horses squarely across the track of an electric railway, on a dark night, at a point where there is a descending grade, whereby his horses are injured by a passing car, is precluded from recovering damages, for a like reason;<sup>189</sup> that the owner of a horse who leaves it in a village street unattended and not securely hitched, in violation of an ordinance, will not be able to recover damages in case a street car collides with the wagon;<sup>190</sup> that the owner of a horse and wagon who leaves it unhitched in a city street, ought not to recover damages for an injury caused by the sudden backing of the wagon into a street car.<sup>191</sup> But if, in such a case, both the driver of a wagon and the driver of a street car *miscalculate the distance* between the car and the wagon, so that the driver of the wagon, while unloading coal therefrom, is struck by the car and injured, there can be no recovery; since both are equally negligent, or both make an equal *mistake of judgment*.<sup>192</sup> Moreover, the mere fact that a milkman stands his wagon temporarily so as to obstruct the passage of a street car, in contravention of a city ordinance which provides that street cars “shall

<sup>187</sup> 10 Mees. & W. 546; s. c. 6 Jur. 954; 12 L. J. (Exch.) 10; 2 Thomp. Neg., 1st ed., 1105. See Vol. I, § 235, *et seq.*

<sup>188</sup> *Gilmore v. Federal Street & C. R. Co.*, 153 Pa. St. 31; s. c. 31 W. N. C. 507; 23 Pitts. L. J. (N. S.) 438; 25 Atl. Rep. 651.

<sup>189</sup> *Winter v. Federal Street & C. R. Co.*, 153 Pa. St. 26; s. c. 19 L. R. A. 232; 31 W. N. C. 565; 23 Pitts. L. J. (N. S.) 302; 25 Atl. Rep. 1028.

<sup>190</sup> *McCambley v. Staten Island & C. R. Co.*, 32 App. Div. 346; s. c. 52 N. Y. Supp. 849.

<sup>191</sup> *Higgins v. Wilmington City & C. R. Co.*, 1 Marv. (Del.) 352; s. c. 41 Atl. Rep. 86. Circumstances under which a driver whose carriage was standing between the curb and a street car track, the space being narrow, was not imputable with contributory negligence: *Tarler v. Metropolitan St. R. Co.*, 21 Misc. (N. Y.) 684; s. c. 47 N. Y. Supp. 1090.

<sup>192</sup> *McKelvey v. Twenty-third Street R. Co.*, 5 Misc. (N. Y.) 424; s. c. 26 N. Y. Supp. 711. Compare *ante*, § 1381, *et seq.*



at all times be entitled to the track, and any vehicles upon the track shall turn out when any cars come up, so as to leave the track unobstructed" under penalty of a fine,—does not authorize the street railway company negligently to run its car against his wagon.<sup>193</sup>

§ 1467. **No Duty on the Part of the Traveller to "Turn to the Right."**<sup>194</sup>—"The law of the road" as it is called, whether existing in the common law or declared by statute, has no application to the meeting of street railroad cars and common vehicles. The former, running in a grooved track, can turn neither to the right nor left; therefore the person driving the ordinary vehicle may turn to the right or left without being in the wrong with reference to the street railway company,<sup>195</sup> and it is his duty to turn either way, accordingly as he may best avoid a collision.<sup>196</sup>

§ 1468. **Contributory Negligence of Bicyclist.**—"Wheelmen" generally do the hurting; but sometimes they get hurt, and then the question of their contributory negligence arises. The fact that a man is a "wheelman" and often runs over others does not put him outside the protection of the law in case he gets run over himself. The mere fact that he attempts to ride on his wheel on a city street will not prevent him from recovering damages from a street railway company whose car runs over him without warning.<sup>197</sup> But if, while riding between the parallel tracks of a street railway, he suddenly turns in front of a car which has signaled its approach by sounding the gong, and succeeds in getting killed, no damages can be recovered from the street railway company because of his death.<sup>198</sup> "Wheelmen" are notoriously better able to keep out of the way of street cars than are foot-passengers or the drivers of vehicles. They have a right, in common with the rest of the public, to use that portion of the street which is occupied by tracks of a street railway; but, in so doing, they are under

<sup>193</sup> *Laethem v. Ft. Wayne &c. R. Co.*, 100 Mich. 297; s. c. 58 N. W. Rep. 996. So, where the plaintiff left his horse untied and unattended on a dark, stormy night in a narrow space between a street railway track and the street gutter, where a car with a headlight was liable to approach at any minute at a rapid speed: *Hoffman v. Syracuse &c. R. Co.*, 63 N. Y. Supp. 442; s. c. 50 App. Div. 83.

<sup>194</sup> Compare § 1479, where this section is referred to.

<sup>195</sup> *Hegan v. Eighth Avenue R. Co.*, 15 N. Y. 380.

<sup>196</sup> *Spurrier v. Front Street Cable R. Co.*, 3 Wash. 659; s. c. 29 Pac. Rep. 346. A statutory provision (Mass. Pub. Stat., chap. 93, §§ 1, 2), requiring persons travelling in vehicles to *turn to the right* on meeting, has no application to a collision with a *railroad train*: *Conaty v. New York &c. R. Co.*, 164 Mass. 572; s. c. 42 N. E. Rep. 103.

<sup>197</sup> *Louisville R. Co. v. Blaydes* (Ky.), 51 S. W. Rep. 820 (not to be off. rep.).

<sup>198</sup> *Gagne v. Minneapolis St. R. Co.* (Minn.), 79 N. W. Rep. 671.



the same obligation to look out for and to endeavor to avoid danger from the street cars, which rests upon other people.<sup>199</sup> Contributory negligence has been ascribed to an expert bicyclist who, familiar with the street, emerged from behind a street car just in time to be struck by another car which was coming around a curve in the opposite direction;<sup>200</sup> and to another who continued to ride on an electric railway track up to the very moment when he was struck, when, by the slightest care or effort on his part, he could have put himself out of danger.<sup>201</sup> So, where a "wheelman," attempting to cross a street railway track, rode upon the track without looking for an approaching car, which he could have seen if he had looked, in time to have avoided it, his contributory negligence precluded a recovery of damages, although the car was running at an excessive speed and without sounding its gong.<sup>202</sup>

§ 1469. **Plaintiff Injured while Violating the Law.**—It has been held that an employé of a telegraph company which has not obtained a license for running its wires, who is injured while climbing a pole to attach a wire, by a horse car running against the wire and dragging him from the pole, can not recover, unless the driver is guilty of wanton recklessness.<sup>203</sup> The view of the court was that in carrying the wire, looped across the street attached to his person, with his back to the street, and so that if the wire was struck he would be pulled from the pole which he was climbing,—the plaintiff was not only doing an unlawful act, but doing it in a manner peculiarly dangerous to himself. The court added: "What the plaintiff was doing was not simply a condition; it was a directly contributory cause of his injury. The car was lawfully passing upon the street, and could not continue its course without striking the wire. The driver of the car, when he saw the wire, had no right to drive on without care or concern for the consequences; but the defendant was not liable to the plaintiff for mere error of judgment on the part of the driver of the car."<sup>204</sup> But the mere fact that a person in the use of the street is proceeding in violation of a statute or city ordinance does not, of course, justify the street railway company in running upon him; but it is its duty to avoid a collision with him, and to seek a legal remedy,

<sup>199</sup> *Everett v. Los Angeles &c. Elec. R. Co.*, 115 Cal. 105; s. c. 34 L. R. A. 350; 43 Pac. Rep. 207, 210; aff'd 46 Pac. Rep. 889.

<sup>200</sup> *Cardonner v. Metropolitan St. R. Co.*, 38 App. Div. 597; s. c. 56 N. Y. Supp. 500.

<sup>201</sup> *Everett v. Los Angeles &c. R. Co.*, 115 Cal. 105; s. c. 34 L. R. A.

350; 43 Pac. Rep. 207, 210; aff'd 46 Pac. Rep. 889.

<sup>202</sup> *Bennett v. Detroit &c. St. R. Co. (Mich.)*, 82 N. W. Rep. 518.

<sup>203</sup> *Banks v. Highland St. R. Co.*, 136 Mass. 485.

<sup>204</sup> *Trask v. Old Colony R. Co.*, 156 Mass. 298; s. c. 31 N. E. Rep. 6.



if it desires to do so, for his violating the statute or ordinance. For example, although there may be a city ordinance obliging ordinary travellers to yield the right of way to the street car, under a penalty,—yet this will not justify the street railway company in running a traveller down who proceeds in disobedience to the ordinance, where such a result can be avoided by the exercise of reasonable care.<sup>205</sup>

**§ 1470. Turning a Vehicle Suddenly in Front of a Moving Car.**<sup>206</sup>—It is contributory negligence, as matter of law, for the driver of a vehicle to turn suddenly across a street car track in front of a moving car, without assuring himself whether a car is coming,<sup>207</sup> when the car is so close upon him that a collision can not be avoided except by extremely prompt action on the part of the motorman,<sup>208</sup> or notwithstanding such action.<sup>209</sup> Rashness is more evident, and contributory negligence is more flagrant, where a driver, after seeing a car approaching, attempts, without any necessity therefor, to hurry his team across the track in front of it.<sup>210</sup> But there are circumstances (or at least courts) which excuse such attempts,—as where a driver hauling dirt from a cellar which is being excavated on the side of a street, turns into the street at a point sixty-five feet distant from the point where the street railway track curves into the street, and no car is in sight at the time.<sup>211</sup>

<sup>205</sup> *Rend v. Chicago &c. R. Co.*, 8 Ill. App. 517. See also *Laethem v. Ft. Wayne &c. R. Co.*, 100 Mich. 279; s. c. 58 N. W. Rep. 996. Compare *post*, § 1631.

<sup>206</sup> This section is cited in § 1669. Compare *post*, § 1666.

<sup>207</sup> *Fritz v. Detroit &c. St. R. Co.*, 105 Mich. 50; s. c. 2 Det. L. N. 19; 62 N. W. Rep. 1007; *South Covington &c. R. Co. v. Enslen*, 18 Ky. L. Rep. 921; s. c. 38 S. W. Rep. 850 (no off. rep.); *Winch v. Third Ave. R. Co.*, 12 Misc. (N. Y.) 403; s. c. 67 N. Y. St. Rep. 322; 33 N. Y. Supp. 615; *Winter v. Crosstown St. R. Co.*, 8 Misc. (N. Y.) 362; s. c. 59 N. Y. St. Rep. 598; 28 N. Y. Supp. 695. The conclusion will be the same where his wagon is so loaded as to obstruct his view of the approaching car,—as where it is piled up with trunks,—although he listens for the gong: *Roth v. Metropolitan St. R. Co.*, 13 Misc. (N. Y.) 213; s. c. 68 N. Y. St. Rep. 113; 34 N. Y. Supp. 232. So, where one drives at a walk diagonally across a street railway track while an approaching

car is only 150 feet away, without in any manner notifying the motorman of his intention to cross: *Meyer v. Brooklyn &c. R. Co.*, 9 App. Div. 79; s. c. 41 N. Y. Supp. 92. So, where one attempts to drive across a street railway track in front of a car moving at the rate of twenty miles an hour, when it is but seventy feet away: *Chicago &c. St. R. Co. v. McCarthy*, 66 Ill. App. 667.

<sup>208</sup> *Blakeslee v. Consolidated St. R. Co.*, 105 Mich. 462; s. c. 63 N. W. Rep. 401; 2 Det. L. N. 154.

<sup>209</sup> *Hemmingway v. New Orleans &c. R. Co.*, 50 La. An. 1087; s. c. 23 South. Rep. 952.

<sup>210</sup> *Clancy v. Troy &c. R. Co.*, 88 Hun (N. Y.) 496; s. c. 34 N. Y. Supp. 877.

<sup>211</sup> *Walsh v. Atlantic Ave. R. Co.*, 23 App. Div. 19; s. c. 48 N. Y. Supp. 343. Or where a vehicle is run into by a street car on a track crowded with cars: *Kelly v. Brooklyn &c. R. Co.*, 12 Misc. (N. Y.) 568; s. c. 67 N. Y. St. Rep. 604; 33 N. Y. Supp. 851.



§ 1471. **Pedestrians Suddenly Thrusting Themselves in Front of Moving Cars.**<sup>212</sup>—It is scarcely necessary to say that contributory negligence will be imputed to a pedestrian who suddenly thrusts himself in front of a moving street car, whether he looks or listens for its approach or not; for, if he fails to look or listen, he is guilty of negligence in not exercising his faculties for his own protection; and, if he looks or listens and thereby acquires knowledge of the immediate presence of the car, he rashly thrusts himself into danger and takes his chances,—in which case a man can not make his own rashness and folly the ground of recovering damages from another;<sup>213</sup> and this is especially so where the person in front of the car uses his utmost endeavor to avert the calamity after seeing the exposed situation of the passenger.<sup>214</sup> It was so held where a foot-passenger attempted to cross an electric railway in the night, when a car was approaching so near that it must be visible and its noise audible;<sup>215</sup> where a woman fifty-six years of age, in good health, and in possession of her faculties, having an unobstructed view of the street railway track for several blocks, glanced up and down the track from the sidewalk, and then walked deliberately upon the track in full view of a car which was approaching with its bells ringing;<sup>216</sup> where one attempted to run diagonally across an electric railway track immediately in front of an approaching car, which he could have seen if he had looked;<sup>217</sup> and in the other cases noted in the margin.<sup>218</sup> It should be added that cases may possibly be found where even this negligence has been condoned.<sup>219</sup>

§ 1472. **Not Negligence to Attempt to Cross in Front of a Car Standing Still.**—It is obviously not negligence, as matter of law, to attempt to drive across a street railway track in front of a car which is standing still when the attempt is made.<sup>220</sup>

<sup>212</sup> This section is cited in §§ 1664, 1665, 1669.

<sup>213</sup> Vol. I, § 186; *Watson v. Mound City St. R. Co.*, 133 Mo. 246; s. c. 3 Am. & Eng. Rail. Cas. (N. S.) 385; 34 S. W. Rep. 573.

<sup>214</sup> *Nugent v. Philadelphia Traction Co.*, 181 Pa. St. 160; s. c. 37 Atl. Rep. 206; 40 W. N. C. 243 (failed to look).

<sup>215</sup> *Hoelzel v. Crescent City R. Co.*, 49 La. An. 1302; s. c. 38 L. R. A. 708; 22 South. Rep. 330.

<sup>216</sup> *Hickman v. Nassau Elec. R. Co.*, 36 App. Div. 376; s. c. 56 N. Y. Supp. 751.

<sup>217</sup> *Doller v. Union R. Co.*, 7 App. Div. 283; s. c. 39 N. Y. Supp. 770.

<sup>218</sup> *Lurie v. Metropolitan St. R. Co.*, 40 N. Y. Supp. 1129; s. c. 18 Misc. 81; *Curtin v. Metropolitan St. R. Co.*, 22 Misc. (N. Y.) 83; s. c. 48 N. Y. Supp. 581; aff'g 47 N. Y. Supp. 1134; s. c. 21 Misc. 788.

<sup>219</sup> *Mills v. Brooklyn City R. Co.*, 10 Misc. (N. Y.) 1; s. c. 62 N. Y. St. Rep. 645; 30 N. Y. Supp. 532.

<sup>220</sup> *Kennedy v. St. Paul City R. Co.*, 59 Minn. 45; s. c. 60 N. W. Rep. 810. Compare *post*, § 1677.



**§ 1473. Contributory Negligence in Allowing a Dog to Patrol the Highway.**—It has been held that the owner of a *dog*, employed in superintending lands on both sides of a highway, whose employer owns the *fee* in the highway, is not guilty of negligence in permitting his dog to use the highway in patrolling the land to prevent trespass and depredation thereon, so as to prevent recovery for the killing of such dog by being run over by an electric street car.<sup>221</sup>

**§ 1474. Imputed Negligence in this Relation.**—The doctrine of imputed negligence—what remains of it—has been explored in the preceding volume.<sup>222</sup> It has been held, with obvious propriety, that failing to look or listen for an approaching street car, although familiar with the locality and knowing of the existence of the street car track, is not negligence on the part of a woman more than seventy-five years old, when riding in a *funeral procession* in a vehicle owned and driven by another, with no reason to believe the driver is not exercising proper care.<sup>223</sup> It has been held that the negligence of a man standing upon the platform of an elevated railroad car, contributing to the fall of a five-year-old child in his charge from the platform, can not be imputed to the child so as to prevent a recovery from the elevated railroad company in case it was guilty of negligence.<sup>224</sup> Another court has held, with equal sense and justice, that a street railway company is not liable for injuries to one riding as a guest in a wagon, which the driver turns from one track into another directly in front of an approaching car, on a down grade, where the motorman does all that he can to stop the car before the collision, and the car is not going at a negligent rate of speed; and this although the negligence of the driver can not be imputed to the guest.<sup>225</sup>

**§ 1475. Negligently Running Down a Person who has Negligently Exposed Himself to Danger, after Discovering his Exposed Position.**—

<sup>221</sup> *Meisch v. Rochester & C. R. Co.*, 72 Hun (N. Y.) 604; s. c. 55 N. Y. St. Rep. 146; 25 N. Y. Supp. 244. Compare Vol. I, § 934, *et seq.*

<sup>222</sup> Vol. I, § 498, *et seq.*

<sup>223</sup> *Johnson v. St. Paul & C. R. Co.*, 67 Minn. 260; s. c. 36 L. R. A. 586; 69 N. W. Rep. 900.

<sup>224</sup> *Metropolitan & C. Elev. R. Co. v. Kersey*, 80 Ill. App. 301; s. c. 4 Chic. L. J. Wkly. 112.

<sup>225</sup> *Kane v. People's & C. R. Co.*, 181 Pa. St. 53; s. c. 37 Atl. Rep. 110. Although the contributory negligence of the *husband* is generally not imputable to the wife, yet another court has held that a wife riding with her husband along a

street in which there is a street railway track is bound to exercise reasonable care to learn of the danger of collision with a car, and avoid injury: *Ulrich v. Toledo & C. St. R. Co.*, 1 Ohio C. D. 111; s. c. 10 Ohio C. C. 635. Circumstances under which the negligence of a street car driver in respect of his conduct towards his own employer is not imputable to him as contributory negligence barring a recovery for personal injuries received by him from a car of another company striking his own: *Tyler v. Third Ave. R. Co.*, 18 Misc. (N. Y.) 165; s. c. 41 N. Y. Supp. 523.



The rule of law which has been successfully invoked for the protection of chattels, animate and inanimate,<sup>226</sup> ought, it should seem, to be capable of protecting the life of an adult human being; though, as already seen, it frequently fails to check the slaughter of innocent children.<sup>227</sup> Applied to street railway operation, this rule is that, although a person may, through negligence of whatever grade, expose himself or his property to injury by a street car upon the public highway,—yet if the street railway company could, through its servants in charge of the car, have avoided the accident by exercising ordinary or reasonable care *after discovering the exposed situation of the plaintiff or his property*, and failed to do so, the company must pay damage.<sup>228</sup> Attention to a doctrine already discussed<sup>229</sup> can not fail to impress the reader with the conclusion that the fact that a person lawfully using the street may, through inattention, inadvertence, or even recklessness, have exposed himself to danger of being run over by a street car, will not excuse the street railway company in murdering him, and that, if the company, after discovering his danger, runs upon him when, by the exercise of reasonable care, it could have avoided the catastrophe, it is guilty of wanton and reckless conduct to which contributory negligence constitutes no defense.<sup>230</sup> Illustrations could scarcely make this principle plainer; but it may be said that it has been applied in the case of a man struck by a car while *negligently standing upon a street railway track*;<sup>231</sup> and in the case of a boy so struck while *standing on the track with his back towards an approaching car*;<sup>232</sup> in the case of a pedestrian struck on a crossing by a car coming rapidly around a short curve;<sup>233</sup> and in case of a traveller attempting to cross a track without looking for an approaching car which he had observed some time before.<sup>234</sup>

<sup>226</sup> Vol. I, § 230, *et seq.*

<sup>227</sup> Vol. I, § 289, *et seq.*; *ante*, § 1424, *et seq.*

<sup>228</sup> *McKeon v. Steinway R. Co.*, 20 App. Div. 601; s. c. 47 N. Y. Supp. 374; *Cincinnati St. R. Co. v. Whitcomb*, 66 Fed. Rep. 915; s. c. 1 Ohio Dec. Fed. 10; *Redford v. Spokane St. R. Co.*, 15 Wash. 419; s. c. 46 Pac. Rep. 650; *Montgomery v. Lansing & C. R. Co.*, 103 Mich. 46; s. c. 61 N. W. Rep. 343; *Orr v. Cedar Rapids & C. R. Co.*, 94 Iowa 423; s. c. 62 N. W. Rep. 851 (motorman saw traveller heedlessly approaching crossing, and ran him down); *Little v. Superior & C. Transit Co.*, 88 Wis. 402; s. c. 60 N. W. 705.

<sup>229</sup> Vol. I, § 230, *et seq.*

<sup>230</sup> Vol. I, § 238; *Little v. Superior & C. Co.*, 88 Wis. 402; s. c. 60 N. W. Rep. 705.

<sup>231</sup> *Davies v. People's R. Co.*, 67 Mo. App. 598.

<sup>232</sup> *Baltimore & C. R. Co. v. Cooney*, 87 Md. 261; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 759; 39 Atl. Rep. 859.

<sup>233</sup> *North Baltimore & C. R. Co. v. Arnreich*, 78 Md. 589; s. c. 28 Atl. Rep. 809 (driver could have seen him if he had been in the exercise of due care).

<sup>234</sup> *Kelly v. Louisville R. Co.*, 20 Ky. L. Rep. 471; s. c. 46 S. W. Rep. 688 (not to be off. rep.).



§ 1476. **Doctrine that the Company is not Liable unless it Observed the Exposed Position of the Person Injured in Time to have Averted the Calamity.**—There is also a very reprehensible doctrine, discoverable in the decisions of a few courts, to the effect that if the person killed or injured was guilty of negligence in exposing himself to the danger, the street railway company will not be liable in damages for running him down, unless its servants *actually discovered* his exposed situation in time, by the exercise of ordinary care, to avert the calamity after making the discovery; and that it is not sufficient that the person driving the car *might have become aware* of his exposed situation by the exercise of reasonable care,<sup>235</sup> or by keeping a proper lookout.<sup>236</sup> There is scant propriety in admitting this doctrine in the case of steam railroads at places other than highway crossings, and at places where their tracks do not traverse the surface of public streets or highways. But, except in these cases, it may be said in favor of it that the railway company is entitled to a clear track and is not bound to anticipate the possible presence of trespassers on its track, or to keep a special lookout for them.<sup>237</sup> But with respect to street railroads, where the public have the right to use the street, including that part of it on which the track is laid, in common with the railroad company, and where the railroad company is consequently bound to anticipate the rightful presence of men, women and children on its track in front of its cars,—the sound and just rule must be different; and in such an application, the doctrine above stated is a miserable doctrine, in favor of which not one word can be said. It has the effect of absolving the street railway company from keeping that constant lookout ahead and around which, as already seen,<sup>238</sup> the law demands of corporations which have received from the public a license to propel cars at a high rate of speed along the surface of the highway, in populous districts, which the public have a right to use in common with them. It ignores the obvious conclusion of sense and justice, that the fact that they, and not the driver or the foot-passenger, are propelling the instrument of danger, puts upon them the duty of exercising constant care and watchfulness to avert death or injury to the other members of the pub-

<sup>235</sup> Schoenholtz v. Third Ave. R. Co., 16 Misc. (N. Y.) 7; s. c. 37 N. Y. Supp. 682; 73 N. Y. St. Rep. 263; rev'g s. c. 14 Misc. 461; s. c. 70 N. Y. St. Rep. 773; 36 N. Y. Supp. 15; Johnson v. Stewart, 62 Ark. 164; s. c. 34 S. W. Rep. 889; Houston & c. R. Co. v. Farrell (Tex. Civ. App.), s. c.

27 S. W. Rep. 942 (no off. rep.); Redford v. Spokane St. R. Co., 9 Wash. 55; s. c. 36 Pac. Rep. 1085.

<sup>236</sup> Hot Springs St. R. Co. v. Johnson, 64 Ark. 420; s. c. 42 S. W. Rep. 833.

<sup>237</sup> Post, § 1597.

<sup>238</sup> Ante, § 1382.



lic who use the highway. If this doctrine is sound, the company will be exonerated, although its motorman looks constantly to the rear, or expends his attention in flirting with women on the sidewalks or in adjacent windows, or even goes forward with his eyes shut; in which last case, he would not be blinder to justice or more recreant to his duty, than are the judges who render such decisions.

**§ 1477. Liable for Running Down a Person who has Negligently Exposed Himself on the Track, where he Might have been Discovered in Time to Avert the Calamity.**—It is, then, a rule constantly applied by many courts in these cases that, although the traveller may have been guilty of negligence in exposing himself to danger on the tracks of the street railway company,—yet if, after discovering him in his exposed position, or if, by the exercise of ordinary diligence and attention to his duties, the driver could have discovered him in that position in time to avoid running upon him and injuring him, by the exercise of the like care in giving him warning, or in checking or stopping the car,—the company will be liable.<sup>239</sup> A good illustration of this principle is found in a holding to the effect that, although a person has been guilty of negligence in driving upon an electric railway track without looking for an approaching car, yet this will not necessarily prevent him from recovering damages for an injury caused by the motorman starting his car and running it against his wagon *after it had been upset by the first collision*,<sup>240</sup> and in another holding to the effect that the contributory negligence of one who is struck by an electric car does not prevent recovery for his death, where it could have been avoided by the exercise of proper care on the part of the motorman, after the person struck had fallen upon the *safety net* of the car.<sup>241</sup>

**§ 1478. Facts which Afford Evidence of Contributory Negligence to Go to the Jury.**—The question of contributory negligence is for the

<sup>239</sup> Ante, Vol. I, § 230, *et seq.*; *Hickman v. Union Depot R. Co.*, 47 Mo. App. 65; *Smith v. Citizens' R. Co.*, 52 Mo. App. 36; *Bergman v. St. Louis &c. R. Co.*, 88 Mo. 678; *Baltimore &c. R. Co. v. Cooney*, 87 Md. 261; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 759; 39 Atl. Rep. 859; *Davis v. People's R. Co.*, 67 Mo. App. 598; *North Baltimore &c. R. Co. v. Arnreich*, 78 Md. 589; s. c. 28 Atl. Rep. 809; *McKeown v. Cincinnati St. R.*

*Co.*, 2 Ohio Leg. News 388; *Kelly v. Louisville R. Co.*, 20 Ky. L. Rep. 471; s. c. 46 S. W. Rep. 688 (not to be off. rep.).

<sup>240</sup> *McDevitt v. Des Moines St. R. Co.*, 99 Iowa 141; s. c. 6 Am. & Eng. Rail. Cas. (N. S.) 106; 68 N. W. Rep. 595.

<sup>241</sup> *Weitzman v. Nassau Elec. R. Co.*, 33 App. Div. 585; s. c. 53 N. Y. Supp. 905.



jury where a driver attempts to drive across a railway at a crossing, after seeing a car approaching about three hundred feet away, at an unusual rate of speed.<sup>242</sup> It has been held that a man driving a wagon on a street railway track on the left side of a bridge which is so narrow that he can not quit the track by turning to the left, should, on seeing a street car approaching on that track, turn upon the right-hand track, although he knows that there is a car approaching on such track from behind, but so far away that he can cross if it is approaching at an ordinary rate of speed, but who nevertheless is struck by it, in consequence of the fact that it is approaching at an excessive rate of speed,—is not guilty of contributory negligence, such as will bar a recovery of damages.<sup>243</sup> A pedestrian, about to cross the tracks of a street railway company, looked along the track in one direction to a point beyond which he could see no further; then looked in the other direction, his attention being detained there for a moment; and then looked in the first direction and discovered a car almost upon him, which was running at a rapid rate of speed, and which he could not see on account of an obstruction to the view, and by which he was struck and injured. It was held that the question of his contributory negligence was for the jury.<sup>244</sup>

§ 1479. **Circumstances under which Courts have Refused to Impute Contributory Negligence to the Traveller in Attempting to Cross a Street Railway Track.**<sup>245</sup>—One court has refused to impute contributory negligence, as matter of law, to a boy eight or nine years old, in attempting to cross a street from a point near a trolley car track, upon seeing a car approaching fifty feet away.<sup>246</sup> Another court has reasoned that the driver of a beer wagon, with heavy horses not capable of good speed, is not bound to wait until an approaching street car, which he sees sixty or eighty feet away, has passed him; but it is for the jury to say whether a prudent, careful driver would attempt to

<sup>242</sup> *Patterson v. Townsend*, 91 Iowa 725; s. c. 59 N. W. Rep. 205.

<sup>243</sup> *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475; s. c. 2 Chic. L. J. Wkly. 287; 37 Atl. Rep. 379.

<sup>244</sup> *Curry v. Union &c. R. Co.*, 86 Hun (N. Y.) 559; s. c. 67 N. Y. St. Rep. 551; 33 N. Y. Supp. 728. Not negligence as matter of law to attempt to drive across an electric railway track on a dark, windy night, after stopping and looking and listening for a car and seeing none: *Tompkins v. Scranton Traction Co.*, 3 Pa. Super. Ct. 576. It has been held to

be a question for the jury whether the driver of a *heavy vehicle* which, on an attempt to turn it from a track on which stood a stationary street car, slipped along the track, striking the car and injuring a workman employed thereon, exercised due care in turning out soon enough: *Ford v. Charles Warner Co.*, 1 Marv. (Del.) 88; 37 Atl. Rep. 39.

<sup>245</sup> This section is cited in § 1462.

<sup>246</sup> *Dowd v. Brooklyn Heights R. Co.*, 61 N. Y. St. Rep. 321; 9 Misc. (N. Y.) 279; 29 N. Y. Supp. 745.



cross under such circumstances.<sup>247</sup> Nor was it contributory negligence, as matter of law, for a footman to attempt to cross a cable railway track at a street crossing on a dark and foggy night, where his view of the approaching car was somewhat obstructed by a car going the other way, where the signals required by the city ordinance were not sounded by the gripman of the approaching car, and where, although bystanders shouted to him to get out of the way, he seemingly did not hear them; but it was a question for a jury.<sup>248</sup> Nor was it contributory negligence *per se* for a teamster to descend with a heavy load at a grade crossing upon a street railway track without repairing a lock chain to his wagon, which broke after he commenced the descent;<sup>249</sup> nor to drive upon the track where he could see along the track for one hundred feet, and saw no car approaching;<sup>250</sup> nor for a truckman, after seeing an electric car standing about one hundred feet away, to attempt to drive across the track in front of it, where he had a lantern in front of his truck, throwing a light forward toward the horses, and did not see the car after he started to drive across the street;<sup>251</sup> nor for the driver of a vehicle who has looked both ways before driving upon a street, on which a street railway was operated, to fail to look again behind him to ascertain the approach of cars, during the time necessary to drive the space of one block;<sup>252</sup> nor for the driver of a vehicle proceeding along a street railway track, to *turn to the left* on seeing a car approaching, where a bank of deep snow on the right of the track, prevents him from turning to the right;<sup>253</sup> nor for the driver of a vehicle to attempt to drive over a street railway track, where there are ruts eight or ten inches deep between the rails, although he knows of the existence of the ruts, and that there is some danger in crossing;<sup>254</sup> nor to drive upon an electric railway track in front of a car approaching at a distance of ninety feet;<sup>255</sup> nor in front of one approaching at a distance of one hundred feet;<sup>256</sup> nor at a distance of one hundred and thirty feet;<sup>257</sup> nor gen-

<sup>247</sup> Witzel v. Third Ave. R. Co., 3 Misc. (N. Y.) 561; s. c. 52 N. Y. St. Rep. 521; 23 N. Y. Supp. 317.

<sup>248</sup> Driscoll v. Market Street Cable R. Co., 97 Cal. 553; s. c. 32 Pac. Rep. 591.

<sup>249</sup> Cross v. California St. & C. R. Co., 102 Cal. 313; s. c. 36 Pac. Rep. 673.

<sup>250</sup> Cross v. California St. & C. R. Co., 102 Cal. 313; s. c. 36 Pac. Rep. 673.

<sup>251</sup> Lowy v. Metropolitan St. R. Co., 62 N. Y. Supp. 743.

<sup>252</sup> Schilling v. Metropolitan St. R. Co., 62 N. Y. Supp. 403; s. c. 47 App. Div. 500.

<sup>253</sup> North Chicago St. R. Co. v. Allen, 82 Ill. App. 128; *ante*, § 1467.

<sup>254</sup> Citizens' Street R. Co. v. Sutton, 148 Ind. 169; s. c. 46 N. E. Rep. 462; rehearing denied in 47 N. E. Rep. 462.

<sup>255</sup> Kerr v. Atlantic Ave. R. Co., 151 N. Y. 656; *aff'g* s. c. 10 Misc. 264; 63 N. Y. St. Rep. 310; 30 N. Y. Supp. 1070.

<sup>256</sup> Cass v. Third Ave. R. Co., 20 App. Div. 591; s. c. 47 N. Y. Supp. 356.

<sup>257</sup> Ehrman v. Nassau Elec. R. Co., 23 App. Div. 21; s. c. 48 N. Y. Supp. 379.



erally where the car is approaching at a considerable distance in plain sight, although it may be necessary for the gripman to slacken its speed in order to avoid a collision.<sup>258</sup>

§ 1480. **Other Conduct to Which Contributory Negligence has not been Ascribed as Matter of Law.**<sup>259</sup>—According to various views, it is not contributory negligence, as matter of law, for a person to be upon a cable railway track at the time of a collision with a car, where he could see the track for a distance of one hundred feet, and saw no car approaching immediately before the accident,—the collision being due to the fact that the car could not be stopped within that distance after the alarm was given, and that the plaintiff's wagon was coming down

<sup>258</sup> Kennedy v. Third Ave. R. Co., 31 App. Div. 30; s. c. 52 N. Y. Supp. 551; New Jersey Elec. R. Co. v. Miller, 59 N. J. L. 423; s. c. 6 Am. & Eng. Rail. Cas. (N. S.) 519; 36 Atl. Rep. 885; Garrity v. Detroit & C. St. R. Co., 112 Mich. 369; s. c. 37 L. R. A. 529; 4 Det. L. N. 46; 2 Chic. L. J. Wkly. 277; 70 N. W. Rep. 1018 (driver of a *fire truck* with horses not under control). Contributory negligence ought not as matter of law to be imputed to one who, driving four miles an hour, attempted to drive across a street railway track on observing when ten yards from the track a street car approaching two hundred or two hundred and fifty yards away, without looking a second time for the car: Citizens' & C. Transit Co. v. Seigrist, 96 Tenn. 119; s. c. 33 S. W. Rep. 920. Nor because one driving down a steep grade with a heavy load, approaching a street railway crossing, neglected to adjust the lock chain so as to put on a brake after the descent began: Cross v. California St. & C. R. Co., 102 Cal. 313; s. c. 36 Pac. Rep. 673. Nor because a driver ran upon an electric railway track fifty feet in front of a car coming at the rate of six miles an hour, when this act was necessary to get around another vehicle: Blakeslee v. Consolidated St. R. Co., 112 Mich. 63; s. c. 29 Chic. Leg. News 257; 3 Det. L. N. 844; 70 N. W. Rep. 408. Nor because the driver of an ice wagon started to cross a street railway track in front of an electric car which was *standing still* at a distance of 133 feet: McCormack v. Nassau Elec. R. Co., 16 App. Div. 24; s. c. 44 N. Y. Supp. 684; rehear-

ing denied in 46 N. Y. Supp. 230; s. c. 18 App. Div. 333. See also Riegleman v. Third Ave. R. Co., 29 N. Y. Supp. 299; s. c. 9 Misc. 51; 59 N. Y. St. Rep. 667 (attempting to cross when car at *full stop*). Under the facts of the following cases, the court refused to impute contributory negligence as matter of law, to the person killed or injured in attempting to cross a street railway track: Dater v. Fletcher, 14 Misc. 288; s. c. 35 N. Y. Supp. 686; 70 N. Y. St. Rep. 462; Nicholsburg v. Second Ave. R. Co., 11 Misc. 432; s. c. 32 N. Y. Supp. 130; 65 N. Y. St. Rep. 273; Mackie v. Brooklyn City R. Co., 10 Misc. (N. Y.) 4; s. c. 62 N. Y. St. Rep. 653; 30 N. Y. Supp. 539; Shanley v. Union R. Co., 14 Misc. 442; s. c. 35 N. Y. Supp. 1030; 70 N. Y. St. Rep. 734; McDonald v. Third Ave. R. Co., 16 Misc. 52; s. c. 37 N. Y. Supp. 639; 73 N. Y. St. Rep. 233; Reilly v. Third Ave. R. Co., 16 Misc. (N. Y.) 11; s. c. 73 N. Y. St. Rep. 289; 37 N. Y. Supp. 593; aff'g 14 Misc. (N. Y.) 445; 70 N. Y. St. Rep. 733; 35 N. Y. Supp. 1030; Kilbane v. Westchester Elec. R. Co., 19 Misc. (N. Y.) 184; s. c. 43 N. Y. Supp. 278; Dise v. Metropolitan St. R. Co., 22 Misc. (N. Y.) 97; s. c. 48 N. Y. Supp. 551; aff'g s. c. 47 N. Y. Supp. 1134; s. c. 21 Misc. (N. Y.) 790. That the failure to defer crossing until a car has passed, or to continue to watch the car, is not contributory negligence as matter of law, but presents a question for the jury,—see Hicks v. Nassau & C. Elec. R. Co., 62 N. Y. Supp. 597; s. c. 47 App. Div. 479.

<sup>259</sup> This section is cited in § 1462.



the hill toward the car and could not be stopped;<sup>260</sup> for a skilled driver to fail to turn off upon a side street upon seeing that his horse, which was but four years old, was frightened by a moving electric car, and the horse bolted across the track and the carriage collided with the car;<sup>261</sup> where one who had ventured upon a street railway at night, looked down the street in the direction from which a car would approach, and saw none, but was nevertheless run over by a car having no headlight and ringing no bell;<sup>262</sup> and also under the facts of the cases noted in the margin.<sup>263</sup>

§ 1481. Facts to which Contributory Negligence has been Ascribed.—After a passenger has got off from a street car, and is walking upon the highway, the relation of *carrier and passenger* has ceased,

<sup>260</sup> Cross v. California St. R. Co., 102 Cal. 313; s. c. 36 Pac. Rep. 673.

<sup>261</sup> Flewelling v. Lewiston &c. R. Co., 89 Me. 585; s. c. 36 Atl. Rep. 1056.

<sup>262</sup> Cooke v. Baltimore Traction Co., 80 Md. 551; s. c. 31 Atl. Rep. 327. And so in a case where a traveller was struck by a *switch-stick* which flew from the hands of a conductor of a trolley car while using it to free the trolley from a frog in the wires,—the traveller not being bound to take special precautions against such a danger: Manning v. West End St. R. Co., 166 Mass. 230; s. c. 44 N. E. Rep. 135. And so where a driver in a blockaded section of a street four hundred feet long, was obliged to drive on the track, although he saw a car six or eight hundred feet ahead, approaching with great rapidity, and thereupon stopped his horses in the expectation that the car would stop: Delaney v. Yonkers R. Co., 13 App. Div. 114; s. c. 43 N. Y. Supp. 225. For a case where contributory negligence was ascribed to the act of the driver of a heavy drag loaded with people, to which six horses were attached, in driving on a street railway track at night, and, in order to permit a car to pass which was approaching from behind, turned to the left across a parallel track and was immediately struck by a car approaching on that track in the opposite direction,—see Schlitz v. Nassau Elec. R. Co., 60 N. Y. Supp. 822; s. c. 44 App. Div. 542.

<sup>263</sup> Smith v. Electric Traction Co., 6 Pa. Dist. Rep. 471; s. c. 40 W. N. C. 486; West Chicago St. R. Co. v. Booker, 70 Ill. App. 67; McQuade v. Metropolitan St. R. Co., 17 Misc. (N. Y.) 154; s. c. 39 N. Y. Supp. 335; Flynn v. Wilkes-Barre &c. Traction Co., 9 Kulp (Pa.) 28; Downey v. Pittsburgh &c. Traction Co., 161 Pa. St. 131; s. c. 28 Atl. Rep. 1019; 24 Pitts. L. J. (N. S.) 439; 34 W. N. C. 380; De Lon v. Kokomo &c. St. R. Co., 22 Ind. App. 377; s. c. 53 N. E. Rep. 847; Bryant v. Metropolitan St. R. Co., 59 N. Y. Supp. 595; Anderson v. Metropolitan St. R. Co., 61 N. Y. Supp. 899 (plaintiff injured while riding in an ice-wagon driven by a fellow-servant whom he did not ask to stop or alter his course when he saw cars approaching); Pechesky v. Metropolitan St. R. Co., 62 N. Y. Supp. 478; s. c. 30 Misc. (N. Y.) 432 (plaintiff saw car approaching 250 feet away, but heedlessly drove on the track in front of it); May v. Metropolitan St. R. Co., 26 Misc. (N. Y.) 748; s. c. 57 N. Y. Supp. 277 (plaintiff attempted to drive diagonally across the track in full view of an approaching car). Where the cars on a street railway track are so numerous that they are crowded close together at a street crossing, so that foot-passengers are obliged, in crossing, to pass near to them in order to cross at all, the question of negligence on the part of a wayfarer so injured is for the jury: Killen v. Brooklyn Heights R. Co., 64 N. Y. Supp. 310.



and towards such a person the railway company is under the obligation of using only such care as is demanded between two persons lawfully using the highway. Therefore, where a person was knocked down and injured in the changing of the horses from one end of the car to the other, at the terminus of the line,—she having got off from the forward end of the car, in violation of the company's regulations,—this act, which, had she been considered a passenger at the time of the accident, might have been conclusive evidence of negligence, upon the theory that she was not a passenger was considered as not even proximately contributing to the accident.<sup>264</sup> It has been held to be negligence, as a matter of law, for a person to attempt to get upon a car from the space between two tracks, on seeing another car approaching upon the parallel track, by which such person was knocked over and injured.<sup>265</sup> The company owes no duty of active vigilance to a *newsboy* having free access to its cars for the purpose of selling papers to passengers. It will not be liable even though an injury to such a person might have been prevented by the attention of its servants; since such a license is enjoyed *cum periculo*.<sup>266</sup> In this, as in other relations, the rule is applied that where an unavoidable inference of contributory negligence arises out of the testimony adduced by the plaintiff, so that it is a part of his case,—there can be no recovery, but a nonsuit is properly directed or a peremptory instruction for the defendant given.<sup>267</sup> Contributory negligence has been ascribed to the driver of a wagon who, at the time of colliding with a street car, was driving with his wheels on one track of the street railway, although there was plenty of room on the outside, and his view of the approaching car was unobstructed, where the driver of the car supposed that he would turn out and did all in his power to prevent the accident, as soon as he discovered that he would not;<sup>268</sup> where the

<sup>264</sup> *Platt v. Forty-second Street &c. R. Co.*, 2 Hun (N. Y.) 124.

<sup>265</sup> *Halpin v. Third Avenue R. Co.*, 8 Jones & Sp. (N. Y.) 175. But see *Milk v. Middlesex R. Co.*, 99 Mass. 167.

<sup>266</sup> *Fleming v. Brooklyn &c. R. Co.*, 1 Abb. N. C. (N. Y.) 433. It is not necessarily contributory negligence to drive in front of a cable car, which is standing still, although but a short distance away; but it is *evidence of negligence* for the gripman to start the car so as to run upon the person so driving: *Riegelman v. Third Ave. R. Co.*, 29 N. Y. Supp. 299; s. c. 9 Misc. (N. Y.) 51; 59 N. Y. St. Rep. 667. Where a person, on a clear night, steps behind a cable

car going in one direction, and immediately in front of another going in the opposite direction at a high rate of speed, with a bright headlight visible for a long distance, and is run over,—the gripman having momentarily turned his head away,—there can be no recovery, but the accident is attributable to the fault or misfortune of the deceased: *Scott v. Third Ave. R. Co.*, 41 N. Y. St. Rep. 152; s. c. 16 N. Y. Supp. 350; 61 Hun (N. Y.) 627.

<sup>267</sup> Vol. I, § 432; *Harnett v. Bleecker &c. R. Co.*, 49 N. Y. Super. 185.

<sup>268</sup> *Glazebrook v. West End St. R. Co.*, 160 Mass. 239; s. c. 35 N. E. Rep. 553.



driver of the wagon which came into collision with the street car was driving at a prohibited rate of speed, and the accident would not have occurred if he had observed ordinary diligence;<sup>269</sup> where the driver of a *fire truck*, on his way to a fire, on approaching the crossing of a street railway, failed to have his horses under such control as to enable him to stop in time to avert a collision with an approaching car;<sup>270</sup> where a driver, knowing that cars passed frequently, and that the nearest rail of the track was not more than ten inches from the hub of one of the wheels of his wagon, attempted to dismount by stepping on the hub with his back to the track, when a car was in plain sight, about fifty feet away approaching at a fast gait;<sup>271</sup> where there were parallel tracks and, just as the plaintiff turned his team upon the down track, it was struck by a car coming from the direction in which he had been going on the up track, there being no obstacle to his seeing the car for a long distance if he had looked, and his testimony not showing that he looked, but merely that he did not see or hear;<sup>272</sup> where, after stopping his horse ten or twelve feet from the track, from which point he could see a quarter of a mile, and, seeing no car, the traveller attempted to go forward, but, on his team becoming stalled, backed up ten or twelve feet, and then, without looking again, started forward with a spurt and was struck by a car.<sup>273</sup>

<sup>269</sup> McGrath v. City &c. R. Co., 93 Ga. 312; s. c. 20 S. E. Rep. 317.

<sup>270</sup> Garrity v. Detroit &c. St. R. Co., 112 Mich. 369; s. c. 4 Det. L. N. 46; 2 Chic. L. J. Wkly. 277; 37 L. R. A. 529; 70 N. W. Rep. 1018.

<sup>271</sup> Crowley v. Metropolitan St. R. Co., 24 App. Div. 101; s. c. 48 N. Y. Supp. 863.

<sup>272</sup> Boehmer v. Pittsburgh &c. Traction Co., 194 Pa. St. 313; s. c. 45 Atl. Rep. 126.

<sup>273</sup> Kern v. Second Ave. Traction

Co., 194 Pa. St. 75; s. c. 45 Atl. Rep. 125. So, where the plaintiff was driving toward a crossing at the rate of seven or eight miles an hour, and saw a car approaching about 150 or 200 feet away, but drove on without slacking speed or looking up again until his companion cried, "Look out," when the plaintiff saw the car within a foot of his wheel, and a collision followed: Reilly v. Metropolitan St. R. Co., 61 N. Y. Supp. 785.



**TITLE ELEVEN.**

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**INJURIES TO TRAVELLERS AT HIGHWAY  
CROSSINGS OF STEAM RAILWAYS.**







# TITLE ELEVEN.

## INJURIES TO TRAVELLERS AT HIGHWAY CROSSINGS OF STEAM RAILWAYS.

### CHAPTER

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### CHAPTER XLVI.

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## SECTION

1489. Further of the degree of care required of the railroad company.

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## SECTION

1493. Relative rights of steam and electric railway companies at crossings.

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§ 1485. **Railway Company has Superior Right of Way.**<sup>1</sup>—We have seen that in the case of passenger railroads occupying the public streets, grouped in one general class as *street railroads*, the rights of the railroad company and of the travelling public, in the use of the surface of the street, are equal, with the qualification that, as the street car can not leave its tracks and turn out for the ordinary traveller, he must turn out for it.<sup>2</sup> But, with regard to steam railways crossing public highways, the rule is different. A steam railway train is usually long and heavy. The railway company serves the public, and, in a sense, represents the rights of the public. A proper public service requires that its trains should be driven at a high rate of speed. It can not maintain such a rate of speed as is compatible with the due service of the public, and at the same time stop or greatly slacken the speed of its trains at every highway crossing. Nor can a ponderous railway train be suddenly stopped upon an appearance of danger to the driver of a vehicle or a pedestrian, on or in the vicinity of a railway crossing. While, therefore, the railway company is bound to exercise reasonable care in the particulars hereafter explained, to the end of avoiding injury to travellers attempting to cross,—yet, its right of way, so to speak, at public crossings, must necessarily *take precedence* over the right of way of the ordinary traveller by vehicle or on foot.<sup>3</sup> But while the right of priority of passage belongs to the

<sup>1</sup> This section is cited in § 1552.

<sup>2</sup> *Ante*, § 1374.

<sup>3</sup> *Ohio &c. R. Co. v. Walker*, 113 Ind. 196; s. c. 12 West. Rep. 737; 15 N. E. Rep. 234; *Louisville &c. R. Co. v. Phillips*, 112 Ind. 59; s. c. 11 West. Rep. 119; 13 N. E. Rep. 132; *Brown v. Texas &c. R. Co.*, 42 La. An. 350; s. c. 7 South. Rep. 682; *Chicago &c. R. Co. v. Pearson*, 82 Ill. App. 605; *Black v. Burlington &c. R. Co.*, 38 Iowa 515; *Madison &c. R. Co. v. Taffe*, 37 Ind. 361, 364; *Pennsylvania R. Co. v. Krick*, 47

Ind. 368, 371; *Chicago &c. R. Co. v. Hatch*, 79 Ill. 137; *Illinois &c. R. Co. v. Benton*, 69 Ill. 174; *Leavenworth &c. R. Co. v. Rice*, 10 Kan. 426; *Warner v. New York &c. R. Co.*, 44 N. Y. 465. It is reasoned that, at public crossings, the rights of a railroad company and persons upon the highway are mutual, coextensive, and reciprocal, qualified only by the *prior right of way* of a moving train: *Southern R. Co. v. Torfan*, 95 Va. 453; s. c. 28 S. E. Rep. 569. Therefore, an instruction that the



railroad company, yet in other respects the rights of a traveller on a highway and the rights of the company are equal at a highway crossing. Neither has the exclusive right to the use of the crossing, and both are required to use ordinary care to prevent a collision.<sup>4</sup> Outside of this, it has been held that the person seeking to cross may select for that purpose any portion of the street within its lateral limits without the imputation of negligence.<sup>5</sup> It is said that the railroad company does not have the right to a clear track at a public crossing when acting in clear violation of law in the manner of operating its trains.<sup>6</sup>

**§ 1486. Rights and Duties of Travellers in Case of Railway Tracks Laid along or across the Public Streets.**<sup>7</sup>—Within the corporate limits of a city regularly laid out, streets are public thoroughfares, which are placed upon a different footing from country roads with respect to the rights of travellers, especially in regard to crossings. A traveller crossing a street upon which the track of a railway is laid, at any point other than a street crossing, does not necessarily become a tres-

deceased and the railroad company had an *equal right* to cross the road at the point where the accident happened was erroneous: *International & C. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210; s. c. 21 S. W. Rep. 58. In *Missouri R. Co. v. Johnson*, 44 Kan. 660, 664; s. c. 24 Pac. Rep. 1116,—it is said by Mr. Commissioner Green that “the correct rule, as we understand it, is that both the railroad company and the traveller have an equal right to cross, and the law imposes on both parties the duty of using reasonable and prudent precautions to avoid accident and danger.” This was said in reference to the manner in which a jury is to be instructed on the subject, and it is believed not to be an accurate statement of the rule.

<sup>4</sup>*Chicago & C. R. Co. v. Spilker*, 134 Ind. 380; s. c. 33 N. E. Rep. 280; 32 Am. L. Reg. 763; rehearing denied 34 N. E. Rep. 218. The following instruction has been judicially approved: “Where a railroad is crossed by any street, road, or public highway, the rights of the travelling public and the railroad company, to the use of said crossing, are equal, and both are bound to use ordinary care, the one to avoid committing, and the other to avoid receiving, an injury.” *Cohen*

*v. Eureka & C. R. Co.*, 14 Nev. 376.

<sup>5</sup>*Louisville & C. R. Co. v. Head*, 80 Ind. 117. That a right of passage exists in the public for the entire width of a public street,—see *Elliott Roads and Str.*, § 645, and cases there cited.

<sup>6</sup>*Alabama & C. R. Co. v. Lowe*, 73 Miss. 203; s. c. 19 South Rep. 96. The case was an action for negligently running over and killing a child at a public crossing. The evidence showed that the train by which the injury was caused, was, at the time, being run on and across frequented streets, in a densely populated part of the city, at a high rate of speed, and without due caution being used in keeping a lookout in turning a sharp curve on which the view was obstructed. The court said: “While it is true, as an abstract proposition and in a general sense, that a railroad has the right to a clear track, yet this is true only when the railroad is operating its trains in conformity to law. It has the right to a clear track when acting within the limits of its legal rights; but when acting in clear violation of law, it has no such right.” *Alabama & C. R. Co. v. Lowe*, 73 Miss. 203; s. c. 19 South. Rep. 96.

<sup>7</sup>This section is cited in § 1489.



passer upon the property of the company;<sup>8</sup> but he stands under the necessity of exercising reasonable care for his own safety, as in other cases.<sup>9</sup> Where, for any good reason, a person has a right to cross, and may reasonably be expected to do so at the time which he selects for that purpose, the same rules apply as in the case of a highway crossing.<sup>10</sup> Thus, where the way was a *private* one, but was the only outlet from the adjacent property, this was held to place the persons using it on the same footing as travellers on a public highway.<sup>11</sup> But where a street had been merely laid out across the railway, and all the property necessary for opening and working the same had been condemned, except that of the company, and the proposed street had been in use for some time by the public as a crossing place, but without notice to the company, or without its consent, it was held that the only obligation of the company towards persons crossing at that point was the exercise of such care as it owed to *trespassers*,—not to do them an intentional injury.<sup>12</sup>

§ 1487. **Relative Care Required of Traveller and Railway Company.**<sup>13</sup>—On this subject the law is unable to formulate any better rule than to say that, at a highway crossing of a railway, both the traveller and the railway company are required to exercise that degree of care, caution, and diligence which a person of ordinary prudence would exercise under like circumstances, and no more.<sup>14</sup> The same theoretical measure of care is required of each.<sup>15</sup> Although the railroad company is driving the instrument of danger, yet, according to the reasoning of the courts, no greater care is required of

<sup>8</sup> *Baltimore &c. R. Co. v. Fitzpatrick*, 35 Md. 32, 45.

<sup>9</sup> *Smedis v. Brooklyn &c. Beach R. Co.*, 88 N. Y. 13; *ante*, § 1376, *et seq.*

<sup>10</sup> *Paducah &c. R. Co. v. Hoehl*, 12 Bush (Ky.) 50.

<sup>11</sup> *Lunt v. London &c. R. Co.*, 12 Jur. (N. S.) 409; 35 L. J. (Q. B.) 105; 14 Week. Rep. 497; 14 L. T. (N. S.) 225.

<sup>12</sup> *Matze v. New York &c. R. Co.*, 1 Hun (N. Y.) 417.

<sup>13</sup> This section is cited in § 1489.

<sup>14</sup> *Chicago &c. R. Co. v. Fisher*, 49 Kan. 460; s. c. 12 Rail. & Corp. L. J. 158; 30 Pac. Rep. 462; *Brand v. Troy &c. R. Co.*, 8 Barb. (N. Y.) 368; *Willoughby v. Chicago &c. R. Co.*, 37 Iowa 432; *Lake Shore &c. R. Co. v. McIntosh*, 140 Ind. 261; s. c. 38 N. E. Rep. 479. See also *Drain v. St. Louis &c. R. Co.*, 86 Mo. 574; s. c. 2 West. Rep. 114.

<sup>15</sup> *Indianapolis &c. R. Co. v. McLin*,

82 Ind. 435. One court has reasoned that the failure of a railroad company to give the proper statutory signals before approaching a crossing, does not excuse one attempting to cross the track from the duty of exercising the *highest degree of care practicable*, to the end of avoiding the danger to himself, which care, of course, includes the obligation of looking each way for an approaching train, providing the vision is unobstructed: *Dela-ware &c. R. Co. v. Hefferan*, 57 N. J. L. 149; s. c. 30 Atl. Rep. 578. But it may safely be concluded that the American law is not in such a condition that it exonerates the party which is driving the murder machine from the obligation to use any more than what is called reasonable or ordinary care, while it exacts of the traveller about to be killed the highest degree of care practicable.



it than of the passive traveller.<sup>16</sup> On the principle already stated,<sup>17</sup> this theoretical degree of care and diligence to be exercised on the part of the railroad company, is a degree of care and diligence commensurate with the danger to travellers at the particular crossing; while the degree of care and diligence to be exercised on the part of the traveller must be in proportion to the risk of injury to him in making the attempt to cross.<sup>18</sup>

**§ 1488. Theory that if the Traveller is Negligent, the Negligence of the Company must be Gross.**—Cases are met with which lay down the doctrine that if the traveller, killed or injured at a railway crossing, was negligent in exposing himself to the danger, or in failing to stop, look and listen, this will not excuse the railroad company from liability, provided its negligence was *gross*,<sup>19</sup>—as for example, in driving its train at a dangerous rate of *speed* past a highway crossing, without giving any *alarm* and without a proper *headlight*.<sup>20</sup> This statement, without explanation, is misleading, because it reintroduces into the law the exploded doctrine of degrees of negligence, and that other exploded doctrine of comparative negligence; for it is conceded, in almost all jurisdictions, that contributory negligence is not imputed to a person, except upon his failure to exercise ordinary or reasonable care.<sup>21</sup> The expression “gross negligence” is intelligible if by this expression is meant the *willful*, *wanton* or *intentional* negligence, as defined by other courts, which, as already seen,<sup>22</sup> renders contributory negligence of no value as a defense on the part of the person or corporation inflicting the injury. A court which uses the expression “gross negligence” has held that a railway company is not

<sup>16</sup> *Texas &c. R. Co. v. Cody*, 166 U. S. 606; s. c. 41 L. ed. 1132; 17 Sup. Ct. Rep. 703. See further upon this subject, *O'Neal v. Dry Dock &c. R. Co.*, 129 N. Y. 125; *Louisville &c. R. Co. v. Phillips*, 112 Ind. 59; *Ohio &c. R. Co. v. Walker*, 113 Ind. 196; *Bailey v. Hartford &c. R. Co.*, 56 Conn. 444; *White v. Wabash &c. R. Co.*, 34 Mo. App. 57; *Brown v. Texas &c. R. Co.*, 42 La. An. 350; *Missouri &c. R. Co. v. Johnson*, 44 Kan. 660; *Chicago &c. R. Co. v. Spilker*, 134 Ind. 380.

<sup>17</sup> Vol. I, § 25.

<sup>18</sup> *Martin v. Baltimore &c. R. Co.*, 2 Marv. (Del.) 123; s. c. 42 Atl. Rep. 442; *Chicago &c. R. Co. v. Pounds* (Ind. Terr. App.), 35 S. W. Rep. 249 (no off. rep.); *Lake Shore &c. R. Co. v. Orvis*, 1 Ohio Dec. 492.

<sup>19</sup> *Schindler v. Milwaukee &c. R. Co.*, 87 Mich. 400; s. c. 49 N. W. Rep. 670.

<sup>20</sup> *Thomas v. Chicago &c. R. Co.*, 86 Mich. 496; s. c. 49 N. W. Rep. 547.

<sup>21</sup> Vol. I, §§ 171, 272, 273. In *Texas*, negligence in handling a hand-car resulting in the death of a person at a railway crossing, must be *gross* in order to make the company liable, where the death occurred in 1886 prior to the amendment of the statute of that State upon the subject of death caused by negligence of railway employes: *Johnson v. Gulf &c. R. Co.*, 2 Tex. Civ. App. 139; s. c. 21 S. W. Rep. 274.

<sup>22</sup> Vol. I, § 265, *et seq.*



guilty of gross negligence because its engineer fails immediately to take measures to stop his train, on discovering a team standing on a private crossing at a distance of a mile or a mile and a quarter away, unless he knows that the team is fast and unable to move.<sup>23</sup> Another court has held that a railway company is not chargeable with willful or intentional negligence resulting in the death of a person attempting to cross in front of its train, where the train was running at a speed of not more than thirty-five miles an hour, and he was first seen when the train was about 1,200 feet from the crossing and he was about 150 feet from the crossing, driving slowly toward it, and efforts were made to stop the train when a collision seemed probable, although the bell was not rung nor the whistle sounded.<sup>24</sup>

§ 1489. **Further of the Degree of Care Required of the Railroad Company.**—As already stated,<sup>25</sup> the theoretical measure or degree of care which the law demands of the railway company for the protection of travellers at highway crossings, is described either as reasonable care,<sup>26</sup> or ordinary care,<sup>27</sup> or reasonable or ordinary care.<sup>28</sup> One court has held that the duty of those in charge of railway trains to persons travelling with teams on a highway, is at most a limited duty, and can not, under any circumstances, require more than the exercise of ordinary care;<sup>29</sup> while conceding that a higher degree of care is demanded towards its passengers. Proceeding to the opposite oscillation of the pendulum, another court has declared it to be the duty of the railway company to use *great care and prudence* in operating its trains in streets and at public crossings;<sup>30</sup> but the same court, in a later decision, reduced the degree of care required of a railway company for the protection of persons on its track at crossings, or other portions commonly used as foot-ways, to the measure of ordinary care, and held that to instruct a jury that the company is bound to use “great care and prudence”—the very language of the decision just quoted—is erroneous, as imposing upon the company too high a de-

<sup>23</sup> Frost v. Milwaukee &c. R. Co., 96 Mich. 470; s. c. 56 N. W. Rep. 19.

<sup>24</sup> Cleveland &c. R. Co. v. Miller, 149 Ind. 490; s. c. 9 Am. & Eng. Rail. Cas. (N. S.) 684; 49 N. E. Rep. 445.

<sup>25</sup> *Ante*, § 1487.

<sup>26</sup> Hendrickson v. Great Northern R. Co., 49 Minn. 245; s. c. 16 L. R. A. 261; 51 N. W. Rep. 1044; Pence v. Chicago &c. R. Co., 79 Iowa 389; s. c. 42 Am. & Eng. Rail. Cas. 126; 44 N. W. Rep. 686.

<sup>27</sup> Lake Shore &c. R. Co. v. Schade, 15 Ohio C. C. 424; s. c. 8 Ohio C. D. 316; aff'd 57 Ohio St. 650; Kansas &c. R. Co. v. Cranmer, 4 Colo. 524; International &c. R. Co. v. Sein, 11 Tex. Civ. App. 386; s. c. 33 S. W. Rep. 558.

<sup>28</sup> Vol. I, § 23.

<sup>29</sup> Bailey v. Hartford &c. R. Co., 56 Conn., 444; s. c. 16 Atl. Rep. 234.

<sup>30</sup> Galveston &c. R. Co. v. Matula, 79 Tex. 577; s. c. 15 S. W. Rep. 573.



gree of care.<sup>31</sup> A subordinate court in Missouri has said that in that State railroad companies are held to a greater degree of care and diligence than is the traveller, and that this is so on account of their dangerous and powerful machinery;<sup>32</sup> but we question the correctness of that statement, and believe that a comparison of the decisions will show that, in practice though not in words, the traveller at a crossing is held to a greater degree of care than is the railroad company. The Supreme Court of Louisiana has reasoned, according to the syllabus of a case, that the traveller on the highway, and the railroad company, are under a common obligation to *do all in their power* to prevent a collision;<sup>33</sup> but a careful examination of the case seems to show that the court does not intend to depart from the standard of reasonable or ordinary care, which may require on the part of the railway company the use of "every exertion to stop if the traveller is inevitably in the way."<sup>34</sup> This statement is theoretically unsound, since a person or a corporation may in many cases exercise ordinary or reasonable care, without doing all in his or its power; but it is practically sound and just, and we shall find as we advance, expressions which substantially concur with it. Thus, one court has reasoned that if those in charge of a moving train see a person approaching a highway crossing in advance of the train, and about to go upon the track, and have reason to believe that he is unaware of the approach of the train, it is their duty to sound the whistle and to *take every reasonable precaution* to prevent running over him.<sup>35</sup> No sane or just person can say that under such circumstances, the duty of taking every reasonable precaution, or even the duty of exercising reasonable or ordinary care, does not impose upon those in charge of the train the duty of using every possible effort to stop the train in time to avert the catastrophe. It has been, therefore, well reasoned that if, under such circumstances, the engineer fails to *make a reasonable use of the means within his reach*, according to the trial judge, which was affirmed, or *use every means and appliance in his power to stop the train*, according to the opinion of the court,—the company will be liable for his negligence if

<sup>31</sup> *Gulf &c. R. Co. v. Smith*, 87 Tex. 348; s. c. 28 S. W. Rep. 520. See also *International &c. R. Co. v. Sein*, 11 Tex. Civ. App. 386; s. c. 33 S. W. Rep. 558. A subordinate court in New York has reasoned that a railroad company is bound, in the exercise of its franchise, to use all necessary caution, care, and diligence to prevent injury to persons while in the exercise of any right relating to property, or in the lawful use of the street: *Maier v. Man-*

*hattan &c. R. Co.*, 53 Hun (N. Y.) 506; s. c. 26 N. Y. St. Rep. 742; 6 N. Y. Supp. 309.

<sup>32</sup> *White v. Wabash &c. R. Co.*, 34 Mo. App. 57, 78.

<sup>33</sup> *Brown v. Texas &c. R. Co.*, 42 La. An. 350; s. c. 7 South. Rep. 682.

<sup>34</sup> *Citing Improvement Co. v. Stead*, 95 U. S. 161.

<sup>35</sup> *Piper v. Chicago &c. R. Co.*, 77 Wis. 247, 257; s. c. 46 N. W. Rep. 165; following *Heddles v. Chicago &c. R. Co.*, 74 Wis. 248, 249.



an accident occurs.<sup>36</sup> This measure of care extends, of course, to the appliances devised and used by the railway company for checking its trains or cars on approaching a crossing. Even in regard to its *hand-cars*, it is held to the duty of adopting well-tested inventions and improvements, and is liable on the footing of negligence for using a hand-car not provided with efficient brakes, whereby the death of a person is brought about.<sup>37</sup> It seems scarcely necessary to add that the rule which governs the liability of a railway company to a *trespasser* on its tracks, discussed in a future chapter,<sup>38</sup> is not properly applicable to cases of injuries at street crossings of railways, where, subject to the obligation of exercising due care, travellers' have the lawful right to be.<sup>39</sup>

§ 1490. This Degree of Care Generally a Question for the Jury.<sup>40</sup>—

It has been reasoned by the highest court in the Union, in a case calling for such an expression, that neither the Legislature nor the Railroad Commissioners of a State can arbitrarily determine in advance what shall constitute ordinary or reasonable care and prudence in a railway company at a highway crossing; but that each case must stand upon its own merits, and that the question is ordinarily one *for a jury* to determine.<sup>41</sup> But, as already seen, and as will be more amply shown hereafter, the question whether ordinary care has been exercised is not a question for a jury where the facts are settled and the inferences to be drawn from them are unequivocal. It is only where the evidence as to the facts is in conflict, or where, although the facts are settled, the inferences to be drawn from them determining whether there has been a want of ordinary care, are such that fair-minded men

<sup>36</sup> *Bullock v. Wilmington &c. R. Co.*, 105 N. C. 180, 185, 189; s. c. 42 Am. & Eng. Rail. Cas. 93; 10 S. E. Rep. 988.

<sup>37</sup> *Johnson v. Gulf &c. R. Co.*, 2 Tex. Civ. App. 139; s. c. 21 S. W. Rep. 274. It has been held that where a railway company operates its trains upon the track of another company, crossing the highway, which highway is also crossed at the same point by the tracks of still another company, rendering the crossing more dangerous, the former company is held to the same degree of care as though it owned and operated all the tracks, this being a degree of care commensurate with the danger: *New York &c. R. Co. v. Luebeck*, 157 Ill. 595; s. c.

41 N. E. Rep. 897. The rule which seems to obtain in Kentucky that a railway corporation must use the highest degree of care in running its trains, within the limits of a populous city, is inapplicable to an unused private crossing, but at such a place the law requires of both the railway company and the traveller the same degree of care: *Southern R. Co. v. Barbour* (Ky.), 51 S. W. Rep. 159 (not to be off. rep.).

<sup>38</sup> *Post*, § 1705, *et seq.*

<sup>39</sup> *Oconee &c. R. Co. v. Ramsay* (Ga.), 34 S. E. Rep. 308; *ante*, 1486.

<sup>40</sup> This section is cited in §§ 1527, 1534.

<sup>41</sup> *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; s. c. 36 L. ed. 487; 12 Sup. Ct. Rep. 679.



might differ in their conclusion,—then the question is always left to the determination of a jury.<sup>42</sup>

§ 1491. **Degree of Care Required toward Weak and Infirm Persons.**—This question has been considered while dealing with the question of contributory negligence in the preceding volume,<sup>43</sup> and will be alluded to in the same connection in a future chapter of this title.<sup>44</sup> Dealing now with reference to the duty of railway companies to such persons at highway crossings, it may be said that the true doctrine is that if the persons in charge of the train, in the exercise of the duty of keeping that vigilant *lookout* which, as we shall see, the law imposes upon them, see a person upon the track or approaching it, in dangerous proximity to the train, and perceive that such person, by reason of evident age, deafness, blindness or other infirmity, is not possessed of ordinary ability to care for himself or herself,—the knowledge of this fact imposes upon them a greater degree of caution than they would be under the duty of exercising toward persons in the possession of all their faculties; and, of course, the law predicates a liability upon an injury resulting from their failure so to observe this care, precisely as though they had observed and acquired the knowledge and neglected the precautions. Under this rule, the law may not indulge them in what has been often called the *right to presume* that the person on the track, or approaching the track, will get out of the way, or otherwise exercise proper care for his own safety; but it may impose upon them the exercise of greater care, for example, toward an elderly person crossing the track, than it would be required to exercise in the case of a younger person.<sup>45</sup>

§ 1492. **Care Demanded in Case of Children.**—Children have the right to use the highway as well as adults,<sup>46</sup> though it may be negligence in the parents, guardians, or custodians of children of tender years, to expose them to the risk of the accidents of the highway.<sup>47</sup> It follows that the mere fact that a child finds himself at play or otherwise at a place where the public highway crosses a railway track, does not make him a *trespasser*, to whom the railway company owes no duty except that of abstaining from wanton injury.<sup>48</sup> Where the

<sup>42</sup> Vol. I, § 424, *et seq.*, especially § 428.

<sup>43</sup> Vol. I, § 336, *et seq.*

<sup>44</sup> *Post*, §§ 1617, 1618, 1619, 1658.

<sup>45</sup> *Green v. Southern & C. R. Co.*, 122 Cal. 563; s. c. 13 Am. & Eng. Rail. Cas. (N. S.) 511; 55 Pac. Rep. 577. See also *Lapleigne v. Morgan R. & C. Co.*, 40 La. An. 661; s. c. 1 L. R. A. 348; *post*, § 1601.

<sup>46</sup> Vol. I, § 324, *et seq.*

<sup>47</sup> Vol. I, § 322.

<sup>48</sup> *Chicago & C. R. Co. v. McArthur*, 53 Fed. Rep. 464; s. c. 10 U. S. App. 546; 3 C. C. A. 594. It has even been held that a child playing on a public crossing on a railway track is not a *trespasser*: *Krenzer v. Pittsburgh & C. R. Co.*, 151 Ind. 587; s. c. 43 N. E. Rep. 649; rehearing denied 151



question of the negligence of the parents becomes material, as where the parents are suing in case of the death of the child, or where the doctrine prevails which imputes the negligence of the parents to the child,—then the mere fact that the child escapes from the parents temporarily, and runs upon the railway track, and is killed, does not establish negligence in the parents, but merely takes the question to the jury.<sup>49</sup> In case of a child old enough to be, in the language of the law, *sui juris*, which, roughly speaking, means able to take care of himself, the question of his contributory negligence in attempting to cross a railroad track will be a question for the jury, under much the same circumstances that it would be in the case of an adult.<sup>50</sup> The precaution of giving suitable warnings at railway crossings is quite as necessary in the case of children as in the case of adults;<sup>51</sup> but the failure to ring the bell of the locomotive on approaching a crossing, obviously does not render the company liable for an injury to a child who broke away from its custodian, after the latter had discovered the train approaching, and ran in front of it, too late for those in charge of the train to avert injury to it.<sup>52</sup> The precautions which ought to be taken in the way of giving *warning signals* in such cases, generally present, as in the case of injuries to adults, questions for juries.<sup>53</sup> Thus, it was held error to refuse to instruct a jury that, if they should find that the bell was rung, that would not necessarily establish due care on the part of the defendant, if they were of opinion that the circumstances, at the time and at the crossing in question, required *other and additional precautions* to secure the safety of the child.<sup>54</sup> As in

Ind. 592; s. c. 1 Rep. 388; 52 N. E. Rep. 220; 12 Am. & Eng. Rail. Cas. (N. S.) 343; 5 Am. Neg. Rep. 137. But it is obvious that he may be guilty of gross negligence in doing so, if he is old enough to be capable of negligence.

<sup>49</sup> Vol. I, § 324, *et seq.* It was so held where a child two years old wandered from home upon the railway track forty feet distant, and, five minutes afterward, was run over by a train. Here the question whether the mother was negligent in allowing the child to escape was for the jury, it appearing that she was busy ironing and did not notice that the child was on the track until it was too late to rescue it, and that the door was left open, and that there was no fence sufficient to prevent the child from going upon the track: Atchison & C. R. Co. v. Calvert, 52 Kan. 547; s. c. 34 Pac. Rep. 976.

<sup>50</sup> Gass v. Missouri & C. R. Co., 57 Mo. App. 574.

<sup>51</sup> *Post*, § 1570.

<sup>52</sup> St. Louis & C. R. Co. v. Denty, 63 Ark. 177; s. c. 37 S. W. Rep. 719.

<sup>53</sup> *Post*, § 1586.

<sup>54</sup> Finklestein v. New York & C. R. Co., 41 Hun (N. Y.) 34; *post*, § 1555. For example, where, as a freight train was crossing a street, and the caboose had entirely crossed, a child nine years old started to cross the track, and was killed by an engine backing on another track, it was held that if the flagman at the crossing was aware of the approach of the backing engine, and gave no warning, he was guilty of negligence which was imputable to the company, although the bell of the engine may have been ringing and the flagman may have presumed that no one would attempt to cross until the freight train had entirely passed: Finklestein v. New York & C. R. Co., 41 Hun (N. Y.) 34.



the case of street railway injuries,<sup>55</sup> so here, where a child, although of such tender years as not to be imputable with negligence, after running alongside a slowly backing locomotive, turns suddenly in front of it and is killed, negligence will not be imputed to the railway company, but the accident will be rather ascribed to misadventure, resulting from the incapacity of the child.<sup>56</sup>

**§ 1493. Relative Rights of Steam and Electric Railway Companies at Crossings.**—As an electric railway company usually operates but one car, or at most two cars, which may be readily checked and stopped, and as it traverses lengthwise the streets and is not allowed to proceed at the same rate of speed which is necessary in the case of steam railway companies,—it is clearly a sound conclusion that where their tracks cross each other, the steam railway company has, in a sense, the right of way,—that is to say, the right of precedence; but it is not sound to say that it may run its cars at such high rate of speed as may be consistent with the safety of its passengers, provided it exercises the proper care in giving signals,—as one court has said,<sup>57</sup>—thus allowing it to neglect the safety of the public at street crossings.<sup>58</sup>

**§ 1494. Statutory Precautions Do Not Exclude the Common Law Obligation of Diligence and Care.**<sup>59</sup>—It is a principle of great importance, in dealing with the subject under consideration, that statutes demanding precautions of railway companies in running their trains, for the promotion of the public safety, do not exclude the general obligation under which such companies rest by the principles of the common law, to exercise diligence and care; but that the railway company is required to take reasonable measures for the safety of the

<sup>55</sup> *Ante*, § 1426.

<sup>56</sup> *Schwier v. New York & C. R. Co.*, 15 Hun (N. Y.) 572. In a pathetic case, which is an example of many, it appeared that the plaintiff's *five children*, while crossing a railroad track in a wagon, were killed by a train. The view of the track was *obscured by bushes* until the wagon was within a few feet of it, a *girl of sixteen* was driving slowly, another train had just crossed, the train was going *faster than usual*, and *rang no bell and sounded no whistle*. It was held that there was evidence of due care on the part of the children, and of negligence on the part of the train hands, proper to be submitted to a jury, and that a verdict for \$10,500 would not be

set aside as excessive: *Nehrbas v. Central & C. R. Co.*, 62 Cal. 320. So it has been held that a railroad company is liable for an injury to a *school boy*, injured without negligence on his part, by the sudden pushing of an engine against *detached cars* near a crossing, which the company knew that school children were wont to cross at that time of day: *Gulf & C. R. Co. v. West* (Tex. Civ. App.), 36 S. W. Rep. 101 (no off. rep.).

<sup>57</sup> *New York & C. R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 52; s. c. 38 L. R. A. 516; 37 Atl. Rep. 627.

<sup>58</sup> *Post*, § 1883.

<sup>59</sup> This section is cited in §§ 1541, 1544, 1555, 1573, 1576.



public, although such measures may not be prescribed by any existing statute.<sup>60</sup> Hence, the fact that a statute provides for certain precautions at a railroad crossing will not relieve a railroad company from adopting *such other measures* as public safety and common prudence dictate.<sup>61</sup>

§ 1495. **Whether Failure to Observe Statutory Precautions is Negligence per se, or Merely Evidence of Negligence.**—Recurring, as we must again and again, to a difference of judicial opinion already indicated,<sup>62</sup> we find that some courts hold that the failure of a railroad company to obey statutes and municipal ordinances with reference to precautions to be taken to prevent accident at railway crossings, is negligence *per se*,<sup>63</sup> while other courts seem to have so far yielded to railroad pressure as to hold that it is merely evidence to be considered by the jury, thus clothing them with power to enforce or to dispense with a statute intended for the protection of life and limb, in their mere discretion, though subject, of course, to judicial superintendence.<sup>64</sup> But it does not follow from the view that the failure to observe statutory precautions is *negligence per se*, that the railway company will not be allowed to excuse itself by showing that it was impossible

<sup>60</sup> See *post*, § 1555, where the subject is considered with special reference to the duty of giving audible signals at crossings; also *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 421; *Burger v. Missouri Pac. R. Co.*, 112 Mo. 238; *Hollinger v. Canadian Pac. R. Co.*, 21 Ont. 705; *Winstanley v. Chicago &c. R. Co.*, 72 Wis. 375; s. c. 39 N. W. Rep. 856; *Rowen v. New York &c. R. Co.*, 59 Conn. 364; s. c. 21 Atl. Rep. 1073; *Com. v. Boston &c. R. Corp.*, 101 Mass. 201; *Bradley v. Boston &c. Railroad*, 2 Cush. (Mass.) 539; *Linfield v. Old Colony R. Co.*, 10 Cush. (Mass.) 569; *Shaw v. Boston &c. R. Co.*, 8 Gray (Mass.) 73; *Chicago &c. R. Co. v. Perkins*, 125 Ill. 127; *Thompson v. New York &c. R. Co.*, 110 N. Y. 636; *Louisville &c. R. Co. v. Com.*, 13 Bush (Ky.) 388; *Weber v. New York &c. R. Co.*, 58 N. Y. 451; *Guggenheim v. Lake Shore &c. R. Co.*, 66 Mich. 150; s. c. 33 N. W. Rep. 161; 9 West. Rep. 903; *Freeman v. Duluth &c. R. Co.*, 74 Mich. 86; s. c. 41 N. W. Rep. 873; 3 L. R. A. 594; *Eaton v. Fitchburg R. Co.*, 129 Mass. 364; *Houston &c. R. Co. v. Boozer*, 70 Tex. 730; s. c. 9 S. W. Rep. 119; *Kaminitzsky v. Northeastern R. Co.*, 25 S. C. 53;

*Wilkins v. St. Louis &c. R. Co.*, 101 Mo. 93; s. c. 13 S. W. Rep. 893; *Coulter v. Great Northern R. Co.*, 5 N. D. 568; s. c. 4 Am. & Eng. Rail. Cas. (N. S.) 336; 67 N. W. Rep. 1046; *South &c. R. Co. v. Thompson*, 62 Ala. 494; *Peoria &c. R. Co. v. Herman*, 39 Ill. App. 287; *Chicago &c. R. Co. v. Pearson*, 82 Ill. App. 605.  
<sup>61</sup> *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; s. c. 36 L. ed. 497; 12 Sup. Ct. Rep. 679.

<sup>62</sup> Vol. I, §§ 10, 11.

<sup>63</sup> *Schbereth v. Missouri &c. R. Co.*, 96 Mo. 509; *South &c. Alabama R. Co. v. Donovan*, 84 Ala. 141; *Dahlstrom v. St. Louis &c. R. Co.*, 108 Mo. 525; *Pennsylvania R. Co. v. Horton*, 132 Ind. 187; *Sullivan v. Missouri &c. R. Co.*, 117 Mo. 214; *Louisville &c. R. Co. v. Webb*, 90 Ala. 185; s. c. 11 L. R. A. 674; *Eswin v. St. Louis &c. R. Co.*, 96 Mo. 290; *Galveston &c. R. Co. v. Harris* (Tex. Civ. App.), 53 S. W. Rep. 599.  
<sup>64</sup> *Philadelphia &c. R. Co. v. Stebbing*, 62 Md. 504; *Western &c. R. Co. v. Young*, 81 Ga. 397. But see *Windsor v. Hannibal &c. R. Co.*, 45 Mo. App. 123 (when the ordinance is not pleaded); *Beck v. Vancouver R. Co.*, 25 Ore. 32.



to comply with the statute,—as where the statute prescribes the doing of certain things, such as the sounding of the steam whistle, the applying of the brakes, etc., upon the appearance of “any person, animal, or other obstruction” upon the track in front of a moving train, and a person thrusts himself upon the track in front of a moving train so suddenly that these things can not be done before he is run over.<sup>65</sup>

<sup>65</sup> *East Tennessee &c. R. Co. v. Scales*, 2 Lea (Tenn.) 688. Further as to the liability of railway companies for the omission of other duties imposed by statutes or municipal ordinances,—see *McGrath v. New York &c. R. Co.*, 63 N. Y. 522, 530; *Baltimore &c. R. Co. v. State*, 29 Md. 252; *Stapley v. London &c. R. Co.*, L. R. 1 Exch. 21; s. c. 4 Hurl. & Colt. 93; 11 Jur. (N. S.) 954; 35 L. J. (Exch.) 7; 14 Week. Rep. 132; 13 L. T. (N. S.) 406; *Skelton v. London &c. R. Co.*, L. R. 2 C. P. 631; s. c. 36 L. J. (C. P.) 249; 16 L. T. (N. S.) 563; 15 Week. Rep. 925; *Williams v. Great Western &c. R. Co.*, L. R. 9 Exch. 157; s. c. 43 L. J. (Exch.) 105; 22 Week. Rep. 531; 31 L. T. (N. S.) 124.



## CHAPTER XLVII.

### LIABILITY OF RAILWAY COMPANIES FOR INJURIES TO TRAVELLERS FROM DEFECTS IN CROSSINGS.

#### SECTION

- 1498. Duty of railway company to restore highway to former safe condition.
- 1499. Statutes enjoining the performance of this duty.
- 1500. Power of the legislature to enact such statutes.
- 1501. Interpretation of such statutes.
- 1502. To what highways this duty of reconstruction and reparation applies.
- 1503. Liability for injuries through failing to make and repair private or farm crossings.
- 1504. For what defects in crossings railway companies are liable.
- 1505. For what defects in crossings railway companies are not liable.
- 1506. Company liable for what accidents arising from defects in crossings?
- 1507. Allowing obstructions to the sight and hearing of the traveller to exist near highway crossings.
- 1508. What obstructions to sight and hearing will afford *prima facie* evidence of negligence.
- 1509. Increased care demanded of the company where the view is obstructed.

#### SECTION

- 1510. In constructing and repairing highway crossings, railway company liable only for the exercise of ordinary care.
- 1511. When sufficiency of repairs, existence of defects, etc., present questions for the jury.
- 1512. Contributory negligence of the traveller in connection with defective railway crossings.
- 1513. Further of the contributory negligence of travellers injured through attempting to use defective crossings.
- 1514. Liability for defective crossings where the railway is leased to another company.
- 1515. Effect of the consent or acceptance of the municipal authorities.
- 1516. Construction and reparation of crossings where two railways cross each other at grade.
- 1517. Construction of agreements by railway companies to construct highway crossings.
- 1518. Other questions relating to railway crossings of highways.

§ 1498. **Duty of Railway Company to Restore Highway to Former Safe Condition.**—As already seen,<sup>1</sup> it is the duty of a railway company, under the principles of the common law, in exercising its fran-

<sup>1</sup> *Ante*, § 1352, *et seq.*



chise of constructing and operating its road across a public highway, not to interrupt or endanger travel on the highway any longer than is reasonably necessary to accomplish the work of construction;<sup>2</sup> nor beyond what is reasonably necessary while the work of construction is in progress;<sup>3</sup> and whether it lays its track across the highway at grade, or above or below grade, it must restore the highway to its former safe condition for public travel, except so far as its safety may necessarily be impaired by a proper and careful exercise by the railway company of its franchise of laying and operating its road across it; and must maintain it in such reasonably safe condition.<sup>4</sup> A failure, through negligence or willfulness, to perform this duty will render the railway company liable in damages to any person specially injured thereby, in his person or property,<sup>5</sup> without his own fault.<sup>6</sup>

§ 1499. **Statutes Enjoining the Performance of this Duty.**—Although this duty is one arising under the implications of the common law,<sup>7</sup> yet numerous statutes have been enacted enjoining its performance, either in the charters of railway companies granted by special acts of legislation, or in the form of general laws regulating such companies. Many of these statutes appear to be merely affirmations of the common law, enjoining a duty which the railway company would be civilly liable for failing to perform in the absence of any such statute;<sup>8</sup> others define what would otherwise be the obligation of the

<sup>2</sup> Dallas &c. R. Co. v. Able, 72 Tex. 150; s. c. 9 S. W. Rep. 871.

<sup>3</sup> Rembe v. New York &c. R. Co., 102 N. Y. 721; s. c. 3 Cent. Rep. 641.

<sup>4</sup> Conklin v. New York &c. R. Co., 102 N. Y. 107; s. c. 3 Cent. Rep. 194; Evansville &c. R. Co. v. Carvener, 113 Ind. 51; s. c. 12 West. Rep. 203; 14 N. E. Rep. 738; Kyne v. Wilmington &c. R. Co., 8 Houst. (Del.) 185; s. c. 13 Cent. Rep. 391; 14 Atl. Rep. 922; Omaha &c. R. Co. v. Brady, 39 Neb. 27; s. c. 57 N. W. Rep. 767; Louisville &c. R. Co. v. Bloyd (Ky.), 55 S. W. Rep. 694; Omaha &c. R. Co. v. Ryburn, 40 Neb. 87; s. c. 58 N. W. Rep. 541; Gates v. Pennsylvania R. Co., 150 Pa. St. 50; s. c. 46 Alb. L. J. 176; 12 Rail. & Corp. L. J. 134; 24 Atl. Rep. 638; Lake Shore &c. R. Co. v. McIntosh, 140 Ind. 261; s. c. 38 N. E. Rep. 476; Grand Trunk R. Co. v. Sibbald, 20 Can. S. C. 259; Houston &c. R. Co. v. Weaver (Tex. Civ. App.), 41 S. W. Rep. 846 (no off. rep.); Goodrich v. Burlington &c. R. Co., 103

Iowa 412; s. c. 72 N. W. Rep. 653; Kimes v. St. Louis &c. R. Co., 85 Mo. 611; Louisville &c. R. Co. v. Phillips, 112 Ind. 59; s. c. 11 West. Rep. 119; 13 N. E. Rep. 132; Mann v. Central &c. R. Co., 55 Vt. 484; s. c. 45 Am. Rep. 628.

<sup>5</sup> Atchison &c. R. Co. v. Miller, 39 Kan. 419; s. c. 18 Pac. Rep. 486 (injury to cattle).

<sup>6</sup> Omaha &c. R. Co. v. Brady, 39 Neb. 27; s. c. 57 N. W. Rep. 767; Rembe v. New York &c. R. Co., 102 N. Y. 721; s. c. 3 Cent. Rep. 641; Dallas &c. R. Co. v. Able, 72 Tex. 150; s. c. 9 S. W. Rep. 871.

<sup>7</sup> Ante, § 1352, *et seq.*

<sup>8</sup> Such would appear to be the statute of Texas which was construed in Galveston &c. R. Co. v. Matula, 79 Tex. 577; s. c. 15 S. W. Rep. 573. The statute requires railroad companies to put their crossings at a highway "in such state as not to unnecessarily impair its usefulness, \* \* \* and to keep such crossing in repair."



railway company at common law, and enforce such obligation by penal sanctions; still others go further, and prescribe, with more or less minuteness, the manner in which the railway company is to restore the highway, at the crossing and at the approaches to the crossing. Under the statute of Texas, the railway company is bound to leave the *approaches* of the highway to the crossing in as good condition as they were before the railway was completed, although the statute does not expressly so direct.<sup>9</sup> The principle, elsewhere already considered,<sup>10</sup> that a statute enacted to promote the safety or convenience of the public generally, gives a right of action to any member of the public who is injured by its violation, operates to give a right of action to any member of the public for an injury sustained, in his person or property,<sup>11</sup> without fault on his part, in consequence of the failure of the railroad company to comply with such statute,<sup>12</sup> either by making such a crossing as complies with the specifications of the statute, or by maintaining a crossing already established in compliance with such specifications, and in an ordinarily safe condition.<sup>13</sup> Under a statute requiring a railway company to maintain a "good and sufficient" crossing, the crossing must be *reasonably safe and convenient*.<sup>14</sup> The fact that a *street* railway track is laid upon a highway which crosses a steam railway, and that the *street* railway company is under an obligation to keep the highway between its rails in repair, does not absolve the *steam* railway company from the statutory duty of restoring the highway where it is intersected by its track, "to such a state as not unnecessarily to have impaired its usefulness;" and does not absolve the *steam* railway company from liability to a traveller who is injured by a defect in the highway at the point of its intersection with the steam railway.<sup>15</sup>

§ 1500. **Power of the Legislature to Enact such Statutes.**<sup>16</sup>—Where such statutes are enacted prior to the creation of the railway corporation, there can not be much room for doubt that it comes into existence subject to them, unless the corporation is created by a special

<sup>9</sup> Gulf &c. R. Co. v. Greenlee, 62 Tex. 344.

<sup>10</sup> Vol. I, § 12.

<sup>11</sup> That such statutes extend to the protection of *property*,—see Burlington &c. R. Co. v. Koonce, 34 Neb. 479; s. c. 51 N. W. Rep. 1033; Atchison &c. R. Co. v. Miller, 39 Kan. 419; s. c. 18 Pac. Rep. 486.

<sup>12</sup> In this instance Rev. Stat. Mo., § 807, as amended by the Act of March 27, 1885.

<sup>13</sup> Hogue v. Chicago &c. R. Co., 32 Fed. Rep. 365. See also Galveston &c. R. Co. v. White (Tex. Civ. App.), 32 S. W. Rep. 186 (no off. rep.).

<sup>14</sup> Brown v. Hannibal &c. R. Co., 99 Mo. 310; s. c. 42 Am. & Eng. Rail. Cas. 87; 12 S. W. Rep. 655.

<sup>15</sup> Masterson v. New York &c. R. Co., 84 N. Y. 247; s. c. 38 Am. Rep. 510.

<sup>16</sup> This section is cited in §§ 1528, 1538.



charter, and the terms of such charter clearly import the contrary. Existing statutes of a general character, enacted to conserve the public safety and welfare, will be deemed to form, in a sense, a part of the charter, unless the instrument clearly implies the contrary, under the principle that grants of franchises which are not enjoyed by the public generally, and which are consequently said to be "in derogation of common right," are to be strictly construed, and that everything not granted, in express terms or by necessary implication, is deemed to be withheld.<sup>17</sup> But where a franchise to build a railroad has been granted by the State and accepted by the coadventurers, who have organized themselves into a corporation, then the question presents more difficulty. To require the railway company to erect and maintain, at its own expense, a crossing whenever a new highway shall be established across its railroad, may justly be regarded as laying a burden upon the franchises conferred upon it, for the public benefit, without compensation, and hence as impairing the obligation of the contract created by the grant of its charter and its acceptance, and as depriving it of its property without due process of law. Accordingly, we find decisions to the effect that such statutes are not to be construed as applying to existing lines of road, unless their language renders such a construction unavoidable;<sup>18</sup> and there are decisions to the effect that where a highway is laid out so as to cross a railway already built, the railway company is entitled to damages for the taking of so much of its land, consisting of its right of way, for that public purpose, just as any other land-owner would, under like cir-

<sup>17</sup> 4 Thomp. Corp., § 5659.

<sup>18</sup> State v. Minneapolis & C. R. Co., 39 Minn. 219; s. c. 39 N. W. Rep. 153; Tyler v. St. Joseph & C. R. Co., 43 Kan. 543; s. c. 42 Am. & Eng. Rail. Cas. 255; 23 Pac. Rep. 585. Thus, it has been held that the duty enjoined upon railroad corporations with respect to the construction of highway crossings, by a statute of Arkansas (Sand. & H. Ark. Dig., § 6263), whenever any such corporation has constructed or shall construct a railroad across a public road or highway, now or to be hereafter established, arises when the railroad is constructed across the highway, and not when the highway is constructed across the railroad: *Prairie County v. Fink*, 65 Ark. 492; s. c. 47 S. W. Rep. 301. It has been held that the statutes of Minnesota (Minn. Laws 1887, chap. 15, and Minn. Laws 1889, chap. 222), requiring railroad companies to con-

struct crossings wherever highways intersect their tracks, are not, as to highways laid out after their passage, unconstitutional because they make no provision for compensation, since such provision is made by the statute regulating the laying out of highways: *State v. Shardlow*, 43 Minn. 524; s. c. 46 N. W. Rep. 74. The Supreme Court of Minnesota has made the distinction that, upon the laying out of a public highway across the track and right of way of a railroad company, the latter is not entitled to compensation for providing and maintaining *cattle-guards* and *sign-boards* at *new crossings*, but is entitled to compensation for *planking the roadway* where it crosses the company's tracks, and for the maintenance of the planking: *State v. Hennepin County Dist. Ct.*, 42 Minn. 247; s. c. 7 L. R. A. 121; 42 Am. & Eng. Rail. Cas. 241.



cumstances, be entitled to damages.<sup>19</sup> But in Massachusetts the railway company is not entitled to damages for the cost of operating the gates rendered necessary by the new crossing.<sup>20</sup> Contrary to the foregoing, there is a class of decisions holding that the legislature may provide that an existing railroad company shall maintain so much of a highway crossing its track at grade as comes within its limits;<sup>21</sup> or that existing railway companies shall construct and repair suitable highway crossings; and this is not deemed unconstitutional as imposing a burden on the railway company that did not exist at its incorporation.<sup>22</sup> Under such a statute,<sup>23</sup> requiring railroad companies to construct and *keep in repair* suitable highway crossings, it is held to be the duty of the company to *make* such crossings, with *approaches*, notwithstanding the highway was laid out *after* the road was built.<sup>24</sup>

§1501. **Interpretation of Such Statutes.**—The word “crossing,” in the statute, means the entire structure, including bridges, although a part may be outside the limits of the lands of the railway company.<sup>25</sup>

<sup>19</sup> Chicago &c. R. Co. v. Chautauqua County Comrs., 49 Kan. 763; s. c. 31 Pac. Rep. 736; Boston &c. R. Co. v. Cambridge, 159 Mass. 283; s. c. 34 N. E. Rep. 383. And, on the same principle, where a railway is laid out so as to cross a gravel road owned by an incorporated company, the gravel road company will be entitled to compensation, and the principle *de minimis non curat lex* has no application to such a case: Indianapolis Gravel Road Co. v. Belt R. Co., 110 Ind. 5.

<sup>20</sup> Boston &c. R. Co. v. Cambridge, 159 Mass. 283; s. c. 34 N. E. Rep. 382.

<sup>21</sup> Boston &c. R. Co. v. County Commissioners, 79 Me. 386; s. c. 4 N. Eng. Rep. 657; 10 Atl. Rep. 113.

<sup>22</sup> State v. Chicago &c. R. Co., 29 Neb. 412; s. c. 42 Am. & Eng. Rail. Cas. 248; 45 N. W. Rep. 469.

<sup>23</sup> Here, Neb. Act March 31, 1887.

<sup>24</sup> State v. Chicago &c. R. Co., 29 Neb. 412; s. c. 42 Am. & Eng. Rail. Cas. 248; 45 N. W. Rep. 469. It has been held that each of several railroad companies crossing streets nearly at the same place may properly be required to construct the parts of the bridges above their own system of tracks respectively, and approaches upon their respective

sides, without other apportionment between them of the cost of the entire bridge structure and approaches: State v. Minneapolis &c. R. Co., 39 Minn. 219; s. c. 39 N. W. Rep. 153. Where, after a charter to a railroad company had been granted, empowering it to build its road across highways, provided they were restored to their former state to the acceptance of selectmen or commissioners, a statute was passed making railroads liable to towns for damages resulting from insufficient crossings, the railway company became liable for failing to restore the highways to their former usefulness as provided by its charter: Roxbury v. Central &c. R. Co., 60 Vt. 121; s. c. 6 N. Eng. Rep. 534; 14 Atl. Rep. 92. The obligation imposed upon a railway company by the statute of Indiana (Burns' Rev. Stat., § 5153), to construct its track “in such a manner as to afford security to life and property,” is the same where a highway is laid out across the track, as where it existed when the track was built: Louisville &c. R. Co. v. Smith, 91 Ind. 119.

<sup>25</sup> Roxbury v. Central &c. R. Co., 60 Vt. 121; s. c. 6 N. Eng. Rep. 534; 14 Atl. Rep. 92.



It includes the necessary *embankment* and *approaches*.<sup>26</sup> Under a statute of Missouri,<sup>27</sup> it is the duty of a railroad company to locate the *planking* specified in the statute, on the particular part of a street that is graded and usually travelled over by wagons and vehicles.<sup>28</sup> There is a holding to the effect that when a statute requires railroad companies to make such highway crossings "as the circumstances of the case and the public safety may require," the nature of the crossing is not governed by considerations relating to the public safety alone, but by what is practicable, in the judgment of a competent engineer, to be done for the purpose of carrying out the objects of the railroad company.<sup>29</sup> A statute<sup>30</sup> making a railroad company liable for an injury caused by a structure legally placed by it on a public highway,—applies whether the highway was established after or before the railroad was built. The expression "it, and not the party bound to keep the road in repair," is to be read as if it were "the party otherwise bound," etc.<sup>31</sup> The provisions of a statute of Iowa<sup>32</sup> extend not only to putting the approaches of a railway crossing in a proper condition, but also to the maintaining of them in such condition.<sup>33</sup> It is the duty of a railway company running its road *under the highway* to maintain a *highway bridge* where necessary; and it is not impliedly relieved therefrom by a charter provision authorizing it to construct its track across highways, provided the highways shall be restored to their former condition.<sup>34</sup> Where a statute<sup>35</sup> enacted that a way "may be so made as to pass under or over" a railroad, it was held that it could not cross it at grade. The word "may" in the statute was construed as of the force of "must" or "shall."<sup>36</sup> The duty enjoined by a statute of Michigan of opening, constructing and maintaining the highway and necessary crossing therefor across its right of way and tracks, does not extend to *building* a highway, if the highway itself is not made necessary by the existence of the railroad.<sup>37</sup> Under a statute of Indiana,<sup>38</sup> providing that whenever the track of a railroad shall cross a road or highway, the latter may be carried under or over the track as may be most expedient; and that, where a change in the road is desirable, additional lands may be taken,—it was held, that the old

<sup>26</sup> *Moberly v. Kansas City &c. R. Co.*, 17 Mo. App. 518.

<sup>27</sup> Mo. Rev. Stat., § 807, as amended March 27, 1885.

<sup>28</sup> *Hogue v. Chicago &c. R. Co.*, 32 Fed. Rep. 365.

<sup>29</sup> *Kyne v. Wilmington &c. R. Co.*, 8 Houst. (Del.) 185; s. c. 13 Cent. Rep. 391; 14 Atl. Rep. 922.

<sup>30</sup> Conn. Gen. Stat., p. 232, § 10.

<sup>31</sup> *Allen v. New Haven &c. R. Co.*, 50 Conn. 215.

<sup>32</sup> Iowa Code, §§ 1262, 1263.

<sup>33</sup> *Newton v. Chicago &c. R. Co.*, 66 Iowa 422.

<sup>34</sup> *Chesapeake &c. R. Co. v. Dyer County*, 87 Tenn. 712; s. c. 11 S. W. Rep. 943.

<sup>35</sup> Vt. Rev. Stat., § 3381.

<sup>36</sup> *Central &c. R. Co. v. Royalton*, 58 Vt. 234.

<sup>37</sup> *People v. Lake Shore &c. R. Co.*, 52 Mich. 277.

<sup>38</sup> Burns' Rev. Stat., § 5172.



highway might be filled up and a new one made.<sup>39</sup> The question whether a steam railroad track is "approximately even with the adjacent surface" of a street in which it is laid, within the meaning of an act and a joint resolution of Congress, requiring fences on both sides of a track approximately even with the surface, must be *submitted to the jury*, where the track is not more than two feet and two inches higher than the level of the street.<sup>40</sup> Under statutes of Indiana,<sup>41</sup> all companies interested in the crossings must coöperate in keeping them in repair.<sup>42</sup>

§ 1502. To what Highways this Duty of Reconstruction and Reparation Applies.<sup>43</sup>—There are holdings to the effect that the duty imposed upon railway companies by statute of constructing crossings over their tracks at places where the same are crossed by public highways does not extend so far as to require the company to construct such a crossing over a highway which has never been legally estab-

<sup>39</sup> *Clawson v. Chicago &c. R. Co.*, 95 Ind. 152.

<sup>40</sup> *Baltimore &c. R. Co. v. Cumberland*, 12 App. D. C. 598.

<sup>41</sup> *Burns' Rev. Stat.*, §§ 5154, 5155.

<sup>42</sup> *Indiana &c. R. Co. v. Barnhart*, 115 Ind. 399; s. c. 13 West. Rep. 425; 16 N. E. Rep. 121. Under an Illinois statute, *notice to repair* crossing must be served on station agent nearest the crossing: *O'Fallon v. Ohio &c. R. Co.*, 45 Ill. App. 572. Such notice insufficient, which fails to direct the manner in which the repairs shall be done, and to locate the crossing: *O'Fallon v. Ohio &c. R. Co.*, *supra*. The charter of the Minnesota Western Railway Company (Minn. Spec. Laws 1853, chap. 66), imposes a continuing duty as to restoring public streets to their original usefulness: *State v. Minneapolis &c. R. Co.*, 39 Minn. 219; s. c. 39 N. W. Rep. 153. Under N. H. Gen. Laws, ch. 161, § 3, a railroad company may be required to *bridge* a highway established but not constructed: *Worcester &c. R. Co. v. Nashua*, 63 N. H. 593. The statute of Minnesota (Minn. Stat. 1887, chap. 315) provides how grade crossings shall be constructed, but does not authorize all crossings to be at grade: *State v. Minneapolis &c. R. Co.*, 39 Minn. 219; s. c. 39 N. W. Rep. 153. The provision that a railroad company must keep up and maintain bridges at highway cross-

ings, included in Conn. Gen. Stat., § 3480, is not repealed by Conn. Acts 1889, ch. 220, § 7, relating to grade crossings: *Middletown v. New York &c. R. Co.*, 62 Conn. 492; s. c. 27 Atl. Rep. 119. If a portion of a highway in a city is lowered for the purpose of having a railroad pass over it by means of a bridge, such portion is not included in the "*approaches*" to the bridge, within the meaning of Mass. Pub. St., ch. 112, § 128, so as to render the railroad corporation liable for an injury caused by a defect therein, and to exonerate the city from liability: *Whitcher v. Somerville*, 138 Mass. 454. Under Conn. Gen. Stat. 1888, § 3480, an order of railroad commissioners authorizing a railroad company which is about to carry its track by a bridge over a street, to place supports under the bridge at the street curb line, is not *appealable*: *Waterbury's Appeal*, 57 Conn. 84; s. c. 17 Atl. Rep. 355. Bill in equity maintainable under Massachusetts statute (Mass. Pub. Sts., ch. 112, §§ 135, 136), by county commissioners to enforce their order requiring a railroad company whose road crosses a highway, to make new provision for effectually *draining the highway*, where the original provision is ineffective: *Dickinson v. New Haven &c. Co.*, 155 Mass. 16; s. c. 34 N. E. Rep. 334.

<sup>43</sup> This section is cited in § 1503.



lished across the company's right of way;<sup>44</sup> and that a railway company can not be required, under a statute, to take across its track a highway which was not opened and worked within six years after it was laid out.<sup>45</sup> Another view is that this obligation of making and maintaining a reasonably safe crossing where a railway intersects a public highway, applies to every public highway lawfully existing, no matter how it came to be such, whether by being formally laid out, as required by statute, or by user and prescription,—in other words, that it applies to a highway *de facto* as well as to a highway *de jure*.<sup>46</sup> This is especially true where, in addition to the fact of open and notorious user by the public, the railway company *recognizes* it as a highway, by permitting the public to cross, and by constructing and assuming to maintain a crossing at that point,—in which case the company will be as much bound to keep the crossing in repair, and as much liable for injuries to travellers in consequence of negligent defects therein, as though the highway had been lawfully laid out and established.<sup>47</sup> The theory of the cases so holding seems to be that, in such a case, by constructing a crossing, the railway company holds out an *implied invitation* to the public to use it, and assumes the corresponding obligation of maintaining it in a safe condition for their use, and is consequently *estopped*, when sued for an injury arising from its failure to perform the duty thus assumed, from setting up that it was under no such duty.<sup>48</sup>

<sup>44</sup> *Missouri &c. R. Co. v. Long*, 27 Kan. 684 (under a statute using the words "any regularly laid out public highway").

<sup>45</sup> *People v. New York &c. R. Co.*, 69 Hun (N. Y.) 166; s. c. 52 N. Y. St. Rep. 530; 23 N. Y. Supp. 456. But under another such statute it has been held that, in order to impose upon a railway company the duty of maintaining a *bridge* over a street across which it makes a cut in laying its tracks, it is not essential that the street should have been graded to any great extent, or that the proceedings for its establishment should have been in all respects regular: *Toledo v. Lake Shore &c. R. Co.*, 9 Ohio C. D. 135; s. c. 17 Ohio C. C. 265.

<sup>46</sup> *Johanson v. Boston &c. R. Co.*, 153 Mass. 57; s. c. 26 N. E. Rep. 426. In this case it was held that a finding that a railroad crossing was a *highway by prescription* is justified by evidence that there was a planking between the tracks, that for more than twenty years the

crossing had been opened and used continually by the public in its present condition, and that, for a long time before the accident, from three thousand to five thousand travellers used the crossing every day: *Johanson v. Boston &c. R. Co.*, *supra*.

<sup>47</sup> *Kelly v. Southern &c. R. Co.*, 28 Minn. 98; *Retan v. Lake Shore &c. R. Co.*, 94 Mich. 146; s. c. 53 N. W. Rep. 1094; *Missouri &c. R. Co. v. Bridges*, 74 Tex. 520; s. c. 6 Rail. & Corp. L. J. 513; 12 S. W. Rep. 210.

<sup>48</sup> *Taylor &c. R. Co. v. Warner*, 88 Tex. 642; s. c. 32 S. W. Rep. 868. Therefore, it was held that a railway company which, at the time of constructing its line, recognized the existence of a street by constructing a *bridge*, and for forty years had maintained a bridge at such a point, could not, when called upon to repair the bridge or substitute another for it, deny the legal existence of the street because of irregularities in its dedication: *Toledo v. Lake Shore &c. R. Co.*, 9 Ohio C. D. 135; s. c. 17 Ohio C. C. 265.



§ 1503. **Liability for Injuries through Failing to Make and Repair Private or Farm Crossings.**—The question indicated by this caption depends for its solution upon the further question whether the railway company stands under an obligation, imposed by its charter or by some governing statute, or assumed by contract, of making and keeping in repair the private or farm crossing in the particular instance. The question in what case railway companies are bound to make and keep in repair private crossings or farm crossings depends upon a great variety of statutory provisions, and other considerations, too numerous to be examined in detail in a work which deals merely with the subject of negligence; but some decisions dealing with the question will be noted in the margin.<sup>49</sup> Assuming that the railway company stands under the obligation of keeping a particular private or farm crossing in repair, it will be liable to a person lawfully using the crossing, for a negligent defect therein, just as though it was a public crossing.<sup>50</sup> As in case of a public crossing,<sup>51</sup> although the railway company may not be bound to undertake the duty of making a private crossing, or of keeping it in repair, yet if it does undertake this duty and negligently fails to perform it, it will become liable for an injury resulting to a person lawfully using the crossing, from a negligent defect permitted to exist therein.<sup>52</sup> So, its obligation, with the consequences already described, of maintaining a farm crossing, may be

<sup>49</sup> A provision in the charter of a railroad corporation, that the road shall be so constructed as not to obstruct the safe and convenient use of any private way which it crosses, imposes upon the corporation the duty of maintaining a safe and convenient crossing for such private way: *Keefe v. Sullivan County R. Co.*, 63 N. H. 271. That a farm crossing may not be "necessary," within the meaning of the statute, although it might add greatly to the convenience of the owner of the farm: *Louisville &c. R. Co. v. Chalcraft*, 14 Ill. App. 516. That a statute which authorizes a *land-owner* to build a necessary *farm crossing*, when a railroad refuses to do so, does not justify his placing it where it will greatly increase the danger of collisions: *Chalcraft v. Louisville &c. R. Co.*, 113 Ill. 86. That, although the statute does not require railroad companies to construct *farm crossings*, yet where the plan of the road shows such crossings, and, in awarding damages, the commissioners took them into account,

the company becomes bound to construct them: *Kansas City &c. R. Co. v. Kregelo*, 32 Kan. 608. Texas statute under which railway company is not required or authorized to construct its track across a third-class public road, with no other crossing than one within an enclosure owned by a private person: *Galveston &c. R. Co. v. O'Neal*, 4 Tex. App. Civ. Cas. 128; s. c. 16 S. W. Rep. 537. That the *easement of way* across a railroad reserved to a land-owner on the condemnation of the right of way through his land does not terminate by sale to other parties of all the land on one side of the road, but continues for the benefit of all the land benefited thereby: *Rathbun v. New York &c. R. Co.*, 20 R. I. 60; s. c. 9 Am. & Eng. Rail. Cas. (N. S.) 333; 37 Atl. Rep. 300.

<sup>50</sup> *Central R. &c. Co. v. Robertson*, 95 Ga. 430; s. c. 22 S. E. Rep. 551.

<sup>51</sup> *Ante*, § 1502.

<sup>52</sup> *Central R. &c. Co. v. Robertson*, 95 Ga. 430; s. c. 22 S. E. Rep. 551.



shown *by prescription*: the fact that it has maintained such a crossing for forty-nine years has been held to be conclusive upon its liability for its maintenance, where no act has been taken for its discontinuance.<sup>53</sup> On the other hand, where the railway company owed no duty to a particular person to keep a private crossing in repair, and held out no invitation to use it, he can not recover for an injury sustained by his wagon when thereon, caused by the crossing being out of repair.<sup>54</sup> Where the railway company stands under the duty of keeping a farm crossing in repair, this duty carries with it the obligation of making a *continuous inspection*, to the end of seeing that it is maintained in a safe condition. If the planks of such a crossing have been torn up by a wreck, the railway company is bound to make such an examination of the crossing as will disclose whether or not it has been left in a dangerous condition.<sup>55</sup> Although there is a statute requiring railway companies to construct and maintain private crossings, and providing that, if they shall fail to do so after notice has been given in writing by the occupant of adjoining lands, such occupant may build or repair the crossing, and recover double the expense from the company,—yet the fact that the land-owner has not given the company notice of the defective condition of the crossing, under the statute, will not relieve it from liability for an injury occasioned thereby.<sup>56</sup> In Minnesota, it is the duty of the land-owner for whose benefit and convenience gates are constructed and placed in a railroad right-of-way fence at a private farm crossing upon the land of such owner, to *keep the gates closed*.<sup>57</sup> A statute imposing upon railway companies the duty of keeping farm crossings in repair has been held to require them to keep such crossings in such a condition as to be safe for the use of the *family* of an occupant of the farm. It is not sufficient that the railway company keep

<sup>53</sup> Prince v. New York &c. R. Co., 60 Hun (N. Y.) 581; s. c. 38 N. Y. St. Rep. 793; 14 N. Y. Supp. 817.

<sup>54</sup> Mann v. Chicago &c. R. Co., 86 Mo. 347. It has been held that a railway company is not liable for failure to keep in repair a railroad crossing over its tracks from a public highway to private premises, to one who *has no business* with the person for whose benefit such crossing was constructed, and whose horse is injured by its being out of repair, while driving across it for his own convenience, to avoid the neighborhood of an approaching train: Cornell v. Skaneateles R. Co., 15 N. Y. Supp. 581; s. c. 40 N. Y.

St. Rep. 1. A railway company is not liable for injuries to a horse caused by his foot being caught between a projecting spike and one of the iron rails of the track, at a *private crossing erected by third persons*, which is not shown to have ever been used or repaired by the railroad company, or to have been serviceable to it in any way: Pratt Coal &c. Co. v. Davis, 79 Ala. 308.

<sup>55</sup> Prince v. New York &c. R. Co., 38 N. Y. St. Rep. 793; s. c. 14 N. Y. Supp. 817.

<sup>56</sup> Baltimore &c. R. Co. v. Keck, 185 Ill. 400; s. c. 57 N. E. Rep. 197.

<sup>57</sup> Swanson v. Chicago &c. R. Co. (Minn.), 82 N. W. Rep. 670.



them in safe repair for driving or hauling across them, but it must also keep them in safe repair for *foot-passengers*.<sup>58</sup>

§ 1504. For what Defects in Crossings Railway Companies are Liable.—Collecting a variety of decisions, and without attempting to indicate to what extent, if at all, some of them may turn upon the wording of statutes, it may be said that railway companies have been held liable for injuries arising from the following defects in crossings:—For a *plank* between the rails which did not extend clear across the crossing, and which left an open space therein, which was not flush and level with the main rail, but was lower than the other part of the crossing, causing the wheel of a traveller's wagon to be deflected into the space between the main and guard rails, so that, while he was endeavoring to extricate his wagon, it was struck by an approaching train;<sup>59</sup> for a bridge raised so high as to cause its *approaches* to be at a greater inclination than that prescribed by statute, in consequence of which an accumulation of snow caused the sleigh of a traveller upon the highway to be upset;<sup>60</sup> for a *foot-bridge*, without railings, constructed over a ditch cut by the railway company in a street in a populous and business portion of the city, the bridge being only three feet wide and only about one-fifth the width of the sidewalk with which it connected, and one end of it being much higher than the other;<sup>61</sup> for a defect in that part of the highway which constitutes an *approach* of a bridge over the railway, although the defect is outside of the approach as it existed when the bridge was originally constructed, but within the approach as widened since the construction of the railroad;<sup>62</sup> for *encroachments* upon the highway by *fences*, *ditches*, and *embankments*, which reduced the passageway over the track to the width of sixteen feet;<sup>63</sup> for a *hole* in a *sidewalk* which the company was bound to maintain across its tracks, in which the foot of a pedestrian was caught, which defect had existed for a long time, although the company had no actual knowledge of it;<sup>64</sup> for a *slivered*

<sup>58</sup> Baltimore &c. R. Co. v. Keck, 84 Ill. App. 159.

<sup>59</sup> Southern R. Co. v. Posey (Ala.), 26 South. Rep. 914.

<sup>60</sup> Fairbanks v. Yarmouth Twp., 24 Ont. App. 273.

<sup>61</sup> Houston &c. R. Co. v. Dunn, 17 Tex. Civ. App. 687; s. c. 42 S. W. Rep. 250 (rehearing denied in 17 Tex. Civ. App. 692).

<sup>62</sup> Carter v. Boston &c. R. Co., 139 Mass. 525. That a railway company is liable for an injury caused

by the defective condition of an *approach* to a railway crossing, although in no other way connected with the operations of its trains, under a statute,—see Illinois &c. R. Co. v. Truesdell, 68 Ill. App. 324.

<sup>63</sup> Lake Shore &c. R. Co. v. McIntosh, 140 Ind. 261; s. c. 38 N. E. Rep. 476.

<sup>64</sup> Retan v. Lake Shore &c. R. Co., 94 Mich. 146; s. c. 53 N. W. Rep. 1094.



*plank*, the ends of which stuck up, left by the company at a public crossing through its yards, the slivers catching the elastic of the shoe of a foot-passenger, so that he was unable to extricate himself until caught by the wheels of a car;<sup>65</sup> for an unnecessarily *large space* left between the rail and the plank next to it, in which the hoof of a horse was caught and wrenched off;<sup>66</sup> for a *spike* in an overturned plank at a crossing which employes of the company were engaged in repairing, where they invited the traveller to drive across, and he did not see the spike, but his horse stepped on it and was fatally injured;<sup>67</sup> for a negligent defect in a crossing, causing injury to *cattle*, as explained in the foot-note;<sup>68</sup> for a defect consisting of a "*sudden drop*" from the railway crossing to the grade of the street;<sup>69</sup> for the want of a "*bunter*" or other device to prevent cars from going beyond the track, where it was laid upon a descending grade with its lower end stopping at a street;<sup>70</sup> for a *hole* in the walk at a grade-crossing, into which a boy stumbled and was killed by an advancing engine;<sup>71</sup> for a *pile of dirt* made by a railway company upon the roadway at a crossing and left there over night without a light being placed thereon, in violation of a city ordinance requiring a light in such cases;<sup>72</sup> for a *rail* elevated an inch above the planks at a crossing, situated at a sharp curve in the railroad, and where there was a slant to the track;<sup>73</sup> for an *excavation* between the tracks of a railway company resulting in an injury to a horse and wagon, and this although the town may also have been responsible;<sup>74</sup> for a *fence* erected and maintained across a street at a railway crossing, under the pretext of its being incidental to the work of raising the road-bed of the company to conform to a new grade authorized by a city ordinance, where the work of elevating the road-bed at that place was not commenced until more than two years after the fence was erected.<sup>75</sup>

<sup>65</sup> *Houston &c. R. Co. v. Weaver* (Tex. Civ. App.), 41 S. W. Rep. 846 (no off. rep.).

<sup>66</sup> *Cuddeback v. Jewett*, 20 Hun (N. Y.) 187. To the same effect, see *Toledo &c. R. Co. v. Clark*, 49 Ill. App. 17; aff'd 147 Ill. 171; s. c. 35 N. E. Rep. 167 (switch track laid across a city sidewalk with space wide enough to catch and hold a man's foot between the movable rail and a plank in the sidewalk).

<sup>67</sup> *Terre Haute &c. R. Co. v. Grandfield*, 58 Ill. App. 136.

<sup>68</sup> *Atchison &c. R. Co. v. Miller*, 39 Kan. 419; s. c. 18 Pac. Rep. 486 (*approaches* improperly constructed by making roadway too narrow—cattle-guards placed in roadway,

thereby reducing width of crossing and making it more difficult).

<sup>69</sup> *Louisville &c. R. Co. v. Pritchard*, 131 Ind. 564; s. c. 31 N. E. Rep. 358.

<sup>70</sup> *Shaw v. New York &c. R. Co.*, 150 Mass. 182; s. c. 41 Am. & Eng. Rail. Cas. 547; 22 N. E. Rep. 884.

<sup>71</sup> *Louisville &c. R. Co. v. Red*, 47 Ill. App. 662.

<sup>72</sup> *Lyon v. St. Louis &c. R. Co.*, 6 Mo. App. 516.

<sup>73</sup> *McDermott v. Chicago &c. R. Co.*, 91 Wis. 38; s. c. 64 N. W. Rep. 430.

<sup>74</sup> *Carstesen v. Stratford*, 67 Conn. 428; s. c. 35 Atl. Rep. 276.

<sup>75</sup> *Knowles v. Pennsylvania R. Co.*, 175 Pa. St. 623; s. c. 38 W. N. C.



§ 1505. **For what Defects in Crossings Railway Companies are not Liable.**—On the other hand, railway companies have been held not liable for the following defects at crossings:—For a *hole in a bridge* maintained by the railway company, near one end of it and outside the usual line of travel, the crossing being otherwise reasonably safe and convenient;<sup>76</sup> for allowing the ground below the *lower board of a gate* at a farm crossing to become worn down by the passage of trucks and teams so as to leave a space fifteen inches in height, through which a child could crawl when the gate was closed, and get upon the track,—the gate being otherwise safe and sufficient for ordinary purposes;<sup>77</sup> for the defective condition of an ordinary *sidewalk* at a point where the street crosses the company's right of way, under a statute providing that at all railroad crossings the railroad companies shall construct and maintain said crossings and the approaches thereto within their respective rights of way, so that at all times they shall be safe to persons and property;<sup>78</sup> under the same statute, for a defective condition of the highway within the company's right of way, when such defect is not in the railway crossing, nor in the approaches thereto;<sup>79</sup> for a *cut five feet deep* on the company's right of way, which was left unfenced, where a space of twenty feet of ground,

303; 34 Atl. Rep. 974. It has been held that a railway carrier which, for the sole purpose of enabling its passengers to safely alight from and to board its trains, keeps, in a smooth and even condition, a space between two public streets in a frequented part of a town, which it knows has long been used by the general public as a footway, is liable for an injury to one *not a passenger* who steps at night, without negligence, into a *hole* dug by the company in such space and negligently left unprotected and unguarded: *Burton v. Western & C. R. Co.*, 98 Ga. 783; s. c. 25 S. E. Rep. 736. Under a statute providing that no approaches to a railroad crossing shall be of a heavier grade than five degrees, a railroad company is responsible for an injury to one driving upon such approach, if it was of a heavier grade than that limited by the statute, provided such excess in grade was the proximate cause of the accident: *Kyne v. Wilmington & C. R. Co.*, 8 Houst. (Del.) 185; s. c. 13 Cent. Rep. 391; 14 Atl. Rep. 922. Where a railway company, acting under a power conferred by a city ordinance, raised the grade of its

road three feet, and, in restoring the *approaches of a sidewalk*, as required to do by statute, built a *flight of steps* in a dark place, without any railing on either side, and left it in that condition for over a year, and a traveller was injured by falling down the steps,—the railroad was held liable, and none the less so from the fact that the city had full control of its streets and sidewalks, and was also liable: *Cincinnati & C. R. Co. v. Claire*, 6 Ind. App. 390; s. c. 33 N. E. Rep. 918. That *posts* supporting the *warning sign* and the safety gate at a railroad crossing, set in the travelled highway, are unlawful obstructions to the highway, and the company is liable for an accident caused thereby,—was held in *Greenwood v. Railroad Co. (Pa.)*, 8 Lanc. L. Rev. 286.

<sup>76</sup> *Patterson v. South & C. R. Co.*, 89 Ala. 318; s. c. 7 South. Rep. 437 (bad decision).

<sup>77</sup> *Friend v. Chicago & C. R. Co. (Wis.)*, 80 N. W. Rep. 934.

<sup>78</sup> *Bloomington v. Illinois & C. R. Co.*, 49 Ill. App. 129.

<sup>79</sup> *Illinois & C. R. Co. v. Truesdell*, 68 Ill. App. 324.



elevated a foot above the surface of the highway, intervened between the highway and the edge of the cut, fifteen feet of which strip was owned by a third person;<sup>80</sup> for a defective crossing under a trestle which the railway company has built to convey its track over the highway, which crossing has been subsequently made by the highway authorities without notice to the company, or compliance with the statute for laying out roads or the discontinuance of farm crossings.<sup>81</sup>

**§ 1506. Company Liable for what Accidents Arising from Defects in Crossings?**—The fact that the injury suffered by the traveller results from a collision with a train of the company does not render the company the less liable, if the traveller was delayed in consequence of the defect in the crossing, or if the collision was brought about, in whole or in part, by the negligent construction of the crossing, although he might have got across without injury, but for the train.<sup>82</sup>

This statement is well illustrated by a case where, in crossing a railroad track at a crossing, the horse which the plaintiff was driving caught his foot in the space between the rail and the plank on the crossing, and fell down on the track. The plaintiff alighted and endeavored, for about two minutes, to extricate the horse's foot, when a train came along and broke the horse's leg. In a suit for damages, the court nonsuited the plaintiff, invoking the rule "that he should have *stopped, looked and listened,*" before approaching the crossing. But the Supreme Court held that the rule was not applicable to the case; that the true question was whether the company was guilty of negligence in allowing the track at the crossing to be in an insecure condition; and that this question should have been submitted to the jury.<sup>83</sup> So, where a foot-traveller caught his foot in a *hole in a sidewalk* which the railway company maintained at a crossing in a village, and was run over by a train before he could extricate himself, it was held that the company was liable.<sup>84</sup> On the same principle, where a public crossing was out of repair, causing a traction engine to be delayed, whereby it was struck by a passing train and destroyed, the railroad company was held liable.<sup>85</sup>

<sup>80</sup> *Daneck v. Pennsylvania R. Co.*, 59 N. J. L. 415; s. c. 37 Atl. Rep. 59.

<sup>81</sup> *Hill v. Port Royal &c. R. Co.*, 31 S. C. 393; s. c. 10 S. E. Rep. 91; 5 L. R. A. 349; 39 Am. & Eng. Rail. Cas. 607.

<sup>82</sup> *Lake Shore &c. R. Co. v. McIntosh*, 140 Ind. 261; s. c. 38 N. E. Rep. 476. See also *Southern R. Co. v. Posey* (Ala.), 26 South. Rep. 914; *Retan v. Lake Shore &c. R. Co.*, 94 Mich. 146; s. c. 53 N. W. Rep. 1094;

*Louisville &c. R. Co. v. Red*, 47 Ill. App. 662.

<sup>83</sup> *Baughman v. Shenango &c. R. Co.*, 92 Pa. St. 335; s. c. 37 Am. Rep. 690.

<sup>84</sup> *Retan v. Lake Shore &c. R. Co.*, 94 Mich. 146; s. c. 53 N. W. Rep. 1094.

<sup>85</sup> *Louisville &c. R. Co. v. Bloyd* (Ky.), 55 S. W. Rep. 694. Evidence under which the fact that a man was thrown out of his buggy by the



§ 1507. **Allowing Obstructions to the Sight and Hearing of the Traveller to Exist near Highway Crossings.**—While it is not exactly a defect in the crossing or in the approach thereto, yet it is a defect which constitutes a severe menace to the safety of the traveller, for the railway company unnecessarily to allow objects to be created or to continue upon its right of way in the vicinity of highway crossings, which prevent the traveller from seeing and hearing the approach of trains. While, as hereafter seen,<sup>86</sup> it is the habit of many courts to apply to the traveller the severe rule that it is negligence as matter of law not to *look* and *listen*,<sup>87</sup> or not to *stop, look* and *listen*<sup>88</sup> for approaching trains before entering upon a railway crossing,—yet there is too much of a disposition on the part of the courts to condone the negligence of the railway company in not clearing its right of way of objects which obstruct the vision of the traveller and break the waves of sound so as to prevent him from seeing and hearing approaching trains. The true view seems to be that the railway company ought not to be held blameworthy for not removing such obstructions to sight and hearing as may be reasonably necessary to the exercise of its franchises,—such as necessary *buildings* on its right of way,<sup>89</sup> or the necessary standing of *cars* upon its side tracks near the crossings of public streets or roads;<sup>90</sup> but that, to allow obstructions to the vision and hearing of the traveller to come or to remain upon its right of way, which are not necessary to the exercise of its franchises, which can be removed at no great expense,—such as weeds, bushes, hedges, trees, embankments, and the like, is negligence as matter of law. But it can not be affirmed with entire confidence that such is the law. It is scarcely necessary to add that a railway company is not liable for obstructing a view of its tracks at crossings by the necessary emission of *smoke* and *steam* from its locomotives.<sup>91</sup> It has been held that a railroad company is not, as matter of law, guilty of negligence in placing an obstruction, consisting of a *hedge fence* ten feet high, on its right of way which will obstruct the vision of a traveller upon

jumping of his horse at a railway crossing, was not ascribed to the narrowness of the approach, but to the insecure manner in which the seat of the buggy was attached: *Chicago & C. R. Co. v. Stamps*, 26 Ill. App. 219.

<sup>86</sup> *Post*, § 1637, *et seq.*

<sup>87</sup> *Post*, § 1642.

<sup>88</sup> *Post*, § 1648.

<sup>89</sup> *Galveston & C. R. Co. v. Harris* (Tex. Civ. App.), 53 S. W. Rep. 599

(water tanks, engine houses and other buildings).

<sup>90</sup> *Galveston & C. R. Co. v. Harris*, *supra*; *Dillingham v. Parker*, 80 Tex. 572; s. c. 16 S. W. Rep. 335; *Chicago & C. R. Co. v. Pearson*, 184 Ill. 386; s. c. 56 N. E. Rep. 633; aff'g 82 Ill. App. 605; *Chicago & C. R. Co. v. Body*, 85 Ill. App. 133.

<sup>91</sup> *Chicago & C. R. Co. v. Pearson*, 184 Ill. 386; s. c. 56 N. E. Rep. 633; aff'g 82 Ill. App. 605.



the highway and prevent him from seeing an approaching train;<sup>92</sup> but this holding seems untenable. Another court has held that a railroad company is not bound, as matter of law, to prevent the obstruction of the view of its tracks at a highway crossing by *buildings* on the right of way, whether erected by it or a third person, and that the existence of such obstructions does not constitute negligence *per se*.<sup>93</sup> Still another court has held that a railroad company is not negligent as matter of law in leaving *cars* upon its side tracks to be loaded or unloaded, although they necessarily obstruct the view of the railroad from persons approaching a crossing.<sup>94</sup> Still another decision is to the effect that it is not negligence in a railroad company to maintain *telegraph poles* on its right of way, or to permit *freight cars* to stand upon its side track so as to obstruct the view of an approaching train from a crossing.<sup>95</sup>

**§ 1508. What Obstructions to Sight and Hearing will Afford Prima Facie Evidence of Negligence.**—On the other hand, we find decisions to the effect that it is *prima facie evidence of negligence*, to be considered by the jury, but subject to explanation or defense,—for a railway company unnecessarily to obstruct the view of travellers with its *cars*;<sup>96</sup> or to allow the view of its track to be obstructed by a *sign-board*, for the distance of 850 feet, leaving a view of the track for the distance of only 125 feet from the crossing;<sup>97</sup> or to permit *weeds* to grow along the side of its track, partially obstructing the view of those approaching the crossing;<sup>98</sup> or to permit *hedges* or *trees* to grow upon its right of way with the like effect.<sup>99</sup> It has been held that the negligence of a railway company in allowing *weeds and bushes* to grow upon its track so as to shut off the view of one approaching the cross-

<sup>92</sup> Chicago &c. R. Co. v. Williams, 56 Kan. 333; s. c. 43 Pac. Rep. 246.

<sup>93</sup> Missouri &c. R. Co. v. Rogers, 91 Tex. 52; s. c. 8 Am. & Eng. Rail. Cas. (N. S.) 141; 40 S. W. Rep. 956; rev'g 40 S. W. Rep. 849. And see Cordell v. New York &c. R. Co., 70 N. Y. 119.

<sup>94</sup> Chicago &c. R. Co. v. Johnson, 61 Ill. App. 464.

<sup>95</sup> Chicago &c. R. Co. v. Nelson, 59 Ill. App. 308. See also Chicago &c. R. Co. v. Pearson, 184 Ill. 386; s. c. 56 N. E. Rep. 633; aff'g 82 Ill. App. 605. Competent to ask plaintiff whether or not, in advancing from where he stopped to listen, he could see the train approaching: Close v. Lake Shore &c. R. Co., 73 Mich. 647; s. c. 41 N. W. Rep. 828.

<sup>96</sup> Houston &c. R. Co. v. Stewart, 62 Tex. 246; s. c. 17 S. W. Rep. 33.

<sup>97</sup> Austin v. Long Island R. Co., 140 N. Y. 639; aff'g s. c. 69 Hun (N. Y.) 67; s. c. 52 N. Y. St. Rep. 746; 23 N. Y. Supp. 193.

<sup>98</sup> Houston &c. R. Co. v. Paras (Tex. Civ. App.), 29 S. W. Rep. 945 (no off. rep.); Houston &c. R. Co. v. Guisar (Tex. Civ. App.), 29 S. W. Rep. 946; Rose v. McCook, 70 Mo. App. 183; Terre Haute &c. R. Co. v. Barr, 31 Ill. App. 57 (may be negligence under certain circumstances); Moberly v. Kansas City &c. R. Co., 17 Mo. App. 518 (weeds, bushes, etc.).

<sup>99</sup> Chicago &c. R. Co. v. Tilton, 29 Ill. App. 95.



ing, does not render it liable for an accident occurring *at night*.<sup>100</sup> But this conclusion is obviously erroneous, since such an obstruction at night would prevent the traveller from seeing the locomotive headlight, and might prevent him from hearing the approach of the train.<sup>101</sup> From the foregoing decisions we may extract the conclusion that, for a railway company *unnecessarily* and *negligently* to permit obstructions to accumulate or remain upon its right of way, so as to obstruct the view of a traveller approaching its track at a public crossing, is negligence which will make the company liable for an injury to the traveller caused by a collision with its train, which would have been averted had the view been unobstructed, provided the traveller is free from contributory negligence.<sup>102</sup>

§ 1509. **Increased Care Demanded of the Company where the View is Obstructed.**—Manifestly, a higher degree of care is required of a railroad company in running its trains where the view of a traveller in approaching a crossing is obstructed.<sup>103</sup> It is bound to operate its trains with reference to such obstructions and in such manner that travellers crossing the track may, by the exercise of ordinary care, avoid injury therefrom.<sup>104</sup> Where the view of the traveller is thus obstructed, so that he can not see whether or not a train is approaching, it is bound to give audible *signals*, at least by sounding its bell as required by a city ordinance, so that the traveller may be apprised of the danger by his sense of hearing; and the fact that the view of the traveller has been obstructed by the negligent or voluntary act or omission of the railway company,—as, by placing and leaving *freight cars* on a side track near a crossing,—imposes upon the company the obligation of using such extra care and caution as is demanded by the danger,<sup>105</sup> to the end of not injuring travellers making use of the crossing.<sup>106</sup> A railroad train struck a person in a city street. Owing

<sup>100</sup> *Fulton County &c. R. Co. v. Butler*, 48 Ill. App. 301.

<sup>101</sup> It has been seemingly well held that a railroad company owes a person crossing at a *farm crossing*, without right under an adjoining proprietor, no duty to remove obstructions to the view of its tracks: *Atchison &c. R. Co. v. Parsons*, 42 Ill. App. 93.

<sup>102</sup> *Galveston &c. R. Co. v. Michalke*, 14 Tex. Civ. App. 495; s. c. 37 S. W. Rep. 480; writ of error denied 90 Tex. 276; s. c. 38 S. W. Rep. 31.

<sup>103</sup> *Atlantic &c. R. Co. v. Reider*, 95 Va. 418; s. c. 28 S. E. Rep. 590; *Thomas v. Delaware &c. R. Co.*, 19

*Blatchf. (U. S.)* 533; *Houston &c. R. Co. v. Paras* (Tex. Civ. App.), 29 S. W. Rep. 945 (no off. rep.); *Houston &c. R. Co. v. Guisar* (Tex. Civ. App.), 29 S. W. Rep. 946 (no off. rep.); *Chicago &c. R. Co. v. Hinds*, 56 Kan. 758; *Galveston &c. R. Co. v. Duelm*, 23 S. W. Rep. 596; s. c. 24 S. W. Rep. 334 (no off. rep.); *Hoggatt v. Evansville &c. R. Co.*, 3 Ind. App. 437; *Close v. Lake Shore &c. R. Co.*, 73 Mich. 647.

<sup>104</sup> *Chicago &c. R. Co. v. Hinds*, 56 Kan. 758; s. c. 44 Pac. Rep. 993.

<sup>105</sup> Vol. I, § 25.

<sup>106</sup> *Close v. Lake Shore &c. R. Co.*, 73 Mich. 647; s. c. 41 N. W. Rep. 828.



to the position of another train, the approaching train *could not be seen*. No bell was sounded, as required by the city ordinance. It was held that the railway company was guilty of negligence.<sup>107</sup> This obligation seems to be even more strongly imposed upon the railway company where it has obstructed the view in violation of the terms of a positive statute, as by leaving an *embankment* on its right of way which obstructs a traveller's view of the track.<sup>108</sup> On the other hand, the railway company can not excuse its negligence in this respect on the ground that it has not violated in any respect the statute law. For example, it can not block up the view of its track by *standing cars*, and then excuse its want of extra care to guard against accidents, on the plea that there is no statute against leaving its cars standing on the track, or requiring additional warnings.<sup>109</sup> The failure to give *audible signals* where the view of its track is thus negligently obstructed, is the failure to take the most obvious precaution; and its negligence is more flagrant where, in such a situation, it not only neglects to give audible signals when its train approaches the crossing, but also drives its train upon the crossing at a *high rate of speed*.<sup>110</sup>

**§ 1510. In Constructing and Repairing Highway Crossings, Railway Company Liable only for the Exercise of Ordinary Care.**—The railway company is liable, if at all, in these cases, by reason of its *negligence*, either in original construction or in subsequent maintenance and repair.<sup>111</sup> The mere fact that a crossing is "dangerous to the public," does not fix the liability of the railway company to a traveller injured thereat, unless its dangerous condition is shown to be the result of negligence on the part of the company, and not a necessary result of the existence and use of the railway across the highway at that place.<sup>112</sup> Here, as in other cases, the obligation of care and diligence which the law puts upon the railway company, is measured by the standard of *reasonable* or *ordinary care*; and it will hence be liable for an injury to a traveller through a defect which it might have remedied through the exercise of such care.<sup>113</sup> As in other cases,<sup>114</sup> this reasonable or ordinary care is a measure of care

<sup>107</sup> *Cumming v. Brooklyn &c. R. Co.*, 38 Hun (N. Y.) 362.

<sup>108</sup> *Hoggatt v. Evansville &c. R. Co.*, 3 Ind. App. 437; s. c. 29 N. E. Rep. 941.

<sup>109</sup> *Guggenheim v. Lake Shore &c. R. Co.*, 66 Mich. 150; s. c. 33 N. W. Rep. 161; 9 West. Rep. 903.

<sup>110</sup> *Houston &c. R. Co. v. Paras* (Tex. Civ. App.), 29 S. W. Rep. 945 (no off. rep.); *Houston &c. R. Co. v.*

*Guisar* (Tex. Civ. App.), 29 S. W. Rep. 946 (no off. rep.).

<sup>111</sup> *Omaha &c. R. Co. v. Ryburn*, 40 Neb. 87; s. c. 58 N. W. Rep. 541.

<sup>112</sup> *Texas &c. R. Co. v. Warren* (Tex. Civ. App.), 32 S. W. Rep. 578 (no off. rep.).

<sup>113</sup> *Houston &c. R. Co. v. Weaver* (Tex. Civ. App.), 41 S. W. Rep. 846 (no off. rep.).

<sup>114</sup> Vol. I, § 25.



proportionate to the danger to be avoided; and hence if the track is so laid as to create extra danger, extra precautions are due from the company.<sup>115</sup> The law does not demand of it the exercise of *extraordinary care* or vigilance in the discharge of this duty.<sup>116</sup> Nor will the fact that the crossing was negligently constructed many years before the particular injury, and so maintained by the company, lessen its liability.<sup>117</sup> The fact that a township did some work on the roadway of an *approach* to a railway crossing over a highway, in an endeavor to make it passable, will not relieve the railway company from its statutory obligation to restore the highway to its former state and to construct suitable crossings.<sup>118</sup>

§ 1511. **When Sufficiency of Repairs, Existence of Defects, etc., Present Questions for the Jury.**<sup>119</sup>—As there can be no definite rule of law upon the question whether a railway crossing, in a given condition, is reasonably safe or negligently unsafe, the question is generally for the decision of the jury,—provided, as in other cases, there is evidence reasonably tending to show that it was negligently unsafe, and subject to the corrective power of the court over unreasonable ver-

<sup>115</sup> New York &c. R. Co. v. Randel, 47 N. J. L. 144.

<sup>116</sup> Terre Haute &c. R. Co. v. Clem, 123 Ind. 15; s. c. 42 Am. & Eng. Rail. Cas. 229; 23 N. E. Rep. 965; 7 L. R. A. 588. The crossing must be "reasonably safe and convenient." Brown v. Hannibal &c. R. Co., 99 Mo. 310; s. c. 42 Am. & Eng. Rail. Cas. 87; 12 S. W. Rep. 655.

<sup>117</sup> Lake Shore &c. R. Co. v. McIntosh, 140 Ind. 261; s. c. 38 N. E. Rep. 476.

<sup>118</sup> Thayer v. Flint &c. R. Co., 93 Mich. 150; s. c. 53 N. W. Rep. 216. Compare Roxbury v. Central &c. R. Co., 60 Vt. 121; s. c. 6 N. Eng. Rep. 534; 14 Atl. Rep. 92 (slight repairs by the town on a travelled track not an acceptance by the town of the crossing from the railway company). It has been held to be no defense to an action to compel the construction by a railroad company of a crossing over its tracks constructed in an excavation across a public highway, that beyond the tracks there is a steep hill in the street, not practicable for loaded teams, and which would prevent a general use of the street, where there are citizens living on the street between such hill and the

tracks who desire to pass over the tracks to and from their homes, and the improvement of the street beyond the crossing has been suspended because of the excavation: Fort Dodge v. Minneapolis &c. R. Co., 87 Iowa 389; s. c. 54 N. W. Rep. 243. There is a holding to the effect that a railway company is not bound, upon *abandoning its location and right of way*, to bridge or fill up a cut thereon, in the absence of any statute imposing such a duty; and that the fact that, for a long time after the change, a bridge is kept up by the company, and that a Federal court which has appointed a receiver for the road, recognizes the propriety of bearing the expense of a bridge as a charge on the assets in the receiver's hands, is immaterial: Alabama &c. R. Co. v. Brandon (Miss.), 14 South. Rep. 438. But this decision does not seem to be sound. The sound view seems to be that, the railway company, having disrupted the highway in the exercise of its franchise, is bound to restore it, whether it continues in the exercise of its franchise or not: Vol. I, § 1190.

<sup>119</sup> This section is cited in §§ 1527, 1534.



dicts, as in other cases.<sup>120</sup> It was so held where the *hoof of a horse* was caught between two rails at a crossing, this being *prima facie* evidence of negligence;<sup>121</sup> where the *foot of a pedestrian* was caught between a rail and a plank of the crossing, and the planks were shown to have been of a kind liable to catch the feet of foot-passengers, and not laid on the improved plan;<sup>122</sup> where the question was whether the company had been negligent with respect to an approach to a crossing by an unreasonable *delay* in erecting *railings* thereto, after having made the approach by a filling;<sup>123</sup> and where the company was negligent in allowing the *drawbar* of its car to encroach upon the planked crossing, frightening the horses of a traveller.<sup>124</sup>

§ 1512. **Contributory Negligence of the Traveller in Connection with Defective Railway Crossings.**<sup>125</sup>—Undoubtedly, the defense of contributory negligence is theoretically available to the railway company in an action brought to recover damages for the death or injury of a traveller through a defective highway crossing,—and this whether the duty to keep the crossing in a safe condition is imposed by statute,<sup>126</sup> or arises under the principles of the common law. But the mere fact that such a crossing is defective does not make it negligence, as matter of law, to attempt to drive or walk over it,<sup>127</sup> unless the danger is *known* to the traveller, and is obviously so great that the passage can not be attempted in the exercise of ordinary prudence.<sup>128</sup> And this will be quite clear where the traveller is *invited*

<sup>120</sup> Rembe v. New York & C. R. Co., 102 N. Y. 721; s. c. 3 Cent. Rep. 641; Lewliss v. Detroit & C. R. Co., 65 Mich. 292; s. c. 8 West. Rep. 806; Kyne v. Wilmington & C. R. Co., 8 Houst. (Del.) 185; s. c. 14 Atl. Rep. 922; 13 Cent. Rep. 391; Spooner v. Delaware & C. R. Co., 115 N. Y. 22; s. c. 23 N. Y. St. Rep. 554; 21 N. E. Rep. 698; Baltimore & C. R. Co. v. Anderson, 85 Fed. Rep. 413; s. c. 56 U. S. App. 137; 29 C. C. A. 255; Schneider v. Pennsylvania R. Co. (Pa.), 2 Cent. Rep. 74 (no off. rep.).  
<sup>121</sup> Schneider v. Pennsylvania R. Co. (Pa.), 2 Cent. Rep. 74 (no off. rep.).

<sup>122</sup> Spooner v. Delaware & C. R. Co., 115 N. Y. 22; s. c. 23 N. Y. St. Rep. 554; 21 N. E. Rep. 696.

<sup>123</sup> Kyne v. Wilmington & C. R. Co., 8 Houst. (Del.) 185; s. c. 14 Atl. Rep. 922; 13 Cent. Rep. 391.

<sup>124</sup> Lewliss v. Detroit & C. R. Co., 65 Mich. 292; s. c. 8 West. Rep. 806.

<sup>125</sup> This section is cited in § 1619.

<sup>126</sup> Reeves v. Dubuque & C. R. Co., 92 Iowa 32; s. c. 60 N. W. Rep. 243; Ford v. Chicago & C. R. Co., 91 Iowa 179; s. c. 24 L. R. A. 657; 59 N. W. Rep. 5 (the effect of the statute being merely to throw the burden of proving contributory negligence upon the railway company).

<sup>127</sup> Kelly v. Southern & C. R. Co., 28 Minn. 98; Evansville & C. R. Co. v. Carver, 113 Ind. 51; s. c. 14 N. E. Rep. 738; Whalen v. Arcata & C. R. Co., 92 Cal. 669; s. c. 28 Pac. Rep. 833 (driver drove across a railroad at an oblique railway crossing, filled in with plank above which the rails projected an inch or more, without slackening his speed of about five or six miles an hour, where, unknown to him, the crossing had been made defective by the removal of a plank).

<sup>128</sup> Artman v. Kansas & C. R. Co., 22 Kan. 296 (farmer attempted to drive over a crossing before the grading had been completed, and the show-



to use the crossing by the railway company, and is led by its *flagman* to believe that there is no danger in crossing at the particular time, although he might have used a safer crossing a little further away.<sup>129</sup> The traveller will not be imputed with contributory negligence where he *does not know* that the crossing is dangerous and can not discover the defect by reason of the darkness, but assumes that the entire width of the road is in proper condition, and is injured in consequence of his deflection, within the road, from the usual travelled part.<sup>130</sup> As will be seen hereafter,<sup>131</sup> as a general rule, the mere fact that a person making a lawful use of the highway *knows* of a negligent defect therein which it is the duty of the *municipal corporation* to repair, does not, unless he rashly thrusts himself upon it, impute contributory negligence to him, such as will bar a recovery of damages if he is thereby hurt. The same principle applies to drivers who know of defects in street railway tracks which it is the duty of the company to repair, and which it negligently leaves unrepaired;<sup>132</sup> though there are cases which ascribe the conclusion of contributory negligence to one who attempts to drive over such a defect with knowledge of its existence.<sup>133</sup> And clearly the fact of such knowledge will be *evidence of negligence* to be considered by the jury;<sup>134</sup> though his negligence may be excused by particular circumstances, as by the fact that he did not have full control of his team at the time when he entered upon the track.<sup>135</sup> But his reliance upon a promise made by the company to repair the defect will not excuse his contributory negligence if, under all the circumstances, the jury find that he did not exercise due care in attempting to drive across it.<sup>136</sup>

ing and jolting caused his team to run away); *Evans v. Charleston &c. R. Co. (Ga.)*, 33 S. E. Rep. 901 (danger from a defect in a bridge, great and obvious to the knowledge of the traveller, who undertook to cross it, there being no emergency or necessity for incurring the risk).

<sup>129</sup> *St. Louis &c. R. Co. v. Gill*, 55 S. W. Rep. 386 (case applies rather to a *dangerous* than to a *defective* crossing).

<sup>130</sup> *Southern R. Co. v. Posey (Ala.)*, 26 South. Rep. 914. But, *contra*, that the statutory duty of a railway company to maintain crossings, outside of crowded cities and towns, does not extend so far as to require it to maintain a crossing for the whole width of the street: *Ellis v. Wabash &c. R. Co.*, 17 Mo. App. 126.

<sup>131</sup> *Post*, Vol. III.

<sup>132</sup> *Houston &c. St. R. Co. v. Richart*, 87 Tex. 539; s. c. 29 S. W. Rep.

1040; rev'g 27 S. W. Rep. 918; *Houston &c. St. R. Co. v. Medlenka*, 17 Tex. Civ. App. 621; s. c. 43 S. W. Rep. 1028; *Farmer v. Findlay &c. R. Co.*, 60 Ohio St. 36; s. c. 41 Ohio L. J. 277; 6 Am. Neg. Rep. 177; 53 N. E. Rep. 447.

<sup>133</sup> *Watson v. Brooklyn &c. R. Co.*, 103 N. Y. 687; aff'g s. c. 14 Misc. 425; s. c. 70 N. Y. St. Rep. 757; 35 N. Y. Supp. 1039; *Johnson v. St. Paul City R. Co.*, 67 Minn. 260; s. c. 36 L. R. A. 586; 69 N. W. Rep. 900; *Rock Falls v. Wells*, 59 Ill. App. 155.

<sup>134</sup> *Houston &c. R. Co. v. Richart*, 87 Tex. 539; s. c. 29 S. W. Rep. 1040; rev'g 27 S. W. Rep. 918.

<sup>135</sup> *Farmer v. Findlay &c. R. Co.*, 60 Ohio St. 36; s. c. 40 Ohio L. J. 277; 6 Am. Neg. Rep. 177; 53 N. E. Rep. 447.

<sup>136</sup> *Houston &c. R. Co. v. Richart*, 87 Tex. 539; s. c. 29 S. W. Rep. 1040; rev'g 27 S. W. Rep. 918.



§ 1513. **Further of the Contributory Negligence of Travellers Injured through Attempting to Use Defective Crossings.**<sup>137</sup>—As the traveller has the right to use the railway crossing and as the railway company has no right to obstruct and endanger it, it is plain that a question of public policy operates to determine the question of contributory negligence in favor of the traveller in most cases, or at least to submit it to the jury. As a general rule, therefore, contributory negligence will not be ascribed to the traveller merely because he *knows that the crossing* is out of repair, provided the defect does not render it necessarily dangerous, since he has the right to use the highway notwithstanding this fact; but the question will go to the jury:<sup>138</sup>—As, where a planking between the rails had not been completed when the traveller made the attempt to drive across;<sup>139</sup> or where he attempted to drive his cart across a crossing at a different angle from that generally used by the public, and the cart was overturned on the crossing;<sup>140</sup> or where a pedestrian, when a train approached, found himself standing on a space about ten feet wide, between the track on which the train was approaching, and another track on which a train was passing in the opposite direction, and, in attempting to cross the track in front of the approaching train, caught his foot between a plank and a rail and was run over and killed;<sup>141</sup> or where a pedestrian, attempting to cross a track in the night, known to be dangerous, but which he had crossed many times before, caught his foot between the ties which were not planked over, and was injured by a train backing upon him before he could extricate himself;<sup>142</sup> or where a pedestrian, whose foot got

<sup>137</sup> This section is cited in § 1619.

<sup>138</sup> *Maltby v. Chicago &c. R. Co.*, 52 Mich. 108; *Thayer v. Flint &c. R. Co.*, 93 Mich. 150; s. c. 53 N. W. Rep. 216; *Georgia &c. R. Co. v. Parks*, 91 Ga. 71; s. c. 18 S. E. Rep. 652; *St. Louis &c. R. Co. v. Box*, 52 Ark. 368; s. c. 12 S. W. Rep. 757.

<sup>139</sup> *Rembe v. New York &c. R. Co.*, 102 N. Y. 721; s. c. 3 Cent. Rep. 641.

<sup>140</sup> *Whalen v. Arcata &c. R. Co.*, 92 Cal. 669; s. c. 28 Pac. Rep. 833.

<sup>141</sup> *Chicago &c. R. Co. v. Smith*, 180 Ill. 453; s. c. 54 N. E. Rep. 325; aff'g s. c. 77 Ill. App. 492.

<sup>142</sup> *Malmstrom v. Northern &c. R. Co.*, 20 Wash. 195; s. c. 12 Am. & Eng. Rail. Cas. (N. S.) 329; 55 Pac. Rep. 38. Circumstances under which an attempt to drive a mule over a crossing obstructed by a train of cars so as to leave about eight feet of it unoccupied, is not negligence as matter of law, so as to preclude a

recovery for the loss of the mule which stepped in a hole in the crossing while shying from the car and broke its leg: *Tankard v. Roanoke &c. R. Co.*, 117 N. C. 558; s. c. 23 S. E. Rep. 46. Railway company liable for the death of a person caused by his falling, in the night-time, into a deep cut made by it at the railroad crossing in constructing its road-bed, where, although knowing of the cut, he did not know the means or location of the crossing, and the accident was caused by the company's permitting a fence along the cut to remain down: *Hogan v. Kentucky &c. R. Co.*, 14 Ky. L. Rep. 678; s. c. 21 S. W. Rep. 242 (not to be rep.). Conditions of fact, in an accident of this kind to the driver of a wagon loaded with straw, whose wheel got caught in a hole, whereby he got tipped off and injured, in which it was held error to charge the jury



caught in a hole in a sidewalk which a railway company was bound to maintain across its tracks, was run over by a train before he could extricate himself,—it being a question for the jury whether he was negligent in attempting to cross in advance of the train, which was six hundred feet away and moving at a moderate rate of speed, and whether he was negligent in not looking where he stepped, where he had no knowledge of the defect in the sidewalk;<sup>143</sup> and in the other cases referred to in the foot-note.<sup>144</sup> And clearly the driver will have, in the absence of some knowledge of, or reasonable ground to believe the contrary, the *right to presume* that the railway company has discharged its duty and that the crossing is in good repair; and the law is not so unreasonable as to require him to get out of his wagon and go forward and inspect it before venturing upon it;<sup>145</sup> and this is so although he may be aware of the fact that the employes of the company were engaged in track-laying at the crossing a few hours before.<sup>146</sup> In one or two such cases, however, contributory negligence has been ascribed to the traveller as matter of law,—as where he drove in broad daylight aside from the travelled portion of the highway, and off the end of a culvert, the company not being liable to him for negligence in respect of the condition of the culvert;<sup>147</sup> where a traveller on a starlight night, knowing of the existence of an unguarded excavation, made by a railroad company across a bridge and foot path, which was considerably used by the public, but which was not a public road, fell into it;<sup>148</sup> where a traveller drove into a cattle-guard outside of the travelled way while intoxicated, and notwithstanding a statute making the railway company liable for all damages from its neglect or refusal to maintain the crossing, and providing that, in order to a recovery by the injured party it should

that they were “not to understand that contributory negligence means any *error of judgment*.” *Hoyt v. New York & C. R. Co.*, 118 N. Y. 399; s. c. 23 N. E. Rep. 565; 29 N. Y. St. Rep. 48.

<sup>143</sup> *Retan v. Lake Shore & C. R. Co.*, 94 Mich. 146; s. c. 53 N. W. Rep. 1094.

<sup>144</sup> *Prince v. New York & C. R. Co.*, 38 N. Y. St. Rep. 793; s. c. 14 N. Y. Supp. 817 (farm crossing, planks torn up by collision). For another farm crossing case, holding that the farmer will be guilty of contributory negligence where he knows of the defect, and that it is dangerous to attempt to pass over it, but otherwise where he is ignorant of the danger,—see *Madison v. Missouri & C. R. Co.*, 60 Mo. App. 599. See

also *Tankard v. Roanoke & C. R. Co.*, 117 N. C. 558; s. c. 23 S. E. Rep. 46; *Hogan v. Kentucky & C. R. Co.*, 14 Ky. L. Rep. 678; s. c. 21 S. W. Rep. 242 (no off. rep.); *Harper v. Missouri & C. R. Co.*, 70 Mo. App. 604 (attempting to ride over a crossing which is being repaired, where the crossing is not in such a condition as to render its use dangerous to a person ordinarily careful).

<sup>145</sup> *Bullock v. Wilmington & C. R. Co.*, 105 N. C. 180; s. c. 10 S. E. Rep. 988; 42 Am. & Eng. Rail. Cas. 93.

<sup>146</sup> *Dallas & C. R. Co. v. Able*, 72 Tex. 150; s. c. 9 S. W. Rep. 871.

<sup>147</sup> *Chicago & C. R. Co. v. Bartley*, 59 Kan. 776; s. c. 53 Pac. Rep. 66.

<sup>148</sup> *McAdory v. Louisville & C. R. Co.*, 109 Ala. 636; s. c. 9 South. Rep. 909.



only be necessary for him to prove such neglect and refusal,—the reason being that the injury did not result from the neglect or refusal of the railway company to maintain a safe crossing;<sup>149</sup> and where the driver of a loaded wagon, who got caught upon the track, failed to unhitch his horses after seeing the smoke of an approaching train, so as to save them, as he could have done, but left them to be killed by the train, and then brought an action to recover damages for their loss.<sup>150</sup>

**§ 1514. Liability for Defective Crossings where the Railway is Leased to Another Company.**—The obligation imposed by statute upon a railway company, of restoring the highways crossed by its track to their former condition and of constructing suitable crossings, continues until properly discharged, even though its road has passed into the hands of another company.<sup>151</sup> The plain reason is that the obligation of restoring the highway and maintaining it in a reasonably safe condition at the place where the railway company, in the exercise of its franchises, has disrupted it, is the condition upon which the railway company has received its franchises from the State and upon which it continues to use them. It can not, therefore, devolve this obligation upon another company without the consent of the State, so as to exonerate itself from performing it.<sup>152</sup> If, therefore, the railway company *leases its road* to another corporation without the consent of the State, it remains liable for injuries to persons caused by negligent defects in its tracks at a highway crossing, though the lessee had entered upon and controlled the road at the time of the accident.<sup>153</sup>

**§ 1515. Effect of the Consent or Acceptance of the Municipal Authorities.**—Under various statutory systems, cities, counties, towns, or other local authorities are charged primarily with the maintenance of streets and roads in a reasonable condition of safety, according to the situation or the amount of travel, and other considerations. They hold the railways in trust, so to speak, for the benefit of the inhabitants of the State, and of all other persons who may lawfully use them. For a negligent failure to discharge this trust, actions for damages

<sup>149</sup> McKelvy v. Burlington &c. R. Co., 84 Iowa 455; s. c. 51 N. W. Rep. 173; 49 Am. & Eng. Rail. Cas. 471.

<sup>150</sup> Frost v. Milwaukee &c. R. Co., 96 Mich. 470; s. c. 56 N. W. Rep. 19. This decision does not seem to be sound. The fact that the driver, finding himself stalled on the track in front of an approaching train, his peril being obvious and immediate, did not use his best judgment,

or act as a reasonably prudent man might have acted under other circumstances, was plainly not negligence as matter of law, but presents a question for the jury: Vol. I, §§ 80, 81, 195; *post*, §§ 1616, 1624.

<sup>151</sup> Thayer v. Flint &c. R. Co., 93 Mich. 150; s. c. 53 N. W. Rep. 216.

<sup>152</sup> 5 Thomp. Corp., § 6293.

<sup>153</sup> Freeman v. Minneapolis &c. R. Co., 28 Minn. 443.



lie against them in some States, but are denied in others.<sup>154</sup> In those jurisdictions where actions for damages are given against the municipality, it is a principle of law that the negligence of the municipality, in permitting a dangerous defect or obstruction to be created or to remain in the highway, will not relieve the primary author of the defect or obstruction from liability to pay damages to one who is injured thereby.<sup>155</sup> But, on the other hand, where the municipal corporation has been sued and has been compelled to pay damages to the injured traveller, it may have an action over for the damages against the primary author of the nuisance. Moreover, in one jurisdiction at least, where the railway company stands under a statutory obligation of so guarding and protecting its tracks at a road as to make a safe and easy passageway across,—if a traveller is injured through a failure of the company to perform this duty the city will not be liable for the injury, but the liability will rest upon the company.<sup>156</sup> These premises open the way to what follows, which is that the consent of the municipal authorities that the railway company so proceed with the operation of its road upon or across the street or highway, will not have the effect of relieving the railway company from the payment of damages to a traveller injured without his own fault by a dangerous defect or obstruction therein.<sup>157</sup> On the other hand, there are statutes and theories under which the company will not be liable in damages to the traveller, where it has constructed the crossings according to the plans and specifications required by the local authorities, and under statutory compulsion.<sup>158</sup>

**§ 1516. Construction and Reparation of Crossings where Two Railways Cross Each Other at Grade.**—This subject is governed by such a variety of statutory and municipal regulations that no general doctrine can be collected with reference to it. Contrary to the theory of the preceding section, it has been held that the consent of the municipal authorities to a proposed plan of such a crossing recognizes

<sup>154</sup> This subject is considered in Volume III, under the head of Negligence of Municipal Corporations.

<sup>155</sup> Vol. I, §§ 1205, 1234, 1242.

<sup>156</sup> Scanlan v. Boston, 140 Mass. 84.

<sup>157</sup> Dominguez v. Orleans R. Co., 35 La. An. 751; Roxbury v. Central & C. R. Co., 60 Vt. 121; s. c. 5 N. Eng. Rep. 534; 14 Atl. Rep. 92 (holding that the waiver of a formal acceptance of a railway crossing, as made by the company, can not be inferred from the fact that *slight repairs* have been made by the town on the travelled track). See Vol. I, § 1234.

<sup>158</sup> Gray v. New York & C. R. Co., 54 Conn. 574; s. c. 3 N. E. Rep. 807. Right to maintain a crossing over a city street under New York General Railroad Act, not derived from the city, but from the Legislature, and can not be revoked by the city, so as to remove the crossing as an obstruction of the highway, unless it necessarily impairs the usefulness of the street: Delaware & C. R. Co. v. Buffalo, 65 Hun (N. Y.) 464; s. c. 48 N. Y. St. Rep. 501; 20 N. Y. Supp. 448.



that it is not unduly dangerous to the public safety.<sup>159</sup> The provision of the Constitution of Pennsylvania, of 1874, that every railway company shall have the right "to intersect, connect with, or cross any other railroad," does not change the policy of that State, as embodied in a prior statute,<sup>160</sup> of preventing railroads from crossing each other at grade where that is reasonably practicable; and a jurisdiction has been lodged in the ordinary courts, sitting in equity, to deal with that subject; and they are to determine, upon the facts and circumstances of each case, whether it is reasonably practicable to avoid crossing at grade, and, if so, to prevent such grade crossing, and, by decree, to define the mode of crossing to be adopted.<sup>161</sup> Under a statute of Ohio,<sup>162</sup> railway companies, whose tracks cross each other at a common grade, must jointly bear the expense of keeping the crossing in repair and maintaining a watchman there;<sup>163</sup> and the same is true under the Indiana statute.<sup>164</sup>

**§ 1517. Construction of Agreements by Railway Companies to Construct Highway Crossings.**—Where a railroad company agreed forever to maintain a crossing over the land of A., and afterwards raised the grade of its road, it was unjustly held that A. must bear the expense of making *new approaches*.<sup>165</sup> A judgment for damages for the failure of a railroad company to comply with its contract to construct a crossing in consideration of a grant to it of a right of way, was held to be a *lien* on that portion of the road covered by the con-

<sup>159</sup> *Pennsylvania R. Co. v. Schuylkill River & C. R. Co.*, 116 Pa. St. 55; s. c. 8 Atl. Rep. 914; 19 W. N. C. 337.

<sup>160</sup> Pa. Act June 19, 1871.

<sup>161</sup> *Northern & C. R. Co.'s Appeal*, 103 Pa. St. 621.

<sup>162</sup> Ohio Rev. Stat., § 3333.

<sup>163</sup> *Baltimore & C. R. Co. v. Walker*, 45 Ohio St. 577; s. c. 14 West. Rep. 172; 16 N. E. Rep. 475. Under the same statute, the words "owning the track" are so construed as to include a railroad company operating a road as *lessee*: *Baltimore & C. R. Co. v. Walker*, *supra*.

<sup>164</sup> *Indiana & C. R. Co. v. Barnhart*, 115 Ind. 399; s. c. 16 N. E. Rep. 121 (construing Burns' Rev. Stat., §§ 5154, 5155). In New York, under § 28 of the General Railroad Act, all questions relating to railroad crossings, as between different railroad corporations, are to be decided by commissioners: *Re New York & C.*

*R. Co.*, 44 Hun (N. Y.) 215. As to actions to recover penalty of \$200 imposed upon railroad companies for not stopping their trains before crossing another railroad upon the same level,—see *Indianapolis & C. R. Co. v. People*, 91 Ill. 452. Conditions upon which a crossing at grade will be *enjoined* under Iowa Code, § 1265: *Humeston & C. R. Co. v. Chicago & C. R. Co.*, 74 Iowa 554; s. c. 38 N. W. Rep. 413. Circumstances under which crossing at grade allowed: *Pennsylvania R. Co. v. Schuylkill & C. R. Co.*, 116 Pa. St. 55; s. c. 8 Cent. Rep. 93; 8 Atl. Rep. 914; 19 W. N. C. 337. Petition and proceeding under Kansas statute, by one railroad company to cross another's right of way: *Union & C. R. Co. v. Leavenworth & C. R. Co.*, 29 Fed. Rep. 728.

<sup>165</sup> *Williams v. Clark*, 140 Mass. 238.



tract.<sup>166</sup> And an agreement that a crossing shall be "*finished*" prevents the company from obstructing it by gates and bars.<sup>167</sup>

§ 1518. **Other Questions Relating to Railway Crossings of Highways.**—A pedestrian has the right to cross a railroad at a crossing anywhere within the limits of the highway, although a footwalk has been made across the railroad.<sup>168</sup> Railroad companies are not liable, unless made so by statute, for damages to abutting owners caused by changing the grade of the railroads and of the streets, when compelled to do so to get rid of grade crossings.<sup>169</sup> The power of a court to require a considerable and important lateral change in the location of railroad tracks, in order to restore the street to a proper condition of usefulness, should not be exercised unless that is reasonably necessary.<sup>170</sup> In Massachusetts, a person who is injured in consequence of a defect in a railway bridge or crossing, can not recover damages for the injury from the railway company without giving to the company the *notice* required by a statute, which provides that a person injured through a defect in a highway "shall give to the county \* \* \* or person obliged by law to keep said highway in repair, notice of the time, place, and causes of the injury or damage."<sup>171</sup> In Minnesota, a court has power to establish the grade at which a bridge or viaduct, with its approaches, shall be constructed by a railway company on a street or highway crossing, when enforcing by mandamus such duty, imposed by the charter of the company, although it in-

<sup>166</sup> *Davies v. St. Louis &c. R. Co.*, 56 Iowa 192.

<sup>167</sup> *Williams v. Clark*, 140 Mass. 238. A contract was made between a city and a railroad company by which a bridge, partly paid for by the city, should be built over a railroad crossing. The company agreed to maintain the foundation, but turned the possession of the bridge and approaches over to the city, which took possession, and made the repairs alleged to have caused the accident complained of. It did not appear that the company was under any legal obligation to change the grade crossing into an overhead crossing. It was held that the railroad company was not liable for injuries received: *Wetherbee v. Michigan Cent. R. Co. (Mich.)*, 80 N. W.

Rep. 787. Validity of a contract between railroad company and city, by which city agrees to establish the grade of a street above the railroad track, preventing the city from removing the bridge and changing the crossing to grade: *Philadelphia R. Co.'s Appeal*, 121 Pa. St. 44; s. c. 22 W. N. C. 285; 15 Atl. Rep. 476.

<sup>168</sup> *Louisville &c. R. Co. v. Head*, 80 Ind. 117.

<sup>169</sup> *Kelly v. Minneapolis*, 57 Minn. 294; s. c. 59 N. W. Rep. 304.

<sup>170</sup> *State v. Minneapolis &c. R. Co.*, 39 Minn. 219; s. c. 39 N. W. Rep. 153.

<sup>171</sup> *Dickie v. Boston &c. R. Co.*, 131 Mass. 516 (construing Mass. Stat. 1877, ch. 234, § 3; Pub. Stat. Mass., ch. 52, § 19). See also, *Mack v. Boston &c. R. Co.*, 164 Mass. 393; s. c. 41 N. E. Rep. 653.



volves a change in the grade previously established for the street or highway.<sup>172</sup>

<sup>172</sup> *Parker v. Truesdale*, 54 Minn. 241; s. c. 55 N. W. Rep. 901. *Indictment* under statute of Mississippi against railway company for suffering a bridge across its track to be out of repair, should be based under Miss. Code, § 1053: *Vicksburg & C. R. Co. v. State*, 64 Miss. 5. Circumstances under which bill in equity to compel the erection of a *foot-bridge* in addition to wagon-bridge, not maintainable: *South Waverly Borough's Appeal* (Pa.), 11 Atl. Rep. 245; s. c. 20 W. N. C. 209 (no off. rep.). When railroad company, under New York Laws 1850, ch. 140, has the election of the method in which a highway should be taken over its track: *Jamaica v. Long Island R. Co.*, 49 N. Y. St. Rep. 365; s. c. 21 N. Y. Supp. 327. The lawful construction of a railroad upon the grade of a street does not exempt it from bridging when it becomes necessary: *State v. Minneapolis & C. R. Co.*, 39 Minn. 219; s. c. 39 N. W. Rep. 153. Revising matters of fact found by commission, and apportionment of the cost, in a proceeding for alteration of railroad bridge: *Boston & C. R. Co. v. Newton*, 148 Mass. 474; s. c. 20 N. E. Rep. 106. A railroad company can not, by converting land procured by it for a right of way, into a yard for storing cars and switching, prevent the extension across it of a highway, which may legally be extended across the right of way, but not across lands acquired for yard purposes: *Detroit Parks & C. Commissioners v. Detroit & C. R. Co.*, 93 Mich. 58; s. c. 51 Am. & Eng. Rail. Cas. 525; 52 N. W. Rep. 1083. When railway company can not be compelled, under New York statute, to take a highway across its tracks which are in constant use for freight depot and yard purposes: *People v. New York & C. R. Co.*, 69 Hun (N. Y.) 166; s. c. 52 N. Y. St. Rep. 530; 23 N. Y. Supp. 456. When city enjoined from constructing a grade crossing over a railway track for the purpose of obtaining access to a harbor: *Vancouver v. Canadian & C. R. Co.*, 23 Can. S. C. 1. Railway company has no ground of complaint that highway which it crosses is used for

water pipes, so long as its franchise is not interfered with: *Lehigh Valley R. Co. v. Orange Water Co.*, 42 N. J. Eq. 205. An injunction was granted at the instance of a city to prevent the use of four tracks across a street at a grade in addition to five already there: *Newark v. Delaware & C. R. Co.*, 42 N. J. Eq. 196. *Injunction* granted at the suit of the Attorney-General to restrain railroad company from obstructing the highway, and to compel it to remove obstructions which it has placed there: *State v. Dayton & C. R. Co.*, 36 Ohio St. 434. In such a case, proper for court to prescribe what change in the location will operate to supersede injunction: *State v. Dayton & C. R. Co.*, *supra*. Power of railway company, in Pennsylvania, to change location of highway so as to avoid a grade crossing: *Abington Twp. v. North Pennsylvania R. Co.*, 2 Pa. Dist. Rep. 68; s. c. 12 Pa. Co. Ct. 118. Company to judge of such necessity, and its actions conclusive unless abused: *Pennsylvania R. Co.'s Appeal* (Pa.), 24 W. N. C. 409. What will and will not be deemed to be such an abuse: *Pennsylvania R. Co.'s Appeal*, *supra*. Objection that such power has been abused must be made before reconstruction completed: *Pennsylvania R. Co.'s Appeal*, *supra*. Section of charter construed as allowing the company only a joint use with the public of a highway, and not as authorizing the exclusion of ordinary travel: *Pittsburgh & C. R. Co. v. Reich*, 101 Ill. 157. Charter provisions not construed as a grant of the use of the streets for the purpose of laying a track upon them: *Chicago & C. R. Co. v. Chicago*, 121 Ill. 176; s. c. 9 West. Rep. 493; 11 N. E. Rep. 907. Extent of the right of a county to recover damages and expenses, under a statute, upon the destruction of a county road by a railroad company: *Weymouth v. Port Townsend & C. R. Co.*, 6 Wash. 575; s. c. 34 Pac. Rep. 154. Proceedings to discontinue or abolish grade crossings of highways in Connecticut—various rulings: *New York & C. R. Co. v. Bristol*, 62 Conn. 527; s. c. 26



Atl. Rep. 122; *Westbrook v. New York &c. R. Co.*, 57 Conn. 95; s. c. 16 Atl. Rep. 724; 17 Atl. Rep. 368 (that the legislature has power to *abate* grade crossing as *nuisances*); *Mooney v. Clark*, 69 Conn. 241; s. c. 37 Atl. Rep. 506, 1080 (similar ruling); *Westbrook v. New York &c. R. Co.*, 57 Conn. 95; s. c. 16 Atl. Rep. 724; 17 Atl. Rep. 368 (the town proper party); *Westbrook v. New York &c. R. Co.*, *supra* (statute includes lessee under perpetual lease); *Westbrook v. New York &c. R. Co.*, *supra* (application need not be signed by the directors individually, but may be signed by their *attorney*); *Westbrook v. New York &c. R. Co.*, *supra* (directors, in making the application, do not represent or bind the State); *Westbrook v. New York &c. R. Co.*, *supra* (taking *appeal* is conclusive as to authority and form of application); *Fairfield's Appeal*, 57 Conn. 167; s. c. 17 Atl. Rep. 764 (when railroad commissioners have no power to order abolition of lawful crossing, or substitute a grade crossing at another place); *Westbrook v. New York &c. R. Co.*, 57 Conn. 95; s. c. 16 Atl. Rep. 724; 17 Atl. Rep. 368 (statute makes it the duty of the town to unite

with a railroad company in removing grade crossings as dangerous *nuisances*). Abolishing grade crossing in Massachusetts—various rulings: *Re Norwood*, 161 Mass. 259; s. c. 37 N. E. Rep. 199 (proceedings not vitiated by the fact that one of the Commissioners, holding the office of Assistant Attorney-General, entered his appearance for the Commonwealth); *Re Norwood*, *supra* (nor because, in making the changes, some of the new ways and approaches are to be made wider than the old ways, and of superior construction); *Re Norwood*, *supra* (improper to provide two crossings and two new ways at a considerable distance from the old crossing); *Re Norwood*, *supra* (when petition sufficiently broad in its language). *Mandamus* to compel construction of *farm crossing* where railway track crosses a farm between the house and the highway: *Boggs v. Chicago &c. R. Co.*, 54 Iowa 435. *Mandamus* to enforce order of Nebraska Board of Transportation in regard to construction or repair of highway crossings by railway companies: *State v. Chicago &c. R. Co.*, 29 Neb. 412; s. c. 42 Am. & Eng. Rail. Cas. 248; 45 N. W. Rep. 469.



## CHAPTER XLVIII.

## FENCES, FLAGMEN, STATIONARY SIGNALS, AND OTHER PRECAUTIONS AT CROSSINGS.

## SECTION

- 1522. Warning sign-boards at crossings.
- 1523. Effect of erecting a sign-board warning the public that there is no crossing.
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- 1526. Electric bell signals at crossings.
- 1527. Duty of railway companies to erect gates at crossings.
- 1528. Statutes and ordinances prescribing this duty.
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## SECTION

- 1534. Failure to operate the gates.
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- 1538. Statutes and ordinances requiring railway companies to station flagmen.
- 1539. Withdrawal of a flagman negligence.
- 1540. One flagman for several companies.
- 1541. Liability of railway company for negligence of its flagman.
- 1542. Right of traveller to act upon signals given by flagman.
- 1543. Effect of disregarding or disobeying flagman.
- 1544. Relevancy of evidence respecting flagmen.

§ 1522. **Warning Sign-Boards at Crossings.**<sup>1</sup>—It may be assumed that no obligation exists, as matter of law, upon a railroad company to erect a sign-board at a highway or street crossing, warning travelers of the danger to them from passing trains, unless such a duty is imposed by statute or ordinance; but whether, in the absence of statute or ordinance, the failure to erect and maintain such a sign-board at a particular crossing will impute negligence to the company, will be a *question for a jury*.<sup>2</sup> Statutes and municipal ordinances no doubt exist in most States and cities, imposing this duty upon steam rail-

<sup>1</sup> This section is cited in § 1536.<sup>2</sup> *Shaber v. St. Paul & C. R. Co.*, 28



way companies, and the omission of such a mode of warning the travelling public of the danger of approaching a railway crossing, will be governed by the same rules as the omission of other statutory provisions: in some States it will be negligence *per se*,<sup>3</sup> and in others it will be merely evidence of negligence for the consideration of the jury.<sup>4</sup> But, under any theory, it will always be a *material fact*, as bearing upon the question whether the traveller exercised ordinary or reasonable care, to prove which, evidence will be admissible, unless such evidence is rendered immaterial by the state of the issues, or by other facts admitted or established in the case.<sup>5</sup> Accordingly, it has been held that the plaintiff may show that no sign-board was up, as required by statute, although the want of a sign-board is not alleged as a ground of recovery.<sup>6</sup> But the failure of a railroad company to erect such a sign-board at a crossing can not be made the ground of an action for damages by a traveller who *saw the track* and went upon it, and was hurt.<sup>7</sup> Nor, in a jurisdiction where the burden of disproving contributory negligence is on the plaintiff, does it release him from the necessity of establishing due care on his own part.<sup>8</sup> In such a case the principle applies that a railroad track is of itself a warning of danger, imposing upon travellers approaching it the duty of looking and listening before venturing upon it;<sup>9</sup> and this rule has been held to apply to a *side-track*, as well as to the main line.<sup>10</sup> When, therefore, a traveller is familiar with the crossing and has frequently been over it, he is not regarded in law as having been injured or prejudiced by the fault of the railway company in this particular;<sup>11</sup> but the contrary is true where he is unfamiliar with it, approaches it in the night-time, and meets with nothing to warn him of its existence.<sup>12</sup>

Minn. 103. Somewhat to the same effect, see *Staal v. Grand Rapids & C. R. Co.*, 57 Mich. 239. *Contra* as to the obligation to station *flagmen*, *post*, § 1537.

<sup>3</sup> Vol. I, § 10.

<sup>4</sup> Vol. I, § 11. See *Lewis v. Long Island R. Co.*, 162 N. Y. 52; s. c. 56 N. E. Rep. 548; reversing 30 App. Div. 410; s. c. 51 N. Y. Supp. 558.

<sup>5</sup> *Heddles v. Chicago & C. R. Co.*, 77 Wis. 228; s. c. 46 N. W. Rep. 115.

<sup>6</sup> *Baltimore & C. R. Co. v. Whitacre*, 35 Ohio St. 627.

<sup>7</sup> *Haas v. Grand Rapids & C. R. Co.*, 47 Mich. 401.

<sup>8</sup> *Lang v. Holiday Creek & C. R. Co.*, 49 Iowa 469.

<sup>9</sup> *Gardner v. Detroit & C. R. Co.*, 97 Mich. 240; *Matta v. Chicago & C. R. Co.*, 69 Mich. 112.

<sup>10</sup> *Mynning v. Detroit & C. R. Co.*, 59 Mich. 257; s. c. 26 N. W. Rep. 514.

<sup>11</sup> *Staal v. Grand Rapids & C. R. Co.*, 57 Mich. 239; *Cleveland & C. R. Co. v. Reiss*, 13 Ohio C. C. 405. Stated in other language, the reason is that in such a case, the failure to maintain the sign-board is not the proximate cause of the injury: Vol. I, § 44, *et seq.*

<sup>12</sup> *Winchell v. Abbot*, 77 Wis. 371; s. c. 46 N. W. Rep. 665. That the designation of the railroad crossing by such a warning sign is a sufficient designation to the engineer, under a statute requiring him to blow the whistle and ring the bell at a stated distance from the crossing, and provided that he shall not be compelled to whistle or ring the



§ 1523. **Effect of Erecting a Sign-Board Warning the Public that there is no Crossing.**—If a street crossing is treated both by the railway and the public as a regular public crossing, the railway company can not absolve itself from liability for injuries sustained thereat, by erecting a sign-board conveying the notice that persons crossing at that place will do so at their own peril.<sup>13</sup> Similarly, it has been held that a railroad company which places the usual planking at a usual crossing, and erects a sign warning travellers that there is no crossing there, owes the public the same duty at such crossing as at other crossings, although the highway has not been laid out in strict accordance with the law.<sup>14</sup>

§ 1524. **Signal-Targets at Crossings.**—A case is met with in Pennsylvania where, on a bill in equity by a railroad company, to procure the right to make four grade crossings over another railroad, the court, confirming the report of a master, granted such permission, but ordered that a *signal-target service* be placed at such crossings, instead of an interlocking apparatus.<sup>15</sup>

§ 1525. **Duty to Maintain Lights at Crossings in Cities and Villages.**<sup>16</sup>—Where the streets are lighted by the municipal authorities, this question is not apt to arise, because the fact that lights are maintained by the municipality renders it unnecessary for the railway company, in the absence of a statute or municipal ordinance otherwise providing, to assume the duty. Where the duty is not assumed by the municipality, then the question whether the railway company ought to perform it, would seem to depend upon the nature of the crossing, the number of tracks, the frequency with which locomotives, trains, or detached cars pass back and forth, and the extent of public

bell at any crossing not so designated,—see *Western & C. R. Co. v. Robertson*, 61 Fed. Rep. 592. The fact that a sign-board has been allowed to stand at a *discontinued highway*, does not necessarily prove that the railway company is under a statutory obligation to give signals at least eighty rods from it: *Coakley v. Boston & C. Railroad*, 159 Mass. 32; s. c. 33 N. E. Rep. 930. There is a Federal Court holding to effect that, under the Tennessee statute making it the duty of *road overseers* to erect at each railroad crossing a *certain sign*, and declaring that no engine-driver shall be compelled to blow the whistle or ring the bell at any crossing unless

it is so designated,—a railroad company is not bound to use *other means* of giving warning at a crossing not so designated: *Southern R. Co. v. Elder*, 81 Fed. Rep. 791; s. c. 54 U. S. App. 129; 26 C. C. A. 615.

<sup>13</sup> *Chicago & C. R. Co. v. Reith*, 65 Ill. App. 461.

<sup>14</sup> *Johnson v. Great Northern R. Co.*, 7 N. D. 284; s. c. 75 N. W. Rep. 250; 11 Am. & Eng. Rail. Cas. (N. S.) 76.

<sup>15</sup> *Pennsylvania R. Co. v. Schuylkill & C. R. Co.*, 116 Pa. St. 55; s. c. 8 Cent. Rep. 93; 8 Atl. Rep. 914; 19 W. N. C. (Pa.) 337.

<sup>16</sup> This section is cited in §§ 1528, 1538.



travel upon the street or highway.<sup>17</sup> The solution of the question whether a railway company is under this duty in a given case, would seem to be determined by analogy to the duty of maintaining lights at station houses at night. It has been reasoned that a railway company is to be regarded as free from blame when, in the administration of its affairs, it conforms to the rules and practices which are generally in use by other prudently conducted railway companies; and that its duty to maintain *lights at its depots* in the night-time is limited to the arrival and departure of trains, and to a sufficient time before and after, to enable persons to enter the cars, or to alight therefrom, without undue haste and in safety.<sup>18</sup> But whatever view may be taken of the question whether the railway company was under this duty in the particular instance, it is a sound conclusion that *evidence* that there was *no light* about the place is admissible as part of the *res gestae*, in an action for injuries alleged to have been sustained by the negligent operation of a train at a public crossing.<sup>19</sup> What has just been said with regard to sign-boards at crossings may be applied to the statutory duty of the railway company to maintain *lights* at street crossings in the night-time: the failure to perform this duty does not relieve travellers, attempting to cross the railway, from the exercise of reasonable care.<sup>20</sup> Under the police power of the State, a railroad company may be compelled to light such portions of its railway as are within a city or incorporated village.<sup>21</sup> While the municipality is authorized to prescribe the kind of light, it must not be a light the erection and maintenance of which would cast an unreasonable burden on the railroad company.<sup>22</sup> An ordinance compelling the company to keep a flagman by day and a red lantern by night at a crossing where it had but one track, and it did not appear that the crossing was unusually dangerous or more so than ordinary crossings, was held unreasonable.<sup>23</sup> Nor, where a city is empowered to pass an ordinance requiring a railroad company to maintain *electric* lights, can they compel the company to maintain lights of the "arc pattern."<sup>24</sup> Such ordinances, in order to be binding, must specify the time within

<sup>17</sup> See *Cincinnati & C. R. Co. v. Bowling Green*, 57 Ohio St. 336, and note to same in 41 L. R. A. 422.

<sup>18</sup> *Alabama & C. R. Co. v. Arnold*, 84 Ala. 159; s. c. 5 Am. St. Rep. 354; 4 South. Rep. 359.

<sup>19</sup> *Easley v. Missouri & C. R. Co.*, 113 Mo. 236; s. c. 20 S. W. Rep. 1073.

<sup>20</sup> *Gulf & C. R. Co. v. Riordan* (Tex. Civ. App.), 22 S. W. Rep. 519 (no off. rep.).

<sup>21</sup> *Cincinnati & C. R. Co. v. Sullivan*, 32 Ohio St. 152; *Cleveland & C. R. Co. v. St. Bernard*, 15 Ohio C. C. 588.

<sup>22</sup> *Cleveland & C. R. Co. v. St. Bernard*, 15 Ohio C. C. 588.

<sup>23</sup> *Toledo & C. R. Co. v. Jacksonville*, 67 Ill. 37.

<sup>24</sup> *Shelbyville v. Cleveland & C. R. Co.*, 146 Ind. 66. To the same effect, see *Cleveland & C. R. Co. v. Connersville*, 147 Ind. 277.



which the lighting must be done.<sup>25</sup> When the company fails to comply with an ordinance requiring the lighting, the council of the municipality may procure it to be done, and the expense of such lighting may be assessed and declared a lien on the real estate of the company within the limits of the municipal corporation.<sup>26</sup>

§ 1526. **Electric Bell Signals at Crossings.**—With the development of electrical science and the improvements in electrical appliances, electric bell signals at railway crossings are coming into use. It is understood that these bells are so arranged and connected as to be sounded by a current of electricity communicated from an approaching train when it arrives within a given distance of the crossing. Doubtless, it will soon become a recognized rule of law that the failure to have such a signal at a crossing, in the absence of any other adequate means of protecting travellers, will be *evidence of negligence* to go to a jury.<sup>27</sup> On the other hand, if such a signal has been erected, and after a long trial has been abandoned as a failure, but is allowed to remain, though out of order, one who is in daily use of the crossing will be presumed to know that it is out of order, and not to rely upon or expect signals to be given by it; so that, in case he is injured, he can not predicate an action for damages on the ground of its not being in proper condition to sound a warning of an approaching train.<sup>28</sup>

§ 1527. **Duty of Railway Companies to Erect Gates at Crossings.**<sup>29</sup>—On the one hand, it has been held that a railroad company is not required, in the exercise of reasonable care and diligence, to maintain a gate and gateman at all crossings; but that there must be *peculiar hazard* at a particular crossing, to render it negligent in failing to maintain a gate and gateman thereat;<sup>30</sup> and whether there is such hazard is a question for a jury.<sup>31</sup> Stating the same doctrine

<sup>25</sup> Lake Erie &c. R. Co. v. St. Mary's, 14 Ohio C. C. 202.

<sup>26</sup> Cincinnati &c. R. Co. v. Sullivan, 32 Ohio St. 152; Bowling Green v. Cincinnati &c. R. Co., 10 Ohio C. C. 63.

<sup>27</sup> See *Re Patchogue Street Crossing*, 74 Hun (N. Y.) 46; s. c. 56 N. Y. St. Rep. 147; 26 N. Y. Supp. 293, where it was held that a county court, under a particular state of circumstances, had power, under a statute, to order an electric bell signal to be erected at a crossing.

<sup>28</sup> Wellenhoffer v. New York &c. R. Co., 66 Hun (N. Y.) 634; s. c. 50 N.

Y. St. Rep. 111; 21 N. Y. Supp. 866.

<sup>29</sup> This section is cited in §§ 1534, 1535, 1606.

<sup>30</sup> Vallance v. Boston &c. R. Co., 55 Fed. Rep. 364. See also Cleveland &c. R. Co. v. Reiss, 13 Ohio C. C. 405; s. c. 7 Ohio Dec. 450.

<sup>31</sup> Lehigh Valley R. Co. v. Brandtmaier, 113 Pa. St. 610; s. c. 5 Cent. Rep. 144; Philadelphia &c. R. Co. v. Layer, 112 Pa. St. 414; s. c. 3 Cent. Rep. 381; Hubbard v. Boston &c. R. Co., 162 Mass. 132; s. c. 38 N. E. Rep. 366; Cleveland &c. R. Co. v. Richerson, 10 Ohio C. D. 326.



affirmatively, another court has held that a railroad company which, at a highway crossing, creates a *situation of unusual peril* and risk to persons having lawful occasion to cross the track, by means of its tracks, buildings, or other erections, must employ every reasonable precaution against such peril and risk, beyond ordinary cautionary signals; and that such precautions may extend to the erection of gates at such crossings, and to keeping them closed while trains are passing.<sup>32</sup> The Court of Appeals of Kentucky have used the following language on this subject, which has been quoted with approval by the Supreme Court of the United States: "The doctrine with reference to injuries to those crossing the track of a railway, where the right to cross exists, is that the company must use such reasonable care and precaution as ordinary prudence would indicate. This vigilance and care must be greater at crossings in a populous town or city than at ordinary crossings in the country; so, what is reasonable care and prudence must depend upon the facts of each case. In a crossing within a city, or where the travel is great, reasonable care would require a *flagman* constantly at the crossing, or *gates* or *bars*, so as to prevent injury; but such care would not be required at a crossing in the country, where but few persons pass each day. The usual signal, such as ringing the bell and blowing the whistle, would be sufficient."<sup>33</sup> While the common law does not attempt to designate the mode in which sufficient notice of a train's approach to a crossing is to be given, and there is no common law duty to have a flagman or gates at crossings, unless peculiar circumstances require it, the absence of flagmen and gates may be *taken into consideration by the jury*, together with other facts, to determine the rate of speed consistent with public safety at a given point.<sup>34</sup> In other words, the question whether a railroad company has been guilty of negligence in not maintaining gates and flagmen at a highway crossing, in the absence of a statute or municipal ordinance requiring it, will ordinarily be a *question for a jury*;<sup>35</sup> and this is merely a branch of the general doctrine that what precautions are reasonably necessary for the safety of the public at such crossings is for the jury to determine.<sup>36</sup> For example, it may be left to a jury to determine whether a railway

<sup>32</sup> Delaware &c. R. Co. v. Shelton, 55 N. J. L. 342; s. c. 26 Atl. Rep. 937.

<sup>33</sup> Central Passenger R. Co. v. Kuhn, 86 Ky. 578; citing 1 Thomp. Neg., 1st ed., 417; quoted with approval in Grand Trunk R. Co. v. Ives, 144 U. S. 408, 420. Compare Com. v. Boston &c. R. Corp., 101 Mass. 201.

<sup>34</sup> Lehigh Valley R. Co. v. Brandtmaier, 113 Pa. St. 610; s. c. 5 Cent. Rep. 144.

<sup>35</sup> Philadelphia &c. R. Co. v. Layer, 112 Pa. St. 414; s. c. 3 Cent. Rep. 381; English v. Southern &c. Co., 13 Utah 407; s. c. 35 L. R. A. 155; 4 Am. & Eng. Rail. Cas. (N. S.) 63; 45 Pac. Rep. 47.

<sup>36</sup> *Ante*, §§ 1490, 1511.



company is guilty of negligence in failing to provide a gate or flagman at a very dangerous and much frequented highway crossing, although the public authorities have not required such a precaution;<sup>37</sup> or in permitting detached cars to pass at the rate of ten miles an hour over a much used crossing *without gates*, watched only by an old man who is required to watch another crossing as well.<sup>38</sup>

§ 1528. **Statutes and Ordinances Prescribing this Duty.**<sup>39</sup>—Statutes and municipal ordinances have been frequently enacted, prescribing this duty; and where such statutes or ordinances are disobeyed and an injury results to a traveller, as the direct and proximate cause of such disobedience, without contributory fault on his part, the railway company will be liable to him in damages,<sup>40</sup> either on the ground that its failure to perform the statutory duty is negligence *per se*<sup>41</sup> or *prima facie* evidence of negligence,<sup>42</sup> according to different theories on this subject.<sup>43</sup> There is no doubt whatever of the power of the legislature of a state, in the exercise of the police power, to enact such statutes or to authorize municipal corporations to enact such ordinances, especially where the legislature possesses a reserved power to modify the chartered privileges of corporations.<sup>44</sup> One court has reasoned that a compliance, by the railway company, with an order passed by the mayor and aldermen requesting it to erect gates at a crossing, is tantamount to an admission by the railway company that

<sup>37</sup> Hubbard v. Boston &c. R. Co., 162 Mass. 132; s. c. 39 N. E. Rep. 366.

<sup>38</sup> Lederman v. Pennsylvania R. Co., 165 Pa. St. 118; s. c. 35 W. N. C. 502; 12 Lanc. L. Rev. 65; 44 Am. St. Rep. 644; 30 Atl. Rep. 725. There are decisions in New York,—but they are entitled to little respect—to the effect that a railroad company is not chargeable with negligence in failing to maintain gates or provide flagmen at highway crossings unless directed to do so in the statutory manner, namely, by order of a court upon an application of the local authorities: Martin v. New York &c. R. Co., 20 Misc. (N. Y.) 363; s. c. 45 N. Y. Supp. 925. See also Cohn v. New York &c. R. Co., 6 App. Div. 196; s. c. 39 N. Y. Supp. 986. The fact that a portion of the arm of a gate at a railroad crossing was broken off is immaterial, when the traveller who was killed saw that a train was passing by; since the gate, if complete, could have

conveyed no additional warning, and the defect in the gate could not have been the proximate cause of the accident: Theobald v. Chicago &c. R. Co., 75 Ill. App. 208; Vol. I, § 44, *et seq.*

<sup>39</sup> This section is cited in § 1535.

<sup>40</sup> Indianapolis &c. R. Co. v. Neubacher, 16 Ind. App. 21; s. c. 43 N. E. Rep. 576; rehearing denied 44 N. E. Rep. 669.

<sup>41</sup> Vol. I, § 10.

<sup>42</sup> Vol. I, § 11.

<sup>43</sup> Under the rule in New York (Vol. I, § 11), proof merely of a failure to comply with a city ordinance requiring the operation of gates at railway crossings at all times when trains are passing, does not make out a cause of action for negligence causing the death of one at a crossing, though it is evidence bearing upon the question: Rainey v. New York &c. R. Co., 68 Hun (N. Y.) 495; s. c. 52 N. Y. St. Rep. 677; 23 N. Y. Supp. 80.

<sup>44</sup> For decisions on analogous sub-



such gates are reasonably necessary for the public security, so as to render the company liable for neglecting to shut them when trains are passing.<sup>45</sup> On the other hand, an ordinance requiring *gates* and *flag-man* to be placed at a railroad crossing which is *not dangerous*, has been held *unreasonable and void*.<sup>46</sup> Where it was in evidence that the company had failed to comply with the statute requiring *gates* to be erected at crossings of railways,<sup>47</sup> and, after the passing of one of its trains, a child whose parents resided near the crossing was found by the side of the track, with one foot cut off, this was held sufficient *evidence of negligence* on the part of the company to take the case *to the jury* and leave to them the solution of the question of contributory negligence.<sup>48</sup>

§ 1529. **Construction of Such Statutes and Ordinances.**—Upon the question of the construction of such an ordinance, there is a decision by a subordinate court, to the effect that where it is to be enforced by penal sanctions, it must be *strictly construed*;<sup>49</sup> but the true view is that statutes or ordinances intended to conserve the public safety, are to be *fairly construed*, so as to carry out the purposes of the legislature.<sup>50</sup>

jects supporting this view, see 4 Thomp. Corp., § 5505. See also *ante*, § 1500; *People v. Long Island R. Co.*, 134 N. Y. 506; s. c. 47 N. Y. St. Rep. 648; 31 N. E. Rep. 873; affirming s. c. 58 Hun (N. Y.) 412,—where it was held competent for the legislature to enact a statute empowering the Supreme Court or County Court to require railroad companies to erect gates at grade crossings. Also see, in support of the text, *Chicago & C. R. Co. v. Ottawa*, 65 Ill. App. 631; s. c. aff'd in 165 Ill. 207; s. c. 46 N. E. Rep. 213; *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118; *Daniels v. Staten Island & C. R. Co.*, 125 N. Y. 405; *Green v. Eastern R. Co.*, 52 Minn. 79.

<sup>45</sup> *Merrigan v. Boston & C. R. Co.*, 154 Mass. 189; s. c. 28 N. E. Rep. 149.

<sup>46</sup> *State v. Bloomfield Twp. Committee*, 59 N. J. L. 109; s. c. 35 Atl. Rep. 158. As to *lights*, compare *ante*, § 1525. There is a decision of the Supreme Court of New Jersey to the effect that the provisions of a city charter which authorize the

city council to regulate the speed of trains through the city, and to designate the crossings at which the railroad companies shall be required to station *flagmen* and *signals*, and authorize the council to establish such ordinances as they shall deem necessary for the protection of the persons and property of its inhabitants, do not empower the city council to require railroad companies running through the city to erect, maintain, and operate *safety gates* at the street crossings: *West Jersey & C. R. Co. v. City of Bridgeton* (N. J.), 44 Atl. Rep. 848.

<sup>47</sup> 8 Vict., c. 20, § 47.

<sup>48</sup> *Williams v. Great Western & C. R. Co.*, L. R. 9 Exch. 157; s. c. 43 L. J. Exch. 105; 22 Week. Rep. 531; 31 L. T. (N. S.) 124.

<sup>49</sup> *Winton v. Delaware & Canal Co.*, 11 Pa. Co. Ct. 167; s. c. 9 Lanc. L. Rev. 188; 1 Pa. Dist. R. 701.

<sup>50</sup> In an action for personal injuries sustained from a railroad train at a point in the city where thirty tracks crossed the street, and where an ordinance required a railroad company to keep gates "on both



§ 1530. **Negligence in Permitting Such Gates to be Open when Trains are Approaching.**<sup>51</sup>—Undoubtedly the failure to close gates so erected when trains are approaching, will be construed by the travelling public as a notification to them that the passage is safe, and as an *implied invitation* to them to cross. While, therefore, a traveller will not, even in such a case, be excused from the duty of making a reasonable use of his faculties,<sup>52</sup> yet the existence of an open gate will manifestly modify, in its application, the rule that he must look and listen,<sup>53</sup> or stop, look and listen.<sup>54</sup> Accordingly, an instruction was approved which told the jury that the existence of gates, seemingly intended to be shut when trains passed, did not excuse the plaintiff from looking before crossing, but that he had a right to take the fact into consideration on the question to what extent he would look.<sup>55</sup> As the leaving of such a gate open notifies the traveller that the passage is safe, and impliedly invites him to use it, it is plain that if it is left open when a train is approaching dangerously near, the railway company will be negligent, and that if a traveller is injured by such negligence, without his own fault, the company must pay damages,—the question of negligence in such a case being *for a jury*;<sup>56</sup> and this rule applies even where the gate is *opened by an intermeddling stranger*, whose conduct can be, but is not prevented.<sup>57</sup>

sides of its tracks," it was error to instruct the jury that plaintiff might recover if there was no gate on either side of "defendant's track," as the jury might fairly infer from such an instruction that the ordinance required gates at each track: *Jennings v. St. Louis & C. R. Co.*, 99 Mo. 394; s. c. 11 S. W. Rep. 999. Whether these statutes have been complied with as to the *manner in which the gate is to be constructed*,—for example, a gate at a farm crossing,—is a *question for a jury*: *Kavanaugh v. Atchison & C. R. Co.*, 75 Mo. App. 78; s. c. 1 Mo. App. Rep. 372. The failure to maintain a gate at a crossing, as required by ordinance, may make a railroad company liable for injuries sustained in consequence of it, by a *runaway team*: *Missouri & C. R. Co. v. Hackett*, 54 Kan. 316; s. c. 28 L. R. A. 696; 38 Pac. Rep. 294.

<sup>51</sup> This section is cited in § 1531.

<sup>52</sup> *Post*, § 1614.

<sup>53</sup> *Post*, §§ 1613, 1637, *et seq.*

<sup>54</sup> *Post*, § 1648.

<sup>55</sup> *Merrigan v. Boston & C. R. Co.*, 154 Mass. 189; s. c. 28 N. E. Rep. 149.

<sup>56</sup> *Merrigan v. Boston & C. R. Co.*, 154 Mass. 189; s. c. 28 N. E. Rep. 149; *Wilson v. New York & C. R. Co.*, 18 R. I. 491; s. c. 29 Atl. Rep. 258; *Whelan v. New York & C. R. Co.*, 38 Fed. Rep. 15; *Haywood v. New York & C. R. Co.*, 59 Hun (N. Y.) 617; s. c. 13 N. Y. Supp. 177; 35 N. Y. St. Rep. 748; *Philadelphia & C. R. Co. v. Kilipps*, 88 Pa. St. 405.

<sup>57</sup> *Haywood v. New York & C. R. Co.*, 59 Hun (N. Y.) 617; s. c. 35 N. Y. St. Rep. 748; 13 N. Y. Supp. 177. In England, the failure to keep such gates closed, as required by an act of Parliament, is evidence of negligence, constituting, as it does, an *invitation to the traveller to cross*: *Stapley v. London & C. R. Co.*, 4 Hurl. & Colt. 93; s. c. L. R. 1 Exch. 21; 11 Jur. (N. S.) 954; 35 L. J. (Exch.) 7; 14 Week. Rep. 132; 13 L. T. (N. S.) 406; *North-East & C. R. Co. v. Wanless*, L. R. 7 H. L. 12; 43 L. J. (Q. B.) 185; 22 Week. Rep. 561; 30 L. T. (N. S.) 275. And see also *Phila. & C. R. Co. v. Killip*, 7 Reporter 440; *Phila. & C. R. Co. v. Hagan*, 47 Pa. St. 244.



§ 1531. **Crossing when Gates are Open.**<sup>58</sup>—As already stated,<sup>59</sup> while the fact that the gates are open when the traveller approaches the crossing, and that there is no flagman at the crossing to warn him of danger, does not relieve him of the duty of looking and listening,—yet in general, it is held so far to modify the rule which exacts this duty of him as to take the question of his contributory negligence *to the jury*.<sup>60</sup> This is for the reason, already stated,<sup>61</sup> that he will naturally take the fact of the gate being open as a notification from the company that the passage is safe, and as an implied invitation to him to use it. Some courts, accordingly, state the rule more strongly than the above, by saying that persons approaching a railway crossing where there is a gate, have the *right to presume*, in the absence of knowledge to the contrary, that the gatemen are probably discharging their duties; and that it is not negligence on their part to act on the presumption that they are not exposed to the dangers which can arise only from a disregard by the gatemen of their duties.<sup>62</sup> “Hence,” to use the official syllabus of an Ohio case, “an open gate, with the gate-man in charge, is notice of a clear track and safe crossing; and, in the absence of other circumstances, when the gates are open and the

<sup>58</sup> This section is cited in §§ 1553, 1606.

<sup>59</sup> *Ante*, § 1530.

<sup>60</sup> *Merrigan v. Boston &c. R. Co.*, 154 Mass. 189; s. c. 28 N. E. Rep. 149; *Hooper v. Boston &c. R. Co.*, 81 Me. 260; s. c. 17 Atl. Rep. 64; *Glushing v. Sharp*, 96 N. Y. 676; *Palmer v. New York &c. R. Co.*, 112 N. Y. 234; s. c. 19 N. E. Rep. 678; 20 N. Y. St. Rep. 904; *Kane v. New York &c. R. Co.*, 31 N. Y. St. Rep. 741; s. c. 9 N. Y. Supp. 879; *Callaghan v. Delaware &c. R. Co.*, 52 Hun (N. Y.) 276; s. c. 22 N. Y. St. Rep. 594; 5 N. Y. Supp. 285; *Ross v. Delaware &c. R. Co.* (N. J. L.), 12 N. J. Law Jour. 235. If, therefore, seeing the gates open, the traveller attempts to cross, and is struck and killed by a small engine of peculiar construction, attached to no train or car, having the cab over the boiler at the end of the engine, in which the division superintendent of the road is riding, and having the bell at the rear of the engine, which does not sound until quite near the crossing, although he might, at certain points, before reaching the track, get a glimpse of the railroad in the direction whence the engine is coming,—it is a *question for the jury* whether he is guilty of contributory negli-

gence: *Palmer v. New York &c. R. Co.*, 112 N. Y. 234; s. c. 19 N. E. Rep. 678; 20 N. Y. St. Rep. 904. It has been held that a female traveller who attempts to cross a railroad track upon the lifting of the gates, is not guilty of negligence as a matter of law, although, by reason of an engine standing on the sidewalk, she is compelled to go upon the travelled portion of the street, where she is fatally injured by a horse which is frightened by the engine blowing off steam: *Scaggs v. Delaware &c. Canal Co.*, 74 Hun (N. Y.) 198; s. c. 56 N. Y. St. Rep. 319; 26 N. Y. Supp. 323. Reversing this decision, it is held that the railroad company is not guilty of negligence under such circumstances, merely because the gateman raised the gate and let the restless horse through: *Scaggs v. Delaware &c. Canal Co.*, 145 N. Y. 201; s. c. 64 N. Y. St. Rep. 594; 39 N. E. Rep. 716.

<sup>61</sup> *Ante*, § 1530. Compare *post*, § 1612, *et seq.*

<sup>62</sup> *Post*, § 1612, *et seq.*; *Railway Co. v. Schneider*, 45 Ohio St. 678; s. c. 17 N. E. Rep. 321; *Evans v. Lake Shore &c. R. Co.*, 88 Mich. 442; s. c. 14 L. R. A. 223; 11 Rail. & Corp. L. J. 45; 50 N. W. Rep. 386.



gatemmen are present, it is not negligence in persons approaching a crossing with teams to drive at a trot, or pass on to the tracks through the open gates without stopping to listen, though the view of the track on either side of the crossing is obstructed; nor, in such case, is their failure, when at a distance of twenty-five feet from the track, to look for locomotives one hundred and fifty feet or more from the crossing, negligence, though they could have seen them."<sup>63</sup>

§ 1532. **Crossing when Gates are Down.**—On the other hand, the fact that the gates are lowered is a plain warning to every traveller approaching the crossing that it is unsafe to attempt to cross. If, in disregard of this warning, a pedestrian passes the gate in broad daylight, and enters upon the crossing, and, while watching one train, is struck by another and killed, his death will be attributed to his own recklessness, and it can not be made the ground of recovering damages.<sup>64</sup> The same rule has been applied so as to prevent a recovery of damages for the death of a *girl eleven years of age* at a crossing with which she was familiar, which she had occasion to cross four times a day, where, without any occasion for haste, she attempted to make the crossing while the gates were down.<sup>65</sup>

§ 1533. **Negligence in the Management of the Gates.**—Where a railroad corporation has, in compliance with a municipal ordinance or otherwise, placed safety gates at a street crossing, it is its duty to exercise reasonable care in operating them so as to protect travellers on the highway, not only from the danger of being run over by the cars, but also from injury from the gates themselves. If, on reaching the crossing, a traveller finds the gates raised and motionless, it is said that he is at liberty to go on, and that, if it becomes necessary to lower the gates while he is passing between them, it should be done with due regard for his safety; and if it is negligently done, so that he is struck by the gate, there will be evidence of negligence to go to a jury. In such a case it will not be held, *as matter of law*, that the traveller is bound to look before passing under the second gate to see whether it is coming down; but it will be a question of fact for the jury to decide, whether, under all the circumstances, she is guilty of negligence

<sup>63</sup> *Railway Co. v. Schneider*, 45 Ohio St. 678; s. c. 17 N. E. Rep. 321.

<sup>64</sup> *Post*, § 1665, *et seq.*; *Cleary v. Pennsylvania R. Co.*, 140 Pa. St. 19; s. c. 21 Atl. Rep. 242. Compare *Granger v. Boston & C. Railroad*, 146

Mass. 276. See also *Shehan v. Philadelphia & C. R. Co.*, 3 Pa. Dist. R. 325.

<sup>65</sup> *Marden v. Boston & C. R. Co.*, 159 Mass. 393; s. c. 34 N. E. Rep. 404.



which contributes to the injury that she receives.<sup>66</sup> So, if the gate-man negligently raises one gate, inviting travellers to drive upon the track, while the other gate is closed, and thus shuts them in between the two gates, and, in the confusion produced by their dangerous situation, they are struck by one of two trains, proceeding in the same direction, on parallel tracks, there will be a question of negligence on the part of the defendant to go to the jury.<sup>67</sup> In such a case, where the traveller thus shut in stopped forty or fifty feet from a track, and apparently listened for an approaching train before attempting to cross, but was struck by a train upon the crossing, the question as to whether he exercised due care was one of fact for the jury.<sup>68</sup> The negligence of the railway company is clear where, the gates being up, the traveller drives upon the track in safety, but is hemmed in on the track, and is struck by an approaching train by reason of the gate being lowered in front of him.<sup>69</sup>

§ 1534. **Failure to Operate the Gates.**<sup>70</sup>—If a railroad company has established *gates* at a highway crossing, its cessation of operating them will be imputed to it as negligence or not, according to the view which may be taken of the necessity of the gates at the particular crossing; and this, as already seen,<sup>71</sup> will ordinarily be a question for a jury;<sup>72</sup> but with this difference,—that a railroad company which has established gates at a highway crossing, although voluntarily and gratuitously, can not, after the public have become accustomed to them as a means of safety, arbitrarily and without any notice to the public suspend their operation while leaving them in position, with-

<sup>66</sup> *Feeney v. Long Island R. Co.*, 116 N. Y. 375; s. c. 26 N. Y. St. Rep. 729; 39 Am. & Eng. Rail. Cas. 639; 22 N. E. Rep. 402; 5 L. R. A. 544. But where a person about to cross a railway track sees an approaching train, the question whether the crossing gates were open or closed, or whether they were in good order, is immaterial: *Bjork v. Illinois & C. R. Co.*, 85 Ill. App. 269.

<sup>67</sup> *Callaghan v. Delaware & C. R. Co.*, 52 Hun (N. Y.) 276; s. c. 22 N. Y. St. Rep. 594; 5 N. Y. Supp. 285.

<sup>68</sup> *Kane v. New York & C. R. Co.*, 56 Hun (N. Y.) 648; s. c. 31 N. Y. St. Rep. 741; 9 N. Y. Supp. 879.

<sup>69</sup> *Prue v. New York & C. R. Co.*, 18 R. I. 360; s. c. 27 Atl. Rep. 450; *Warren v. Boston & C. R. Co.*, 163 Mass. 484; s. c. 40 N. E. Rep. 895. It has been held that the failure of

a railroad company to lower its gates in time to prevent a team from going upon its track at a crossing, in front of an engine of another company running thereon, and the approach of such engine to the crossing without proper signals, will render both companies concurrently liable for the killing of the driver of such team, himself free from negligence: *Startz v. Pennsylvania & C. R. Co.*, 42 N. Y. St. Rep. 457; s. c. 16 N. Y. Supp. 810.

<sup>70</sup> This section is cited in § 1539. <sup>71</sup> *Ante*, § 1527. See also *ante*, §§ 1490, 1511.

<sup>72</sup> *Hooper v. Boston & C. R. Co.*, 81 Me. 260; *Lake Shore & C. R. Co. v. Frantz*, 127 Pa. St. 297; s. c. 4 L. R. A. 389; *Greenwood v. Philadelphia & C. R. Co.*, 124 Pa. St. 572; s. c. 3 L. R. A. 44.



out being guilty of negligence.<sup>73</sup> The governing principle here is somewhat analogous to that which prevents the fencing up of a private way, which the public have been licensed to use, without notice to them.<sup>74</sup>

§ 1535. **Duty to Station Flagmen at Crossings.**—The presence of gates at highway crossings of railways implies the presence of gatemen to operate them. These gatemen are often called “flagmen,” because they usually carry a flag to warn approaching trains on one hand, or approaching travellers on the other. We have already considered the extent of the obligation to maintain gates at public crossings, and incidentally the extent of the obligation to maintain gatemen or flagmen at such places,—the subject of gates and gatemen or flagmen being treated in the decisions as one subject.<sup>75</sup> Restating the doctrine with especial reference to flagmen, gatemen, or watchmen, as the men who exercise this office are variously called, the weight of judicial authority is to the effect that where the crossing is much frequented, or where, by reason of *obstructions of the view*, or other circumstances, it is *peculiarly dangerous*, the company does not discharge its full duty to the public by merely sounding the statutory signals on approaching the crossing with its train, but that a jury will be warranted in finding it guilty of negligence in failing to take the additional precaution of stationing a flagman to watch the track both ways, and to warn travellers of the approach of trains.<sup>76</sup> The standard of duty and liability is such that the railway company is required to place a flagman at a highway crossing when the surroundings are of such a nature and the amount of travel is such as to make it necessary, in the exercise of *ordinary or reasonable care*, for the protection of the public;<sup>77</sup> and whether this is so, is, in the absence of specific statutory or municipal regulations, generally a *question of fact for a jury*.<sup>78</sup> Even where the statute law requires this subject to be

<sup>73</sup> Chicago &c. R. Co. v. Redmond, 70 Ill. App. 119; s. c. 2 Chic. L. J. Wkly. 552.

<sup>74</sup> Vol. I, §§ 1016, 1017.

<sup>75</sup> *Ante*, §§ 1527, 1528.

<sup>76</sup> Cleveland &c. R. Co. v. Schneider, 45 Ohio St. 678; s. c. 14 West. Rep. 538; 17 N. E. Rep. 321; Freeman v. Duluth &c. R. Co., 74 Mich. 86; s. c. 3 L. R. A. 594; 41 N. W. Rep. 872.

<sup>77</sup> Lapsley v. Union &c. R. Co., 50 Fed. Rep. 172; aff'd 51 Fed. Rep. 174.

<sup>78</sup> Omaha &c. R. Co. v. Brady, 39 Neb. 27; s. c. 57 N. W. Rep. 767; Chicago &c. R. Co. v. Lane, 30 Ill. App. 437; aff'd in 130 Ill. 116; 22 N. E. Rep. 513; Chicago &c. R. Co. v. Perkins, 26 Ill. App. 67; s. c. aff'd 125 Ill. 127; 14 West. Rep. 400; 17 N. E. Rep. 1; Bolinger v. St. Paul &c. R. Co., 36 Minn. 418; s. c. 31 N. W. Rep. 856; Lesan v. Maine &c. R. Co., 77 Me. 85; Rumsey v. Delaware &c. R. Co., 6 Kulp (Pa.) 359; Ross v. Delaware &c. R. Co., 12 N. J. L. J. 235; Staal v. Grand Rapids &c.



regulated by the *railroad commissioners*,<sup>79</sup> yet, nevertheless, it has been observed that "when a railroad company so obstructs its track that its trains can not be seen by those approaching a crossing, and so that the signals required by the statute, the bell and whistle, are not sufficient to warn the traveller on the highway of the coming of its trains, it is very clear \* \* \* that some additional warning must be given, and there are cases where a flagman would be necessary to acquit the company of negligence."<sup>80</sup>

### § 1536. Further of the Duty to Station Flagmen at Crossings.—

So, in Massachusetts, a railway corporation may be guilty of negligence in not maintaining a flagman at a crossing, although neither the selectmen nor the county commissioners have required it under the provisions of a statute;<sup>81</sup> and we have had occasion to note a similar rule with reference to the duty of erecting *warning sign-boards*, although the proper public officer has not ordered them.<sup>82</sup> The company may so run and manage its trains at a high rate of speed as to make it a plain duty to place a flagman or gates at a particular crossing;<sup>83</sup> and the fact that there was *no flagman* stationed at the crossing at which a traveller was killed, may be considered in passing on the question of the alleged negligence of the railroad company in running its train at a *dangerous and unreasonable rate of speed*, although there is no evidence of any ordinance requiring a flagman to be provided at that point.<sup>84</sup> Again, there may be *special circumstances* which will convict the railway company of negligence in not stationing a man at a crossing to give warning, as where it backs a train,

R. Co., 57 Mich. 239; s. c. 23 N. W. Rep. 795; *Eaton v. Fitchburg R. Co.*, 129 Mass. 364; *Louisville & C. R. Co. v. Hackman*, 17 Ky. L. Rep. 81; s. c. 30 S. W. Rep. 407 (no off. rep.); *Huntress v. Boston & C. R. Co.*, 66 N. H. 185; s. c. 49 Am. St. Rep. 600; 34 Atl. Rep. 154.

<sup>79</sup> As in Michigan: *Battishill v. Humphreys*, 64 Mich. 494.

<sup>80</sup> *Guggenheim v. Lake Shore & C. R. Co.*, 66 Mich. 150; s. c. 9 West. Rep. 903; 33 N. W. Rep. 161 (opinion by Morse, J.). See also *Freeman v. Duluth & C. R. Co.*, 74 Mich. 86; s. c. 3 L. R. A. 594; 41 N. W. Rep. 872, where this doctrine is reaffirmed distinctly. Also *Battishill v. Humphreys*, 64 Mich. 511, and *Chesapeake & C. R. Co. v. Gunter*

(Ky.), 56 S. W. Rep. 527 (holding that the failure of the railroad commissioners to require a flagman at a particular crossing does not relieve the company from the charge of negligence in failing to have a flagman, where the situation is such that common prudence requires the precaution to be taken; and that such failure on the part of the commissioners is not even admissible in evidence to show due care on the part of the company).

<sup>81</sup> *Eaton v. Fitchburg R. Co.*, 129 Mass. 364.

<sup>82</sup> *Ante*, § 1522.

<sup>83</sup> *New York & C. R. Co. v. Swartout*, 3 Ohio Dec. 636.

<sup>84</sup> *Lake Shore & C. R. Co. v. Foster*, 74 Ill. App. 387.



which has just passed the crossing, suddenly down upon it.<sup>85</sup> Finally, it may well be concluded that, whether or not, in the absence of any statute or ordinance on the subject, a jury may determine the necessity of a flagman at a street crossing, or predicate negligence upon the mere absence of a flagman, yet *the presence or absence may be shown*, in connection with other facts and circumstances, as bearing upon the question of the negligence of the railroad company in moving the train over such crossing,<sup>86</sup>—the same being a part of the *res gestae*.

**§ 1537. Doctrine that it is not Negligence not to Station Flagmen at Crossings.**—It is plain enough that there is no *rule of law* on the subject of the obligation of a railway company to station flagmen at crossings; because, as seen in the preceding section, the duty is a shifting one, depending upon the character of the crossing, the amount of travel, and other circumstances. It follows that the failure to station a flagman at a particular crossing is not negligence as matter of

<sup>85</sup> Duame v. Chicago &c. R. Co., 72 Wis. 523; s. c. 40 N. W. Rep. 394; 7 Am. St. Rep. 879. The Court of Appeals of Kentucky have characterized the failure of a railway company to station a flagman at a crossing in a populous city, *at night*, where the cars were obliged to cross over the railway track, and where the adjacent buildings obstructed the view, and railway locomotives and trains were constantly passing back and forth,—as *negligence of the most flagrant character*: Central Pass. R. Co. v. Kuhn, 86 Ky. 578, 584; s. c. 6 S. W. Rep. 441. And yet the same court has held it error to instruct the jury that, if the crossing was an exceptionally dangerous one, it was the duty of defendant to keep a watchman at such crossing, or to use some other “effective” means to warn travellers of the approach of trains, for the reason that the law does not require that the means adopted shall prove *effective*, but only that they shall be such as an ordinarily prudent person operating a railroad would adopt under like circumstances: Chesapeake &c. R. Co. v. Gunter (Ky.), 56 S. W. Rep. 527,—a decision which deserves to be characterized as weak casuistry. The same court has held it to be the duty of a railway company to keep a flagman or to adopt and use

some other “reasonably safe and effectual mode” of warning travellers of the approach of trains, at a crossing near a populous town continuously used by travellers, which can not be crossed at an ordinary travelling gait, because of the steep approach to it, and at which approaching trains can not be seen by one who is driving, until his horse’s head has almost reached the track: Newport News &c. Co. v. Stewart, 99 Ky. 496; s. c. 18 Ky. L. Rep. 345; 36 S. W. Rep. 528. But, plainly, the failure to keep a flagman at a crossing can not be adjudged to be negligence, in the *absence of evidence* as to the number of people using the crossing: Hutcherson v. Louisville &c. R. Co. (Ky.), 52 S. W. Rep. 955. Not error to refuse an instruction to the effect that, in considering whether the stationing of flagmen was sufficient to warn travellers of approaching danger, the fact that it did not appear, that at any time previously, an accident had occurred at that place, must be taken as conclusive proof of the sufficiency of the precautions adopted by the company: Quill v. New York &c. R. Co., 32 N. Y. St. Rep. 612; s. c. 11 N. Y. Supp. 80; *aff’d* in 126 N. Y. 629, *mem.*

<sup>86</sup> Hoyer v. Chicago &c. R. Co., 67 Wis. 1.



law, whatever may be the dangers attending the traveller on approaching it.<sup>87</sup> One or two other courts deny the doctrine of the preceding section that, whether a railroad company is bound, in the exercise of reasonable care for the safety of the public, to station a flagman at a given crossing, is a question of fact *for a jury*.<sup>88</sup> This doctrine, which commits the public safety to the tender mercies of the railroad companies until the legislature intervenes, ought not to invoke one word in its favor.<sup>89</sup> Other cases go to the length of holding, contrary to the preceding section, and to the sound and just doctrine on this subject, that negligence can not be predicated upon the omission of a railroad corporation to station a flagman or to maintain gates or a light at a highway crossing, in the absence of any statutory duty.<sup>90</sup> One court has even done worse, by holding that the railway company fulfills its whole duty by complying with the statutory precautions, except, perhaps, in a case where the crossing is of such a character that the employment of a flagman is one of the common and usual means of warning adopted by prudent railroad companies,—conceding that in such a case the omission to employ one might be negligence.<sup>91</sup> But, clearly, there are cases where it can be said upon principle, and as matter of law, that the railroad company is not bound to provide a flagman. It is not, for example, bound to take such a precaution for the benefit of a *trespasser* who makes use of its railway track as a highway.<sup>92</sup> There are also special circumstances where it can be said, as matter of law, that a railroad company owes no duty to maintain a special lookout or take special precautions,—as where the exit to its track from a building is through a gate marked “No Admittance,” which is usually kept locked. In such a case it is well reasoned that there is no evidence, express or implied, of any invitation or license by the railway company to persons thus to use its crossing.<sup>93</sup>

<sup>87</sup> Haas v. Grand Rapids &c. R. Co., 47 Mich. 401.

<sup>88</sup> Houghkirk v. Delaware &c. Canal Co., 92 N. Y. 219; s. c. 44 Am. Rep. 370; reversing s. c. 28 Hun (N. Y.) 407; Heddles v. Chicago &c. R. Co., 74 Wis. 239; s. c. 42 N. W. Rep. 237.

<sup>89</sup> Peoria &c. R. Co. v. Herman, 39 Ill. App. 287.

<sup>90</sup> Heaney v. Long Island R. Co., 112 N. Y. 122; s. c. 20 N. Y. St. Rep. 296; 19 N. E. Rep. 722; Case v. New York &c. R. Co., 75 Hun (N. Y.) 527; s. c. 57 N. Y. St. Rep. 653; 27 N. Y. Supp. 496; Northern &c. R. Co. v. Medairy, 86 Md. 168; s. c. 37

Atl. Rep. 796; 7 Am. & Eng. Rail. Cas. (N. S.) 526.

<sup>91</sup> Welsch v. Hannibal &c. R. Co., 72 Mo. 451; s. c. 37 Am. Rep. 440.

<sup>92</sup> Chicago &c. R. Co. v. Eininger, 114 Ill. 79, *post*, § 1705, *et seq.*

<sup>93</sup> Donnelly v. Boston &c. R. Co., 151 Mass. 210; s. c. 42 Am. & Eng. Rail. Cas. 182; 24 N. E. Rep. 38. That an instruction making it the duty of those in charge of an engine, not only to ring the bell and blow the whistle, but also to slow up and see that a crossing is clear, and imposing upon the company the additional duty of stationing a flagman at the crossing, imposes too great a



§ 1538. **Statutes and Ordinances Requiring Railway Companies to Station Flagmen.**—There is no doubt, upon many analogous holdings, of the power of the legislature, acting directly or through an ordinance of a municipal corporation thereto authorized by the legislature, in the exercise of the police power, to compel railway companies to *maintain flagmen at highway grade crossings*, to warn the travelling public of the approach of trains.<sup>94</sup> But no such power will be held to exist unless it is plainly granted by the legislature, either in general or in particular terms.<sup>95</sup> Upon the question what grant of power to a municipal corporation by the legislature will include the power to order a railway company to provide a flagman at a particular crossing, it has been held that where this power has been claimed under the *general powers* conferred upon the city, it will not be deemed to be excluded by the fact that a *special power* is also conferred upon it to regulate the speed of trains, prevent the obstruction of streets, etc.<sup>96</sup> Where such a statute or ordinance has been enacted, its violation by the railroad company will, according to the best judicial theory on this question,<sup>97</sup> though not according to all theory,<sup>98</sup> be negligence *per se*, such as will charge the railway company with damages, provided such violation is the proximate cause of an injury resulting to the traveller, and provided he is not barred from his right of recovery by his own negligence;<sup>99</sup> though, of course, this negligence can not be made the basis of a recovery where it was not the *proximate cause* of the injury, but was merely *collateral* to it.<sup>100</sup> In instructing a jury, this element of *proximate cause* ought to be included where the state of evidence justifies the submission of that question to them, and hence it has been held error to instruct them that "if there was such an ordinance, then the defendant could not fail or neglect to comply

degree of care on the company,—see *Carraher v. San Francisco Bridge Co.*, 81 Cal. 98; s. c. 22 Pac. Rep. 480. That a *personal notice* is necessary and the depositing of a *notice in the mails* is insufficient, under a city ordinance requiring railroad companies to station a flagman at crossings within ten days after notice to do so from the city council, but providing no method of service thereof,—see *La Friend v. New York & C. R. Co.*, 46 N. Y. St. Rep. 686; s. c. 19 N. Y. Supp. 664.

<sup>94</sup> For analogous decisions, see 5 *Thomp. Corp.*, § 5507; *ante*, § 1525; with which compare *ante*, § 1500.

<sup>95</sup> *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118; s. c. 10 West. Rep. 463; 12 N. E. Rep. 445.

<sup>96</sup> *Green v. Eastern R. Co.*, 52 Minn. 79; s. c. 53 N. W. Rep. 808.

<sup>97</sup> Vol. I, § 10.

<sup>98</sup> Vol. I, § 11.

<sup>99</sup> *Dickson v. Missouri & C. R. Co.*, 104 Mo. 491; s. c. 16 S. W. Rep. 381; *Murray v. Missouri & C. R. Co.*, 101 Mo. 236; s. c. 13 S. W. Rep. 817; *Wilkins v. St. Louis & C. R. Co.*, 101 Mo. 93; *Schlereth v. Missouri & C. R. Co.*, 96 Mo. 509; *Denver & C. R. Co. v. Ryan*, 17 Colo. 98; s. c. 28 Pac. Rep. 79; *Pennsylvania Co. v. Hensil*, 70 Ind. 569; s. c. 36 Am. Rep. 188.

<sup>100</sup> *Pennsylvania Co. v. Hensil*, 70 Ind. 569; s. c. 36 Am. Rep. 188; *post*, § 1557. Compare Vol. I, § 82, *et seq.*



with its requirements without being guilty of negligence.”<sup>101</sup> For example, the failure to supply a flagman at a crossing will not charge the railroad company with liability for an injury to a child, injured at a crossing while attempting to climb upon a moving train.<sup>102</sup>

§ 1539. **Withdrawal of a Flagman Negligence.**<sup>103</sup>—If a railway company has been in the habit of keeping a flagman at a particular crossing to give warning to the public, it will be negligence to withdraw him, at least without resorting to some other mode of notifying the public and protecting them from injury; since they may justly

<sup>101</sup> Pennsylvania Co. v. Hensil, 70 Ind. 569; s. c. 36 Am. Rep. 188.

<sup>102</sup> Chicago & C. R. Co. v. Roath, 35 Ill. App. 349. Proceedings in the Supreme Court, under New York Laws 1884, ch. 439, § 3, to compel railway companies to erect gates: Daniels v. Staten Island & C. R. Co., 125 N. Y. 407; s. c. 35 N. Y. St. Rep. 435; 26 N. E. Rep. 466. *Indictment* for disobedience of order thus made by court or judge: People v. Long Island R. Co., 58 Hun (N. Y.) 412; s. c. 34 N. Y. St. Rep. 715; 12 N. Y. Supp. 41. Proceedings under New York Gen. Railroad Law, § 33, to compel railway company to station flagmen, erect gates, or signal electric bells at village crossings: *Re Islip Highway Commrs.*, 74 Hun (N. Y.) 48; s. c. 56 N. Y. St. Rep. 148; 26 N. Y. Supp. 385. Proceedings under New York Laws 1892, ch. 76, by the “local authorities” to compel railway company to erect gates and station flagmen at highway crossings—who are “local authorities:” *Re Niagara Highway Commrs.*, 72 Hun (N. Y.) 575; s. c. 55 N. Y. St. Rep. 141; 25 N. Y. Supp. 231. That an order requiring the stationing of a flagman at a crossing is not complied with by stationing one there between six A. M. and nine P. M.,—see *Wilson v. New York & C. R. Co.*, 18 R. I. 598; s. c. 29 Atl. Rep. 300. The power conferred in Illinois upon municipalities to require flagmen at railroad street crossings does not limit the power to require other safeguards necessary, in the opinion of the proper authorities, for the protection of life and property: *Chicago & C. R. Co. v. Ottawa*, 65 Ill. App. 631; *aff’d* 165 Ill. 207; s. c. 46 N. E. Rep. 213. The Indiana

statute (Burns’ Rev. Stat., § 5174) providing that a railroad company shall, upon the order of the board of county commissioners, maintain a flagman at a designated crossing, is applicable to a crossing within the corporate limits of a town: *State v. Chicago & C. R. Co.*, 151 Ind. 474; s. c. 1 Repr. 265; 51 N. E. Rep. 914. An ordinance requiring “proprietors” of railroads to maintain flagmen and bell towers at all crossings, was held not to include a company which only had a temporary right to run over the tracks of another company subject to its control: *Lake Shore & C. R. Co. v. Kaste*, 11 Ill. App. 536. What roads included within the English Railways Clauses Act 1863, § 6, requiring company to maintain a lodge at crossings: *Reg. v. Longe*, 66 L. J. Q. B. (N. S.) 278. Statute of Illinois under which a mere notice by the village authorities to the railway company to keep a flagman at a particular crossing is not enough, without the passage of an ordinance: *Altamont v. Baltimore & C. R. Co.*, 184 Ill. 47; s. c. 56 N. E. Rep. 340; *aff’d* s. c. 84 Ill. App. 274. Under the same statute, a finding is necessary in some way by the authorities that such a flagman is necessary,—the implication of such a finding arising from a notice to the railway company, not being deemed sufficient: *Baltimore & C. R. Co. v. Altamont*, 84 Ill. App. 274; *aff’d* s. c. 184 Ill. 47; 56 N. E. Rep. 340. The statute just referred to applies to a village incorporated under the provisions of Starr & C. Ann. St. 1896, c. 24: *Baltimore & C. R. Co. v. Altamont, supra*.

<sup>103</sup> This section is cited in § 1544.



rely upon the fact of his being there, and his absence, of which they are not notified, may have the effect of luring them upon the track to their injury,<sup>104</sup>—a principle which we have had occasion to note with reference to the *discontinuance of gates*.<sup>105</sup> By analogy to what has preceded, the presence or absence of a flagman at a railroad crossing may be considered by the jury on the question whether a railroad company was or was not negligent in *moving cars* at a particular time and place, although it may not be negligent in not maintaining a flagman at the crossing.<sup>106</sup> In an action for an injury by a railroad company caused by backing a freight car on the public street of a city, on a dark night, when no flagman was present at the crossing, that fact is competent to be submitted to the jury, where it is also shown that no one was on the rear end of the train, and no signal or warning was given before backing the train.<sup>107</sup> In such an action *evidence* of the absence of the flagman customarily stationed there to the plaintiff's knowledge is *competent*.<sup>108</sup> It has been reasoned that, in an action against a railway company for injuries to a person on a public crossing, the question for the jury is, not whether there should have been a flagman, but whether, in view of his absence, the train was moved with prudence or negligence.<sup>109</sup>

**§ 1540. One Flagman for Several Companies.**—Several railroad companies, whose tracks are laid so near each other across a highway that but one set of gates is required, may contract with each other for the erection of gates at the common expense and for the employment of a gateman as a common agent; or one company may agree with the others to erect gates and employ a gateman for the benefit of all. Proof of such an arrangement need not be express, but may be implied

<sup>104</sup> *Burns v. North Chicago Rolling Mill Co.*, 65 Wis. 312. See also *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 28, and 39 N. Y. 61; *Beisiegel v. New York & C. R. Co.*, 40 N. Y. 9; *McGrath v. New York & C. R. Co.*, 63 N. Y. 523.

<sup>105</sup> *Ante*, § 1534.

<sup>106</sup> *Tierney v. Chicago & C. R. Co.*, 84 Iowa 641; s. c. 51 N. W. Rep. 175.

<sup>107</sup> *Union & C. R. Co. v. Henry*, 36 Kan. 565, 566.

<sup>108</sup> *Pittsburgh & C. R. Co. v. Yundt*, 78 Ind. 373; s. c. 41 Am. Rep. 580.

<sup>109</sup> *Winchell v. Abbot*, 77 Wis. 371; s. c. 46 N. W. Rep. 665; *Annaker v. Chicago & C. R. Co.*, 81 Iowa 267; s. c. 47 N. W. Rep. 68. Company responsible on the principle *respondet superior* for the negligence of its flagman at a street crossing when

absenting himself from his post of duty: *Waldele v. New York & C. R. Co.*, 4 App. Div. (N. Y.) 549; s. c. 38 N. Y. Supp. 1009. That the question put to a jury whether there was a *flagman* at the crossing is sufficiently answered by a *finding*, "None visible from the east," when plaintiff was injured while attempting to cross a track from east to west,—see *Lake Shore & C. R. Co. v. Johnsen*, 135 Ill. 641; s. c. 26 N. E. Rep. 510; aff'g 35 Ill. App. 430. Evidence sufficient to support a finding of negligence that there was *no watchman* in charge of the gates located at the crossing, and that the gates were up: *Hughes v. Delaware & Canal Co. (Pa.)*, 1 Lack. L. News 215.



from facts and circumstances,—as from the fact that one company pays the flagman, and the other companies contribute to the former company a portion of his wages. In such a case, where several railway companies employ a common agent, each and all of them will be responsible for his negligence in the performance of his duties.<sup>110</sup> A railway company using the tracks of another company under an agreement to pay it a specified sum yearly, and accepting the services of its *gatemmen*, is liable for their negligence. If it does not accept such services, or place competent gatemmen at crossings, it is liable for its omission to do so.<sup>111</sup>

**§ 1541. Liability of Railway Company for Negligence of Its Flagman.**—If the flagman is negligent in the performance of his duty, whereby a traveller is led upon the track to his injury, the railway company will be liable under the rule of *respondeat superior*. This will often raise the question whether, in the given instance, the flagman was acting within or without the line of his duty and the scope of his authority. If a flagman is stationed, in pursuance of a statute or municipal ordinance which defines the purposes and duties for which he is stationed, the statute or ordinance may be referred to as prescribing the measure of his duties, for the neglect of which the railway company will become liable in case of an injury proceeding therefrom. But, on a principle already considered,<sup>112</sup> the mere fact that the statute or ordinance named certain duties to be performed by the flagman will not exclude the liability of the railway company for his failure to perform *other duties*, naturally incident to his position, and reasonably required for the protection of the travelling public,—as where a municipal ordinance requires the railway company to station a watchman at a public crossing, “who shall display at the cars in the day-time a red flag, and at night a red light,”—this not exonerating the railroad company from liability if he fails otherwise to exercise care in discovering an approaching train and warning travellers of it.<sup>113</sup> Outside of statutes and ordinances, the rule is that, as in the case of any other agency,<sup>114</sup> the scope of the powers of the agent, or servant, may be *implied from circumstances*,—that is to say, *proved by circumstantial evidence*. For example, where a railway company employed a flagman for one of its tracks, but it appeared that he had for years been in the habit of warning travellers about to

<sup>110</sup> *Brow v. Boston & C. R. Co.*, 157 Mass. 399; s. c. 32 N. E. Rep. 362.

<sup>111</sup> *Cleveland & C. R. Co. v. Schneider*, 45 Ohio St. 678; s. c. 14 West. Rep. 538; 17 N. E. Rep. 321.

<sup>112</sup> *Ante*, § 1494; and see *post*, § 1555.

<sup>113</sup> *Wilkins v. St. Louis & C. R. Co.*, 101 Mo. 93; s. c. 13 S. W. Rep. 893.

<sup>114</sup> 4 Thomp. Corp., §§ 4893, 4894.



cross another track of the same company,—it was held, in an action by a traveller injured by crossing the latter track, in consequence of being misled by the flagman's signal, that whether he was signaling in respect of the latter track by the assent, express or implied, of the defendant, was a question *for the jury*.<sup>115</sup> On the same principle, a person approaching a railroad crossing at which a flagman has been regularly stationed, has the right to assume that a person acting as flagman is under the employment or authority of the company.<sup>116</sup> For a flagman to signal a traveller to drive his team upon the track when the flagman knows that a passenger train is approaching without blowing its whistle or ringing its bell, and that the view of the train is obstructed by cars left on the side tracks and by buildings, has been characterized as *gross negligence*.<sup>117</sup> A flagman does not discharge his duty by giving a warning to the traveller, unless he gives it in time to enable the latter, by the exercise of reasonable care, to avoid being injured;<sup>118</sup> and, generally, if the flagman signals the traveller to come on, where the circumstances are such that, in the exercise of reasonable care, he ought to signal him to wait longer, and the traveller is injured in consequence of obeying the signal, the negligence of the flagman will be imputed to the company, and it will be liable for damages, provided the approaching train is unseen by the traveller.<sup>119</sup> A railroad company does not perform its entire duty, so far as a *child* seven years of age is concerned, who goes upon a crossing in full view of a flagman, by simply lowering the gate and warning the child back; but it is the duty of the flagman, so far as he can do so, having regard to his other duties, to protect the child from danger.<sup>120</sup> For the flagman to *shut down the gate* after the driver of a vehicle has got upon the track so as to prevent him from escaping from an approaching train, is a species of negligence by no means infrequent; and where a traveller has been caught and injured in this way, it is a just conclusion that the railway company should be held liable, although the traveller got into the situation by his own negligence, as

<sup>115</sup> *Peck v. Michigan &c. R. Co.*, 57 Mich. 3.

<sup>116</sup> *Waldele v. New York &c. R. Co.*, 4 App. Div. 549; s. c. 38 N. Y. Supp. 1009.

<sup>117</sup> *Chicago &c. R. Co. v. Clough*, 134 Ill. 586; s. c. 45 Am. & Eng. Rail. Cas. 137; 25 N. E. Rep. 664; aff'g s. c. 33 Ill. App. 129.

<sup>118</sup> *Chicago &c. R. Co. v. Clough*, 134 Ill. 586; s. c. 45 Am. & Eng. Rail. Cas. 137; 25 N. E. Rep. 664; affirming 33 Ill. App. 129.

<sup>119</sup> *Pennsylvania Co. v. Sloan*, 125

Ill. 72; s. c. 14 West. Rep. 379; 17 N. E. Rep. 37.

<sup>120</sup> *Jones v. Harris*, 186 Pa. St. 469; s. c. 42 W. N. C. 362; 40 Atl. Rep. 791. Evidence under which the question of the negligence of a flagman in beckoning a traveller to cross was a question *for the jury*, where it was very dark and the train had broken in two, and the rear portion followed without lights at a considerable distance: *Steele v. Chicago &c. R. Co.*, 107 Mich. 516; s. c. 2 Det. L. N. 727; 65 N. W. Rep. 573.



by failing to make a proper use of his faculties before driving upon the track, to ascertain whether a train was approaching.<sup>121</sup>

§ 1542. **Right of Traveller to Act upon Signals Given by Flagman.**—The very object of stationing a flagman at a railway crossing, is to warn travellers of danger when trains are approaching, and to beckon them forward when it is safe for them to cross. It is, therefore, a sound and just conclusion that a traveller may, unless otherwise advised by a fair exercise of his senses, rightfully rely upon the warning given by the flagman, and that if he is thereby lured to his injury he will have an action for damages against the company. As ordinarily prudent travellers will act upon the assumption that the flagman is performing his duty,<sup>122</sup> they will not be deemed, as matter of law, to be guilty of a want of reasonable care in failing to look and listen for the approach of trains at crossings where a flagman is stationed.<sup>123</sup> On the other hand, the traveller will manifestly not be exonerated from the imputation of contributory negligence, where he

<sup>121</sup> Evidence that the driver of a traction car whose view of a railroad at a crossing was interfered with by cars standing on another track, attempted to cross the track without stopping to look or listen; and that the flagman of the railroad company, after seeing the traction car upon the crossing, shut down the gates so as to render escape impossible,—was held sufficient to justify a finding of negligence against *both companies*, where the injury was to a *passenger* on the traction car: *Downey v. Philadelphia & c. R. Co.*, 161 Pa. St. 588; s. c. 58 Am. & Eng. Rail. Cas. 594; 29 Atl. Rep. 126.

<sup>122</sup> *Henning v. Caldwell*, 45 N. Y. St. Rep. 373; s. c. 18 N. Y. Supp. 339; *Fusill v. Missouri & c. R. Co.*, 45 Mo. App. 535; *Central Trust Co. v. Wabash & c. R. Co.*, 27 Fed. Rep. 159; *Doyle v. Boston & c. R. Co.*, 145 Mass. 386; s. c. 14 N. E. Rep. 461; 5 N. Eng. Rep. 454. A strong case in affirmation of the doctrine of the text, was decided upon evidence to the effect that a *boy eleven years old*, on his way home from school, after having stood for fifteen minutes at a street crossing in a heavy rain waiting for a freight train to pass, perceived that the engineer left his place on his engine, and that it was standing still, whereupon the boy asked the flagman,

who had frequently given him instructions under like circumstances, whether it were safe to pass through, and the flagman answered that it was, and the boy attempted to do so, and was injured by the *sudden backing of the train* without any warning being given. Here it was held that there was evidence of negligence to go to the jury, and that there was no evidence of contributory negligence: *Cleveland & c. R. Co. v. Keeley*, 138 Ind. 600; s. c. 37 N. E. Rep. 406. Where a woman driving a buggy was signaled by a flagman stationed at a crossing, to drive over, and, when nearly up to the track, was called upon by the flagman to stop on account of an approaching train, which she did, but the horse became frightened and overturned the buggy, and injured the occupant,—the question of her contributory negligence is *for the jury*: *Buchanan v. Chicago & c. R. Co.*, 75 Iowa 393; s. c. 39 N. W. Rep. 663.

<sup>123</sup> *Chicago & c. R. Co. v. Hutchinson*, 120 Ill. 587; s. c. 9. West. Rep. 544; 11 N. E. Rep. 855; *Chicago & c. R. Co. v. Clough*, 134 Ill. 586; s. c. 45 Am. & Eng. Rail. Cas. 137; 25 N. E. Rep. 664; *aff'd* 33 Ill. App. 129; *Jennings v. St. Louis & c. R. Co.*, 112 Mo. 268; s. c. 20 S. W. Rep. 490.



obeys the flagman when he himself sees that it is dangerous to do so; for which reason it can not, in general, be properly charged, as matter of law, that the traveller about to cross a railroad track is free from negligence in obeying a flagman who beckons him to come on;<sup>124</sup> but this will ordinarily present a *question of fact for the jury*.<sup>125</sup>

§ 1543. **Effect of Disregarding or Disobeying Flagman.**—As it can not be said, as matter of law, that the traveller is excusable, under all circumstances, in acting upon the signal or invitation of the flagman,<sup>126</sup>—so it can not be said, under all circumstances, as matter of law, that it is negligence in him to attempt to cross the track without the permission of the flagman,<sup>127</sup> or even contrary to his warning.<sup>128</sup>

§ 1544. **Relevancy of Evidence Respecting Flagmen.**—An action for an injury received by a traveller at a railway crossing, almost invariably involves questions of negligence and contributory negligence which, except in plain cases where the judge should direct a nonsuit, depend upon the view which a jury may take of all the facts and circumstances attending the accident. It is especially clear that in estimating the evidence bearing upon the question of the contributory negligence of the traveller, the jury ought to have before them all the facts and circumstances, and that the courts should not eliminate those facts and circumstances which do not bear directly upon the paper issues. The presence or absence of a flagman at a crossing is, therefore, a part of the *res gestae*, and evidence of it is justly admitted as going to make up that complete image of the circumstances surrounding the accident which it is the object of the trial to convey to the minds of the jurors. But such evidence will generally be found to relate more or less closely to the issues raised by the pleadings. For example, where the action was to recover for injuries received by the *frightening of the horses* which the plaintiff was driving, caused by the sudden emission of steam from an engine which was standing at a public crossing, it was held that the fact that the railway company

<sup>124</sup> Chicago &c. R. Co. v. Spring, 13 Ill. App. 174.

<sup>125</sup> Evans v. Lake Shore &c. R. Co., 88 Mich. 442; s. c. 14 L. R. A. 223; 11 Rail. & Corp. L. J. 45; 50 N. W. Rep. 386; Berry v. Pennsylvania R. Co., 48 N. J. L. 141. Where a train approached at an unusual speed, without giving any signal by bell or whistle, and a traveller was induced, by a signal of the flagman, to attempt to drive across the track, but the flagman, on discovering his

error, gave the proper signal when it was too late to avoid the collision,—it was held that this was sufficient to take the question of the negligence of the railway company to the jury: Coleman v. Pennsylvania R. Co. (Pa.), 46 Atl. Rep. 66.  
<sup>126</sup> Post, § 1614.

<sup>127</sup> International &c. R. Co. v. Dyer, 76 Tex. 156; s. c. 13 S. W. Rep. 377.

<sup>128</sup> Oldenburg v. New York &c. R. Co., 29 N. Y. St. Rep. 836; s. c. 9 N. Y. Supp. 419.



did not provide a flagman at the crossing, or give other signals to warn the plaintiff of the movement of the engine, should be considered in determining the question of the defendant's negligence,—such signals not being required merely to prevent actual collisions upon the track, but to enable travellers upon the highway to guard against other accidents as well.<sup>129</sup> So, where the negligence of a railway company must depend upon a collection of concurrent facts and circumstances, although negligence may not be predicated on the single circumstance of the failure to provide a flagman at the crossing, yet the presence or absence of a flagman may be shown in connection with other facts and circumstances bearing upon the question of negligence in moving the train over the crossing.<sup>130</sup> From this it follows that, although negligence is not predicated in the declaration, petition, or complaint, upon the failure to keep a flagman at a crossing, yet this does not prevent the admission of evidence that such was the fact;<sup>131</sup> especially where there is no statute or ordinance requiring the railway company to keep a flagman at a particular crossing.<sup>132</sup> Such evidence may be given, although no foundation therefor is laid, by proving that the railway company was notified by the public authorities to maintain a flagman at the particular crossing;<sup>133</sup> or although there is no statute or ordinance requiring such a precaution.<sup>134</sup> This conclusion refers itself to the doctrine, elsewhere considered, that the fact that a public statute may provide for one precaution does not exonerate the railway company from adopting others, such as a reasonable care for the public safety may render necessary.<sup>135</sup> So, although the action is predicated upon the negligence of the railway company in moving a train at its crossing, and not upon its failure to comply with a city ordinance, requiring the stationing of a watchman there and prescribing his duties,—the existence of the ordinance is deemed a fact bearing upon the conduct of the managers of the train, and is held to be proper evidence as tending to support the allegation of neg-

<sup>129</sup> *Hart v. Chicago &c. R. Co.*, 56 Iowa 166; s. c. 41 Am. Rep. 93.

<sup>130</sup> *Hoye v. Chicago &c. R. Co.*, 67 Wis. 1. Similarly, see *Reid v. New York &c. R. Co.*, 44 N. Y. St. Rep. 688; s. c. 17 N. Y. Supp. 801; *Chicago &c. R. Co. v. Lane*, 130 Ill. 116; s. c. 22 N. E. Rep. 513; affirming s. c. 30 Ill. App. 437; *Friess v. New York &c. R. Co.*, 67 Hun (N. Y.) 205; s. c. 51 N. Y. St. Rep. 391; 22 N. Y. Supp. 104; *ante*, § 1539.

<sup>131</sup> *Kansas &c. R. Co. v. Richardson*, 25 Kan. 391.

<sup>132</sup> *Lesan v. Maine Central R. Co.*, 77 Me. 85.

<sup>133</sup> *Chicago &c. R. Co. v. Perkins*, 125 Ill. 127; s. c. 14 West. Rep. 400; 17 N. E. Rep. 1.

<sup>134</sup> *Chicago &c. R. Co. v. Lane*, 130 Ill. 116; s. c. 22 N. E. Rep. 513; *aff'd* 30 Ill. App. 437.

<sup>135</sup> *Ante*, § 1494; *post*, § 1555; *Shaber v. St. Paul &c. R. Co.*, 28 Minn. 103.



ligence.<sup>136</sup> On the other hand, evidence that, twelve years before an accident at a railway crossing, the lessor of the defendant had, in compliance with an application of the town selectmen, maintained a flagman at the crossing, has been held inadmissible, in the absence of a covenant in the lease to keep a flagman where one was kept before, to show negligence by defendant.<sup>137</sup>

<sup>136</sup> *Fusili v. Missouri &c. R. Co.*, 45 Mo. App. 535. The court cite the following cases to the effect that the fact that a railway company is operating its road in violation of law, is competent evidence in the support of a charge of negligence: *Robertson v. Wabash &c. R. Co.*, 84 Mo. 119;

*Judd v. Wabash R. Co.*, 23 Mo. App. 56; *Riley v. Wabash &c. R. Co.*, 18 Mo. App. 385; *Nutter v. Chicago &c. R. Co.*, 22 Mo. App. 328; *Pennsylvania Co. v. Stegmeier (Ind.)*, 20 N. E. Rep. 843.

<sup>137</sup> *Tyler v. Old Colony R. Co.*, 157 Mass. 336; s. c. 32 N. E. Rep. 227.



## CHAPTER XLIX.

## DUTY TO DISPLAY LIGHTS AT NIGHT ON LOCOMOTIVES AND TRAINS.

## SECTION

1548. Failure to have proper head-lights on locomotive and train.

1549. Failure to display proper hind-lights.

## SECTION

1550. Absence of lights in connection with contributory negligence of traveller.

§ 1548. **Failure to have Proper Headlights on Locomotive and Train.**—The duty which the law imposes upon a traveller approaching a railway crossing, to look for approaching trains, would be rendered nugatory if such trains carried no lights by which their approach could be discerned in the night-time. It is, therefore, well said to be the reciprocal duty of those approaching a railway crossing, in the night-time, to look for approaching trains, and of the railroad company to have a *headlight* upon its engines, so that the act of looking on the part of the traveller may be effectual to give him the requisite warning.<sup>1</sup> It has been justly characterized as negligence, as matter of law, for a railway company to run a passenger train on a dark night, in a populous country, approaching a crossing near the suburbs of a city, at the rate of twenty-five miles an hour, without having the lantern at the head of the locomotive lighted.<sup>2</sup> Municipal ordinances have frequently been enacted enforcing the duty to display lights upon moving trains at night, the violation of which will be negligence *per se*,<sup>3</sup> or *prima facie evidence of negligence*, according to the theory prevailing in the particular jurisdiction.<sup>3a</sup> If, in addition to having no headlight, the train approaches the crossing at a dangerous rate of speed and without giving any alarm, the negligence of the railroad company is, under the theory of one court, so *gross* as to make the company

<sup>1</sup> Becke v. Missouri &c. R. Co., 102 Mo. 544; s. c. 13 S. W. Rep. 1053; 9 L. R. A. 157.

<sup>2</sup> Becke v. Missouri &c. R. Co., 102 Mo. 544; s. c. 13 S. W. Rep. 1053; 9 L. R. A. 157.

<sup>3</sup> Easley v. Missouri &c. R. Co., 113 Mo. 236; s. c. 20 S. W. Rep. 1073.

<sup>3a</sup> Vol. I, §§ 10, 11. That a railroad company is guilty of negli-

gence in running a train without a headlight,—see Baltimore &c. R. Co. v. Alsop, 71 Ill. App. 54; McDonald v. New York &c. R. Co., 138 N. Y. 663, *mem.*; *aff'g* s. c. 63 Hun (N. Y.) 587; Chicago &c. R. Co. v. Sharp, 63 Fed. Rep. 532; s. c. 11 C. C. A. 337; 60 Am. & Eng. Rail. Cas. 595; Thomas v. Chicago &c. R. Co., 86 Mich. 496; s. c. 49 N. W. Rep. 547.



liable, notwithstanding the contributory negligence of the driver in failing to *stop, look, and listen*.<sup>4</sup> For a railway company to back a train, which is several hours late, on a dark night, through a shed used as a depot, across a passway much used by the public with the knowledge and consent of the company, without any light, flagman, or signalman on the front of the foremost car, has been justly held to be evidence of negligence, in case the train thus propelled runs upon a person on the passway.<sup>5</sup> In nearly all cases which speak upon this element of negligence, the absence of lights on the locomotive or cars at night is associated with some other dereliction, such as running an engine or cars at an excessive or prohibited rate of speed and without any audible signal to warn the traveller in time to enable him to get out of the way.<sup>6</sup>

§ 1549. **Failure to Display Proper Hind-Lights.**—So, it is also negligence to back a train over a crossing without displaying sufficient hind-lights to warn travellers who may be in danger, as well as to warn trains which may be approaching from behind.<sup>7</sup> Statutes and municipal ordinances have been enacted enforcing this duty. One such statute requires every train backing in the night-time to have a conspicuous light on the rear car, so as to show in what direction the car is moving. An ordinary lantern in the hand of a brakeman on the

<sup>4</sup> *Thomas v. Chicago &c. R. Co.*, 86 Mich. 496; s. c. 49 N. W. Rep. 547. It seems scarcely necessary to add that the question whether the headlight was burning on the locomotive is immaterial, where the accident happened *in the day-time*: *Theobald v. Chicago &c. R. Co.*, 75 Ill. App. 208; *Purnell v. Raleigh &c. R. Co.*, 122 N. C. 832; s. c. 29 S. E. Rep. 953.

<sup>5</sup> *Purnell v. Raleigh &c. R. Co.*, 122 N. C. 832; s. c. 29 S. E. Rep. 953. In this case the plaintiff's intestate was killed about 9:30 o'clock at night, by a train of defendant company backing into a dark railway depot shed. This shed was frequented by passengers and citizens of the town. An instruction that if the deceased was standing on the track, and the defendant backed its train without light or signal, the defendant was negligent and the negligence was the cause of the injury, was held proper, if, in the same connection, the court charged that the defendant was not liable

if the deceased discovered the train in time to escape injury with the use of ordinary care: *Purnell v. Raleigh &c. R. Co.*, 122 N. C. 832; s. c. 29 S. E. Rep. 953.

<sup>6</sup> For a case of this kind, where the railway company was adjudged guilty of negligence which was the proximate cause of the injury to a traveller,—see *Texas &c. R. Co. v. Moore* (Tex. Civ. App.), 56 S. W. Rep. 248.

<sup>7</sup> *Zoliewski v. New York &c. R. Co.*, 21 N. Y. Supp. 916; s. c. 1 Misc. (N. Y.) 438; 51 N. Y. St. Rep. 54. It has been held that the absence of a light or flagman at the rear end of a long train of cars while they are being backed over a crossing is not such negligence as will render the company liable for the death of a person, struck while attempting to cross the track near the *tender* attached to the engine, to which *bright lights are attached*: *Bryant v. Illinois &c. R. Co.* (La.), 22 South. Rep. 799; s. c. 3 Am. Neg. Rep. 406.



top of a car does not meet the requirements of this statute.<sup>8</sup> A municipal ordinance requiring a light to be displayed upon the end of cars in whatever direction moving, applies to cars or locomotives moved in the private *switch-yard* of the railroad company.<sup>9</sup>

§ 1550. **Absence of Lights in Connection with Contributory Negligence of Traveller.**—But even this species of negligence, gross and palpable as it is, will not excuse contributory negligence on the part of the traveller, or give him a right of action for any damages which he may suffer by being brought into collision with the train, where the failure of the company to have the train properly lighted was *not the proximate cause of the injury*. If, for instance, notwithstanding the headlight of the engine attached to a passenger train has been broken, and a common *lantern* substituted therefor,—yet, if the train is well lighted, so that its approach is plainly visible, and a person familiar with the crossing hears its rumbling as it approaches, and does not get out of the way, but is hurt by it, he will be precluded from recovering damages, because of his own negligence.<sup>10</sup> So, also, where the injury which happened to the plaintiff was caused by the fact that he *caught his foot* between a rail and the planking at the crossing, and he saw the approach of the engine, it was held that he could not predicate an action for damages upon the absence of the headlight and other signals.<sup>11</sup> But the absence of a headlight will, under particular circumstances, have *an important bearing* in solving the question whether the traveller was guilty of contributory negligence. Where, for example, a traveller approaching a railroad crossing, in the open country on a dark night, was injured by a train running without a headlight, it was held that contributory negligence would not be imputed to him, as matter of law, in failing to stop his team before driving upon the track, in order to listen for an approaching train, but that, the view of the track being unobstructed otherwise than by the darkness, the question whether he acted imprudently was at most a question *for the jury*.<sup>12</sup> We have seen that, for a railroad company to run a train at such a *dangerous rate of speed* over a railway crossing, without displaying a proper headlight and without giving any alarm, is such gross negligence as renders the failure of the traveller to stop,

<sup>8</sup> Chicago &c. R. Co. v. Walsh, 157 Ill. 672; s. c. 41 N. E. Rep. 900.

<sup>9</sup> Grube v. Missouri &c. R. Co., 98 Mo. 330; s. c. 10 S. W. Rep. 185; 11 S. W. Rep. 736.

<sup>10</sup> Mahlen v. Lake Shore &c. R. Co., 49 Mich. 585.

<sup>11</sup> Pakalinsky v. New York Central &c. R. Co., 82 N. Y. 424.

<sup>12</sup> Van Auken v. Chicago &c. R. Co., 96 Mich. 307; s. c. 55 N. W. Rep. 971.



look, and listen before attempting to cross the track, immaterial.<sup>13</sup> So, one was not deemed guilty of contributory negligence as matter of law, who passed at night behind a freight train at a public crossing, after waiting for it to pass, on to another track six or eight feet beyond that on which the freight train was, where he was struck by an engine and tender moving without *headlight, lookout, or warning* of any kind.<sup>14</sup>

<sup>13</sup> Thomas v. Chicago &c. R. Co., 86 Mich. 496; s. c. 49 N. W. Rep. 547.  
<sup>14</sup> Iron Mountain R. Co. v. Dies, 98 Tenn. 655; s. c. 41 S. W. Rep. 860.



## CHAPTER L.

### DUTY TO GIVE WARNING SIGNALS FROM LOCOMOTIVES AND CARS.

| SECTION   | SECTION  |
|---|--|
| 1552. Duty to give reasonable warning when train approaches highway.  | 1563. Doctrine that a continuous crossing by the public does not raise an implied license to cross.    |
| 1553. Further of this duty in the absence of statute or ordinance.  | 1564. Necessity of giving signals at farm or private crossings.  |
| 1554. Validity of statutes and ordinances requiring railway companies to give signals for the protection of travellers. | 1565. Circumstances under which signals need not be given at private crossings.                        |
| 1555. Statutory precautions do not exclude the common law obligation of diligence and care.                             | 1566. What constitutes a public road or street with reference to the statutory duty of giving signals. |
| 1556. Construction of statutes requiring signals to be given at crossings.  | 1567. Duty to give signals at overhead crossings.  |
| 1557. Omission to give statutory signals is negligence or evidence of negligence.                                       | 1568. Duty to give signal before starting train at or near crossings.                                  |
| 1558. Failure to give signal must be proximate cause of the injury.   | 1569. Duty to give warning before starting trains which have been standing upon or near crossings.     |
| 1559. Illustrative cases where the failure to give the statutory signals was not the proximate cause of the injury.     | 1570. Duty to give warning signals in case of children.  |
| 1560. For whose protection statutory signals intended.  | 1571. Duty to give warning signals where trains are backing.   |
| 1561. Further of the persons for whose benefit statutory signals are deemed to be required.                             | 1572. Duty to give warning signals in making the "flying switch."                                      |
| 1562. Duty to give signals and use care when approaching private crossings, disused roads, etc.                         | 1573. Greater duty to give signals where view obstructed.  |
|   | 1574. Nature of warnings which are to be given—bell, whistle, or both.                                 |
|   | 1575. Point at which signals are to be given—at what distance from crossing.                           |
|   | 1576. Further of the places at which signals are to be given.  |



SECTION

- 1577. What will not excuse the failure to perform the statutory duty of giving signals.
- 1578. Liability for frightening travellers' horses by giving the statutory signals and by failing to give them.
- 1579. Effect of the failure to give signals upon the question of contributory negligence.
- 1580. Question of contributory negligence continued.
- 1581. The same subject continued.
- 1582. Further of the contributory negligence of the traveller.

SECTION

- 1583. Effect of such failure on contributory negligence where the view is obstructed.
- 1584. Effect of failure to give signals in connection with the omission of other precautions.
- 1585. Examples of negligence in running trains without signals.
- 1586. Whether negligence in the omission of signals is a question of law or of fact.
- 1587. Evidence: presumptions—burden of proof.
- 1588. Instructions on the duty of giving signals.

§ 1552. **Duty to Give Reasonable Warning when Train Approaches Highway.**<sup>1</sup>—As already seen,<sup>2</sup> the rights of the general public travelling a common highway and of a railway company crossing it, are reciprocal; and although common convenience and the rights of the travelling public to rapid transit give the railway train precedence upon the crossing, it is upon condition that those in charge of the train will give *reasonable warning* of its approach, so that a person, or a vehicle upon the highway, may stop and wait for it to pass.<sup>3</sup> Gates, gatemen, and automatic signals at crossings may dispense with the duty of giving audible signals from approaching trains; but the travelling public have the right to a reasonable and adequate warning of the fact that a train is approaching, whether such warning be given at the crossing itself, or from the approaching train.<sup>4</sup> As to the nature and kind of warning which the railway company is bound to give, the law does not undertake to lay down a rule applicable to all cases. Ordinarily, the ringing of the bell or the sounding of the locomotive whistle as the train approaches the crossing, and within a reasonable distance from the same, is no doubt sufficient;<sup>5</sup> but at

<sup>1</sup> This section is cited in § 1574.

<sup>2</sup> *Ante*, § 1485, *et seq.*

<sup>3</sup> *Chesapeake & C. R. Co. v. Steele*, 84 Fed. Rep. 93; s. c. 29 C. C. A. 81; 54 U. S. App. 550.

<sup>4</sup> *Durkee v. Delaware & C. Canal Co.*, 88 Hun (N. Y.) 471; s. c. 34 N. Y. Supp. 978; 69 N. Y. St. Rep. 39; *Hickey v. New York & C. R. Co.*, 8 App. Div. 123; s. c. 40 N. Y. Supp. 484; *Haupt v. New York & C. R. Co.*, 20 Misc. (N. Y.) 291; s. c. 45 N. Y. Supp. 666; *rev'g* s. c. 18 Misc. (N. Y.) 594; 42 N. Y. Supp. 477; *Lehigh Valley & C. R. Co. v. Brandt-*

*meier*, 113 Pa. St. 610; s. c. 5 Cent. Rep. 144; *Pennsylvania R. Co. v. Horst*, 110 Pa. St. 226; s. c. 1 Cent. Rep. 96; *Philadelphia & C. R. Co. v. Hogeland*, 66 Md. 149; s. c. 5 Cent. Rep. 587; *Baltimore & C. R. Co. v. Owens*, 65 Md. 502; s. c. 3 Cent. Rep. 847; *Johnson v. Baltimore & C. R. Co.*, 6 Mackey (D. C.) 232; s. c. 11 Cent. Rep. 720; *Missouri & C. R. Co. v. Moffatt*, 56 Kan. 667; s. c. 44 Pac. Rep. 607; 3 Am. & Eng. Rail. Cas. (N. S.) 488.

<sup>5</sup> *Hunt v. Fitchburg R. Co.*, 22 App. Div. 212; s. c. 47 N. Y. Supp. 1634.



crossings peculiarly dangerous, the maintaining of gates, gatemen, or automatic signals may be demanded as a reasonable safeguard to the public. As we shall more fully see when treating of the contributory negligence of travellers at railway crossings,<sup>6</sup> judicial opinion tends to the conclusion that, in the absence of directions embraced in statutes and municipal ordinances, the railway company discharges its general duty by giving such warnings as may reasonably be expected to protect travellers who themselves are in the exercise of reasonable care and vigilance.<sup>7</sup> As the law can not undertake to lay down any exact rule on the subject of the number and kind of signals required, the same depending upon the character of the crossing, the speed of the train, and all the surrounding circumstances which determine the danger to be anticipated and provided against,—it becomes, in most cases, a question of fact *for a jury*, under proper directions from the court, as in other cases.<sup>8</sup> This is peculiarly so where the particular crossing is not, in strictness, that of a public highway, but is a *passage-way* used by pedestrians without objection from the company.<sup>9</sup> The question is peculiarly one for the jury, where the crossing is shown to be ordinarily very dangerous, and where the train which does the mischief in the particular case is so run as to increase the danger.<sup>10</sup> It seems reasonably to follow that, in the absence of a statute prescribing such regulations, the omission to give such warning may be considered, in connection with other circumstances going to show negligence.<sup>11</sup>

<sup>6</sup> *Post*, § 1605, *et seq.*

<sup>7</sup> *Smith v. Maine &c. R. Co.*, 87 Me. 339; s. c. 32 Atl. Rep. 967.

<sup>8</sup> *Missouri &c. R. Co. v. Moffatt*, 56 Kan. 667; s. c. 44 Pac. Rep. 607; 3 Am. & Eng. Rail. Cas. (N. S.) 488; *Johnson v. Baltimore &c. R. Co.*, 6 Mackey (D. C.) 232; s. c. 11 Cent. Rep. 720; *Roach v. St. Joseph &c. R. Co.*, 55 Kan. 654; s. c. 41 Pac. Rep. 964; *Struck v. Chicago &c. R. Co.*, 58 Minn. 289; s. c. 59 N. W. Rep. 1022; 60 Am. & Eng. Rail. Cas. 687; *Byrne v. New York &c. R. Co.*, 104 N. Y. 362; s. c. 6 Cent. Rep. 392; *White v. St. Louis &c. R. Co.*, 20 Mo. App. 564; s. c. 2 West. Rep. 593; *Baltimore &c. R. Co. v. Golway*, 23 Wash. L. Rep. 308.

<sup>9</sup> *Baltimore &c. R. Co. v. Golway*, 23 Wash. L. Rep. 308. It has been held that the fact that there is no evidence that the ringing of the bell, etc., would have averted the accident, will not justify the court in taking the case from the jury:

*White v. St. Louis &c. R. Co.*, 20 Mo. App. 564; s. c. 2 West. Rep. 593.

<sup>10</sup> *Struck v. Chicago &c. R. Co.*, 58 Minn. 289; s. c. 59 N. W. Rep. 1022; 60 Am. & Eng. Rail. Cas. 687. It has been held improper to leave to the determination of a jury the question whether the sound of the whistle at some point less distant from the crossing than is required by law, would be as good a notice to the traveller of the approach of the locomotive as the notice required by the statute,—since this would be to allow the jury to set aside the statute: *Atlantic &c. R. Co. v. Reiger*, 95 Va. 418; s. c. 28 S. E. Rep. 590.

<sup>11</sup> *Bilbee v. London &c. R. Co.*, 1 C. B. (N. S.) 584, 592. In connection with this case, see *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 261; s. c. 10 Week. Rep. 456; 22 L. T. (N. S.) 382. See also *New Jersey Transp. Co. v. West*, 32 N. J. L. 91.



**1553. Further of this Duty in the Absence of Statute or Ordinance.**—This duty exists independently of statutes or ordinances; it is usually regarded by the courts as imperative; and negligence is either conclusively ascribed to its omission,<sup>12</sup> or it is regarded as *evidence of negligence* to be considered by a jury;<sup>13</sup> provided, however, that this omission is the *proximate cause* of the accident to the traveller,<sup>14</sup> who is himself without contributory fault.<sup>15</sup> In such cases, a traveller who has exercised what care he can by the use of his faculties, is justified in assuming that the railway company will not neglect this duty.<sup>16</sup>

**§ 1554. Validity of Statutes and Ordinances Requiring Railway Companies to Give Signals for the Protection of Travellers.**—The legislature of a State may, in the exercise of the police power, require railway companies to give signals on approaching highway crossings and in passing through cities and towns, for the protection of travel-

<sup>12</sup> Vol. I, § 10; *Loucks v. Chicago &c. R. Co.*, 31 Minn. 526; *Toledo &c. R. Co. v. Cline*, 31 Ill. App. 563; s. c. reversed on other grounds, 135 Ill. 41; 45 Am. & Eng. Rail. Cas. 150; 25 N. E. Rep. 846; *Louisville &c. R. Co. v. Penrod* (Ky.), 56 S. W. Rep. 1; *Hermans v. New York &c. R. Co.*, 63 Hun (N. Y.) 625; s. c. 43 N. Y. St. Rep. 900; 17 N. Y. Supp. 319; *Lehigh &c. Coal Co. v. Lear* (Pa.), 8 Cent. Rep. 109; 9 Atl. Rep. 267. That public safety and policy require that a railroad train moving through a large city in the night and at an hour when people may be expected to be crossing the track, should *both* ring its bell or blow its whistle *and* indicate its movement and approach by a proper *light*.—see *Louisville &c. R. Co. v. Morris*, 14 Ky. L. Rep. 466; s. c. 20 S. W. Rep. 539 (not to be off. rep). It follows from this doctrine that it is proper to charge the jury that the unexplained negligence of the trainman to give the proper signals when running through a village with frequent street crossings, at a high rate of speed, is negligence: *Loucks v. Chicago &c. R. Co.*, 31 Minn. 526.

<sup>13</sup> Vol. I, § 11; *Rupard v. Chesapeake &c. R. Co.*, 88 Ky. 280; s. c. 10 Ky. L. Rep. 1023; 11 S. W. Rep. 70; *Vandewater v. New York &c. R. Co.*, 135 N. Y. 583; s. c. 18 L. R. A. 771; 49 N. Y. St. Rep. 55; 32 N. E. Rep. 636; *Johnson v. Balti-*

*more &c. R. Co.*, 6 Mackey (D. C.) 232; s. c. 11 Cent. Rep. 720; *Eskridge v. Cincinnati &c. R. Co.*, 89 Ky. 367; s. c. 11 Ky. L. Rep. 557; 42 Am. & Eng. Rail. Cas. 176; 12 S. W. Rep. 580. A court can not, under this rule, instruct the jury, as an unqualified legal proposition, that the failure to ring the bell or blow the whistle when approaching a crossing, constitutes negligence; but must leave it to them as a *question of fact under the circumstances in evidence*: *Sauerborn v. New York &c. R. Co.*, 69 Hun (N. Y.) 429; s. c. 52 N. Y. St. Rep. 784; 23 N. Y. Supp. 478. *Evidence* that no bell was rung or whistle blown as the train approached the crossing is *admissible*, although there is no statute requiring the sounding of the whistle or ringing of the bell: *Friess v. New York &c. R. Co.*, 67 Hun (N. Y.) 205; s. c. 51 N. Y. St. Rep. 391; 22 N. Y. Supp. 104.

<sup>14</sup> *Post*, § 1558.

<sup>15</sup> *Post*, § 1605, *et seq.*; *Chicago &c. R. Co. v. McGaha*, 19 Ill. App. 342; *Thayer v. Flint &c. R. Co.*, 93 Mich. 150; s. c. 53 N. W. Rep. 216.

<sup>16</sup> *Thayer v. Flint &c. R. Co.*, 93 Mich. 150; s. c. 53 N. W. Rep. 216; *Geveke v. Grand Rapids &c. R. Co.*, 57 Mich. 587; *St. Louis &c. R. Co. v. Faltz*, 23 Ill. App. 498; *Ohio &c. R. Co. v. McDonald*, 5 Ind. App. 108; s. c. 31 N. E. Rep. 836; *ante*, § 1531.



lers on the highway, and others who may be lawfully upon their tracks.<sup>17</sup> It may, for example, require them to ring bells at highway crossings, for the protection of wayfarers;<sup>18</sup> and a statute exempting a railway company from this duty may, in the exercise of the police power of the legislature, be *repealed*, against the will of the company, so as to render it liable for a breach of the duty.<sup>19</sup> So, the fact that the special charter of a railway company fixes its duties as to the giving of signals by trains approaching highway crossings, does not disable the legislature from imposing upon it the provisions of a general law prescribing different duties in this regard.<sup>20</sup> But a statute imposing a penalty for a failure to discharge this duty is, if made to apply to actions pending at the date of its passage, in the nature of an *ex post facto* law, and hence unconstitutional.<sup>21</sup> This power is frequently exercised by municipal corporations; but it can be properly exercised by them only where the power to do so has been granted to them by the legislature in their charters or governing statutes, either in express language or by necessary implication.<sup>22</sup> Although the legislature has granted to a municipal corporation a general power to make regulations upon this subject, yet this power is subject to the common law principle that municipal ordinances must be *reasonable*, and that whether they are reasonable or unreasonable is a question to be determined by the judicial courts.<sup>23</sup> Exercising this power, it has been held that a municipal ordinance requiring the ringing of the bells of locomotives at street crossings and the presence of flagmen at the more important crossings, is reasonable and proper;<sup>24</sup> and so of an ordinance requiring the ringing of the bell of a locomotive within the corporate limits of the city; and the ordinance is applicable even to the *yards of the railroad* company, situated in a thickly settled portion of the city, and traversed by people at all times and places;<sup>25</sup>

<sup>17</sup> 4 Thomp. Corp., § 5507.

<sup>18</sup> Galena &c. R. Co. v. Appleby, 28 Ill. 283; Galena &c. R. Co. v. Loomis, 13 Ill. 548; s. c. 56 Am. Dec. 471.

<sup>19</sup> Galena &c. R. Co. v. Appleby, 28 Ill. 283.

<sup>20</sup> Illinois &c. R. Co. v. Slater, 129 Ill. 91; s. c. 21 N. E. Rep. 575.

<sup>21</sup> Wilson v. Ohio &c. R. Co., 64 Ill. 542; s. c. 16 Am. Rep. 565.

<sup>22</sup> State v. Miller, 41 La. An. 53; s. c. 5 South. Rep. 258; State v. Jersey City, 29 N. J. L. 170. Where the charter of a city empowered it to *direct the use* and regulate the speed of locomotives within its limits, it was held that an ordinance requiring the *bell to be rung all the time* while the engine is in motion

within the city, is valid: Texas &c. R. Co. v. Nelson, 50 Fed. Rep. 814; s. c. 2 U. S. App. 213; 1 C. C. A. 698. That a municipal ordinance requiring the ringing of a bell on an engine running within the limits of a city, is authorized by the Illinois City and Village Act, art. 5, § 1, subd. 27: Illinois &c. R. Co. v. Gilbert, 157 Ill. 354; s. c. 41 N. E. Rep. 724.

<sup>23</sup> 1 Thomp. Corp., §§ 937, 1022, 1024, 1025; 2 *Id.*, § 1767; 4 *Id.*, §§ 4417, 5647.

<sup>24</sup> Denver &c. R. Co. v. Ryan, 17 Colo. 98; s. c. 28 Pac. Rep. 79.

<sup>25</sup> Texas &c. R. Co. v. Brown, 11 Tex. Civ. App. 503; s. c. 33 S. W. Rep. 146.



and so of an ordinance requiring the bell of a locomotive to be continually rung while the locomotive is in motion, within city limits, and prohibiting the running of locomotives at more than five miles an hour, as applied to a street crossing within three blocks of the railway depot in the city.<sup>26</sup>

§ 1555. **Statutory Precautions do not Exclude the Common Law Obligation of Diligence and Care.**<sup>27</sup>—In dealing with the subject of the duty of giving signals at railway crossings, and of the nature and adequacy of the signals which ought to be given, we must constantly keep in mind the principle of statutory construction already considered,<sup>28</sup> and supported by an overwhelming mass of judicial authority, which is that statutory precautions imposed upon railway companies for the protection of travellers at crossings do not furnish the only standard of care and caution, but are *cumulative* merely, and do not exclude a liability on the part of the railway company for failing to take such *other and further precautions* as may be reasonably necessary under all the surrounding circumstances,<sup>29</sup>—the object of such statutes being to prescribe, generally under penalties, the *minimum* of care which must be exercised in all cases.<sup>30</sup> Nor does the failure of the legislature or of the municipal council to authorize any standard of precaution at all, imply that the railway company is justified in running its trains without giving reasonable signals. For example, it may be evidence of negligence in a railroad company to fail to ring its bell and sound its whistle before crossing a street car track, although not required by statute or ordinance to give any signal.<sup>31</sup> So, if there has been a statute prescribing certain signals, and the statute has been *repealed*, the repeal of the statute does not at all imply a license from the legislature to cross the track without the exercise of adequate care or the giving of adequate signals.<sup>32</sup> Under the operation of this principle, a railroad company is not relieved from liability

<sup>26</sup> *Washington &c. R. Co. v. Lacey*, 94 Va. 460; s. c. 26 S. E. Rep. 834. On the subject of the validity of such ordinances, see, further, *Denver &c. R. Co. v. Ryan*, 17 Colo. 98; *Texas &c. R. Co. v. Nelson*, 2 U. S. App. 213; s. c. 50 Fed. Rep. 314.  
<sup>27</sup> This section is cited in §§ 1492, 1541, 1544, 1573, 1576.

<sup>28</sup> *Ante*, § 1494.

<sup>29</sup> *Atchison &c. R. Co. v. Hague*, 54 Kan. 284; s. c. 60 Am. & Eng. Rail. Cas. 617; 38 Pac. Rep. 257; *English v. Southern &c. R. Co.*, 13 Utah 407; s. c. 35 L. R. A. 155; 4

*Am. & Eng. Rail. Cas. (N. S.)* 63; 45 Pac. Rep. 47.

<sup>30</sup> *Missouri &c. R. Co. v. Moffatt*, 56 Kan. 667; s. c. 3 Am. & Eng. Rail. Cas. (N. S.) 488; 44 Pac. Rep. 607.

<sup>31</sup> *San Antonio &c. R. Co. v. Way*, 9 Tex. Civ. App. 214; s. c. 29 S. W. Rep. 205.

<sup>32</sup> *Bailey v. Jourdan*, 18 App. Div. 387; s. c. 46 N. Y. Supp. 399. See also *Vandewater v. New York &c. R. Co.*, 63 Hun (N. Y.) 186; s. c. 43 N. Y. St. Rep. 420; 17 N. Y. Supp. 652.



for injuries at a public crossing by merely complying with the statutory requirements in regard to *audible signals* by approaching trains, but must take such additional precautions as may be rendered necessary by the circumstances at the particular crossing.<sup>33</sup> It is admitted that there are judicial decisions to the contrary; but their existence is to be regretted, unless they can be justified upon a sound interpretation of the statute prescribing the regulations under consideration. If the legislature has enacted a code of regulations for the running of railway trains, or if it has empowered the railway commissioners to make such a code, and if it has done this in language which plainly indicates its intent that this code shall be exclusive and shall exonerate the railway company from the duty of acting outside of it, no matter what the situation may be,—then these decisions are justified; otherwise not.<sup>34</sup>

<sup>33</sup> Pennsylvania R. Co. v. Miller, 99 Fed. Rep. 529.

<sup>34</sup> A decision of the Court of Appeals of New Jersey (reversing the Supreme Court of that State) is to the effect that a railway company, when its train is approaching a public crossing, discharges its full duty by giving the *audible signals* required by the statute, which, in the particular case, required the bell to be rung, or the whistle to be blown at a distance of at least three hundred yards from the crossing until it should be passed. The judge charged the jury that circumstances might arise under which it would be the duty of the railroad company to do more than give the statutory signals. "If, for example," said he, "it was very foggy so that the train could not be seen at a great distance by travellers on the highway, then it might be the duty of the persons having the train in charge, beyond the ringing of the bells and beyond those of looking out, to give additional signals with their whistles; for it may be that the jury will think that the mere ringing of the bells does not carry the sound far enough, especially in foggy weather, to warn travellers on the highway, and that, under these circumstances, additional signals by blowing a whistle, even when danger is not apparent, should be given." The reasoning of the Court of Appeals will not be set out. It will be sufficient to say that it proceeded upon the idea that the statu-

tory precautions were intended to be exclusive, and that other precautions could not be required at the mere caprice of juries: New York &c. R. Co. v. Leaman, 54 N. J. L. 202; s. c. 23 Atl. Rep. 691; 15 L. R. A. 426. The decision is contrary to the weight of American judicial opinion, and seems plainly untenable. Clearly the trial judge was right in the instruction above quoted. The statute gave the railway company the *alternative* of either ringing the bell or sounding the steam whistle; and all that the judge told the jury was that they may not have discharged their full duty by electing to do what the statute permitted them to do, merely to ring their bell without sounding their whistle. A subsequent decision of the Supreme Court of New Jersey, following the preceding decision as authority, is to the effect that a railroad company can be required to give only such signals of the approach of trains to a crossing as are required by the legislature, unless such crossing has some peculiarly dangerous feature occasioned by the act of the company itself in constructing its roads or buildings: Philadelphia &c. R. Co. v. State, 61 N. J. L. 71; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 241; 38 Atl. Rep. 820. The Supreme Court of Errors of Connecticut, in like manner, held in one case that the statute of that State, requiring of railway companies certain precautionary measures at highway cross-



§ 1556. **Construction of Statutes Requiring Signals to be Given at Crossings.**—In an action by the State to enforce the penalty affixed to a statute requiring railway companies to give prescribed signals on approaching a highway crossing, the common law rule of statutory construction has been applied, that where a statute is *penal*, it is to be strictly construed;<sup>35</sup> but, plainly, this rule of construction ought not to be applied in a civil action, grounded upon negligence in failing to perform the statutory duty.

ings, is *exhaustive* and defines the whole of the ordinary duties of the company in the matter. But at the same time the court concede that there may be special circumstances which will impose upon them additional duties, such as slackening the speed of the train at a particular time upon seeing a person on a track in a position of danger, for the failure to perform which negligence might be imputed to the company: *Dyson v. New York & C. R. Co.*, 57 Conn. 9; s. c. 17 Atl. Rep. 137. In considering whether the use of a *steam whistle* is a precaution on approaching a crossing which can not be dispensed with without the imputation of negligence, it must be kept in mind that this is a constant source of danger to travellers through *frightening their horses* (*post*, § 1925), and that there are statutes and municipal regulations which dispense with it and even prohibit it (*compare post*, § 1558). Keeping this in view, the same court have reasoned that, although under ordinary circumstances it is not the duty of a railway engineer, upon approaching a highway crossing, *both* to blow the whistle and ring the bell,—yet notwithstanding an order of the Railway Commissioners dispensing with the blowing of the whistle, it may become the duty of the engineer to blow it, if necessary to prevent an accident and if the exercise of reasonable care requires the use of it: *Rowen v. New York & C. R. Co.*, 59 Conn. 364; s. c. 21 Atl. Rep. 73. Compare *Andrews v. New York & C. R. Co.*, 60 Conn. 293, 296; s. c. 22 Atl. Rep. 566,—where there are observations by Andrews, C. J., to the effect that cases may arise where the statutory duty of sounding the steam whistle not nearer than eighty rods from the crossing, will not ex-

onerate the railroad company. A later decision of the Supreme Court of Connecticut (*Tessmer v. New York & C. R. Co.*, 72 Conn. 208; s. c. 44 Atl. Rep. 38), is to the general effect that a compliance with statutory precautions exonerates the railway company from the duty of observing any others, unless peculiar conditions, known to the engineer at the time, demand further precautions. A decision of the Court of Appeals of New York to the effect that where there is no statutory duty to sound a whistle or ring a bell, and the company does neither, a charge which leaves it to the jury to say, whether, under all the circumstances, it should have adopted *some other precautions* in running its train than those observed, is erroneous: *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669; s. c. 6 Cent. Rep. 394. If these decisions, taken in the aggregate, mean that a compliance with the requirement of the statute is sufficient for ordinary purposes, they are well enough; but if they mean that, under all circumstances, no matter what the nature of the public peril at the crossing, the railway company is to be released from taking other precautions which ordinary social duty and common prudence may suggest, then they are to be condemned as careless of justice, opposed to the dictates of humanity, and inconsistent with the great weight of judicial authority. The view of the court in a neighboring country that where a crossing is *unusually dangerous*, it may be incumbent upon the railway company to use even greater precautions than those required by statute (*Hollinger v. Canadian & C. R. Co.*, 21 Ont. 705), is much to be preferred.

<sup>35</sup> *State v. Chicago & C. R. Co.*, 19 Mo. App. 104; s. c. 1 West. Rep. 401.



§ 1557. **Omission to Give Statutory Signals is Negligence or Evidence of Negligence.**<sup>86</sup>—The omission of those in charge of a railway train, to give the warning signals required by statute or municipal ordinance, on approaching a public crossing, is such negligence as will render the railway company responsible in damages to travellers injured without their own fault.<sup>87</sup> Under all theories such neglect is at least *prima facie evidence of negligence*, casting upon the defendant the burden of explaining it consistently with the conclusion of reasonable care and diligence, thus presenting a *question for a jury*.<sup>88</sup> Other opinion is to the effect that the omission to give such statutory signals is *negligence as matter of law*, and that the court may so charge the jury;<sup>89</sup> and in one jurisdiction, when the doctrine of *com-*

<sup>86</sup> This section is cited in §§ 1538, 1586.

<sup>87</sup> *Baltimore &c. R. Co. v. Walborn*, 127 Ind. 142; s. c. 26 N. E. Rep. 207; *Evans v. Concord R. Co.*, 66 N. H. 194; s. c. 21 Atl. Rep. 105; *Terre Haute &c. R. Co. v. Barr*, 31 Ill. App. 57; *Orcutt v. Pacific &c. R. Co.*, 85 Cal. 291; s. c. 24 Pac. Rep. 661; *Hunter v. Montana &c. R. Co.*, 22 Mont. 525; s. c. 57 Pac. Rep. 140; *Stolz v. Baltimore &c. R. Co.*, 7 Ohio C. D. 435; *Johnson v. Chicago &c. R. Co.*, 77 Mo. 546; *Connersville &c. R. Co. v. Butler* (Ind.), 1 West. Rep. 110 (no off. rep.); *Georgia R. &c. Co. v. Wynn*, 42 Ga. 331; *Galena &c. R. Co. v. Dill*, 22 Ill. 264; *Chicago &c. R. Co. v. McKean*, 40 Ill. 218; *St. Louis &c. R. Co. v. Terhune*, 50 Ill. 151; *Chicago &c. R. Co. v. Fears*, 53 Ill. 115; *Galena &c. R. Co. v. Loomis*, 13 Ill. 548; *Chicago &c. R. Co. v. Reid*, 24 Ill. 144; *Indianapolis &c. R. Co. v. Stables*, 62 Ill. 313; *Chicago &c. R. Co. v. Notzki*, 66 Ill. 455; *Peoria &c. R. Co. v. Siltman*, 67 Ill. 72; *Chicago &c. R. Co. v. Bell*, 70 Ill. 102; *Artz v. Chicago &c. R. Co.*, 34 Iowa 153; *Commonwealth v. Fitchburg R. Co.*, 10 Allen (Mass.) 189; *Fletcher v. Atlantic &c. R. Co.*, 64 Mo. 484; *Payne v. Chicago &c. R. Co.*, 39 Iowa 523; *Chicago &c. R. Co. v. Payne*, 59 Ill. 534, 541. Mere employment of statutory signs and signals will not exonerate the company when its servants are otherwise negligent: *Bradley v. Boston &c. R. Co.*, 2 Cush. (Mass.) 539.

<sup>88</sup> Vol. I, § 11; *Petrie v. Columbia &c. R. Co.*, 29 S. C. 303; s. c. 7 S. E. Rep. 515; *Huckshold v. St. Louis &c. R. Co.*, 90 Mo. 548; *Orcutt v. Pacific*

*&c. R. Co.*, 85 Cal. 291; *Barr v. Hannibal &c. R. Co.*, 30 Mo. App. 248; *Gulf &c. R. Co. v. Breitling* (Tex.), 12 S. W. Rep. 1121 (no off. rep.); *Missouri &c. R. Co. v. Geist*, 49 Neb. 489; s. c. 68 N. W. Rep. 640; 5 Am. & Eng. Rail. Cas. (N. S.) 421; *Omaha &c. R. Co. v. Talbot*, 48 Neb. 627; s. c. 67 N. W. Rep. 599 (not negligence *per se*, but evidence of negligence); *Terre Haute &c. R. Co. v. Black*, 18 Ill. App. 45; *Cincinnati &c. R. Co. v. Butler*, 103 Ind. 31; *Terre Haute &c. R. Co. v. Voelker*, 129 Ill. 540; s. c. 22 N. E. Rep. 20; 39 Am. & Eng. Rail. Cas. 615; *Erwin v. St. Louis &c. R. Co.*, 96 Mo. 290; s. c. 9 S. W. Rep. 577; *Reed v. Chicago &c. R. Co.*, 74 Iowa 188; s. c. 37 N. W. Rep. 149.

<sup>89</sup> Vol. I, § 10; *Chicago &c. R. Co. v. Boggs*, 101 Ind. 522; *Houston &c. R. Co. v. Wilson*, 60 Tex. 142; *Western &c. R. Co. v. Young*, 81 Ga. 397; s. c. 7 S. E. Rep. 912; *Louisville &c. R. Co. v. Davis*, 7 Ind. App. 222; s. c. 33 N. E. Rep. 451; *McNown v. Wabash R. Co.*, 55 Mo. App. 585; *Petty v. Hannibal &c. R. Co.*, 88 Mo. 306; s. c. 8 West. Rep. 297; *Coffin v. St. Louis &c. R. Co.*, 22 Mo. App. 601; s. c. 4 West. Rep. 885; *Nuzun v. Railway Co.*, 30 W. Va. 228; 4 S. E. Rep. 242; *Houston &c. R. Co. v. Rogers*, 15 Tex. Civ. App. 680; s. c. 39 S. W. Rep. 1112; *Strother v. South Carolina &c. R. Co.*, 47 S. C. 375; s. c. 25 S. E. Rep. 272; 5 Am. & Eng. Rail. Cas. (N. S.) 430; *Pittsburgh &c. R. Co. v. Shaw*, 15 Ind. App. 173; s. c. 43 N. E. Rep. 957; *Texas &c. R. Co. v. Brown*, 11 Tex. Civ. App. 503; s. c. 33 S. W. Rep. 146; *Connersville &c. R. Co. v. Butler* (Ind.) 1



*parative negligence*<sup>40</sup> prevailed, this omission was characterized as *gross negligence* at a crossing known by the trainmen as unusually dangerous.<sup>41</sup>

§ 1558. **Failure to Give Signal must be Proximate Cause of the Injury.**<sup>42</sup>—It does not follow from the foregoing, that there will be any liability for damages on the part of the railroad company, as the mere consequence of the failure to give the appropriate or statutory signals, and of an accident to a traveller at the crossing. The two things may have no juridical connection. Here, as elsewhere, the rule of law is that, although at the time of the collision the railway company was violating a positive statute by omitting some of the prescribed warnings, yet, unless the omission was the *proximate cause* of the collision, the company will not be liable.<sup>43</sup> The failure of those

West. Rep. 114 (no off. rep.); Chicago & c. R. Co. v. Metcalf, 44 Neb. 848; s. c. 28 L. R. A. 824; 63 N. W. Rep. 51. Under this rule an instruction to the effect that if the jury believe that the plaintiff's injuries were caused by the moving backward of an engine and cars upon and against the plaintiff, without the ringing of the bell or blowing of the whistle, and that the plaintiff was injured while crossing a public street, and that he received said injuries on account of the failure to ring the bell or blow the whistle, they shall find for the plaintiff,—is not subject to the objection that it charges more than the statutory duty: Texas & c. R. Co. v. Laverty, 4 Tex. Civ. App. 74; s. c. 22 S. W. Rep. 1047.

<sup>40</sup> Vol. I, § 259, *et seq.*

<sup>41</sup> St. Louis & c. R. Co. v. Faitz, 23 Ill. App. 498. One court, recalling the rule that a person under the excitement produced by the presence of an impending catastrophe, may not be required to exercise the same cool and sound judgment that a person of ordinary care would exercise under other circumstances, has applied this test to the conduct of an engineer on seeing a person negligently exposed on the track in front of his engine, in failing to sound a warning signal: Stoltz v. Baltimore & c. R. Co., 7 Ohio C. D. 435. It has been held that an *agreement* between an *electric railway* company and a steam railway company that the former shall have a derailing

switch near a crossing as a precaution against collisions, and that the conductor of an electric car, before it passes over the crossing, shall look in both directions and listen for the approach of a railroad train,—does not excuse the railroad company from giving the *statutory signals* as a warning of the approach of a train: New York & c. R. Co. v. New Jersey Electric R. Co., 60 N. J. L. 52; s. c. 38 L. R. A. 516; 37 Atl. Rep. 627. It has been held that a railway company is not bound to give signals by means of bell or whistle, where a train is on a siding built to allow trains to pass, and there is neither a highway crossing nor a station in the vicinity: Enk v. Brooklyn City R. Co., 64 Hun (N. Y.) 634; s. c. 45 N. Y. St. Rep. 627; 19 N. Y. Supp. 130. But it is doubtful whether this statement can be made to apply in every such situation.---- The *habitual failure* to give the required signals is an *indictable nuisance*: Louisville & c. R. Co. v. Commonwealth, 13 Bush (Ky.) 388; s. c. 6 Cent. L. J. 86.

<sup>42</sup> This section is cited in §§ 1553, 1582, 1606.

<sup>43</sup> Chicago & c. R. Co. v. Notzki, 66 Ill. 455; Peoria & c. R. Co. v. Siltman, 67 Ill. 72; Cook v. New York & c. R. Co., 5 Lans. (N. Y.) 401; Cosgrove v. New York & c. R. Co., 13 Hun (N. Y.) 329; Commonwealth v. Fitchburg R. Co., 120 Mass. 372; Chicago & c. R. Co. v. Van Paten, 74 Ill. 91; Cordell v. New York



operating a train to give signals of its approach to a *path* used by the public in crossing the track, does not render the company liable for an injury to one whose *foot* was so *caught* in the track that he was unable to extricate it until the train ran upon him.<sup>44</sup> The traveller may *see* or *hear* the train approaching, or otherwise have timely notice of it, and thereby be as thoroughly warned of it as he would be if the bell were rung or the whistle sounded, in which case the failure to ring the bell or sound the whistle will not be the proximate cause of the injury,<sup>45</sup> but it will be ascribed to his own *contributory negli-*

&c. R. Co., 70 N. Y. 119; Wilcox v. Rome &c. R. Co., 39 N. Y. 358; Nicholson v. Erie &c. R. Co., 41 N. Y. 525; Baxter v. Troy &c. R. Co., 41 N. Y. 502; Gorton v. Erie R. Co., 45 N. Y. 660; Calligan v. New York &c. R. Co., 59 N. Y. 651; Stackus v. New York &c. R. Co., 7 Hun (N. Y.) 559; Havens v. Erie R. Co., 41 N. Y. 296; Fletcher v. Atlantic &c. R. Co., 64 Mo. 484; Illinois &c. R. Co. v. Benton, 69 Ill. 174; Pakalinsky v. New York &c. R. Co., 82 N. Y. 424; Louisville &c. R. Co., v. Pirschbacher, 63 Ill. App. 144; Omaha &c. R. Co. v. Talbot, 48 Neb. 627; s. c. 67 N. W. Rep. 599; McManamee v. Missouri &c. R. Co., 135 Mo. 440; s. c. 37 S. W. Rep. 119; 5 Am. & Eng. Rail. Cas. (N. S.) 474. Compare Reeves v. Delaware &c. R. Co., 30 Pa. St. 454; Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60, 71; Madison &c. R. Co. v. Taffe, 37 Ind. 361, 376; Commonwealth v. Fitchburg R. Co., 10 Allen (Mass.) 189; Ernst v. Hudson &c. R. Co., 39 N. Y. 61, 67; s. c. 35 N. Y. 9; 32 Barb. (N. Y.) 159; 24 How. Pr. (N. Y.) 97; 32 How. Pr. (N. Y.) 262; St. Louis &c. R. Co. v. Dunn, 78 Ill. 197; Kennayde v. Pacific R. Co., 45 Mo. 255; Correll v. Burlington &c. R. Co., 38 Iowa 120.

"Bosko v. Delaware &c. R. Co., 91 Hun (N. Y.) 320; s. c. 71 N. Y. St. Rep. 1; 36 N. Y. Supp. 261. Further as to liability for injuries resulting from failure to give statutory signals,—see Augusta &c. R. Co. v. McElmurry, 24 Ga. 75. See also McGrath v. New York &c. R. Co., 1 N. Y. S. C. (T. & C.) 243; Eaton v. Erie R. Co., 51 N. Y. 544; Weber v. New York &c. R. Co., 58 N. Y. 451; s. c. 67 N. Y. 587; Richardson v. New York &c. R. Co., 45 N. Y. 846; Zimmer v. New York &c. R. Co., 7 Hun (N. Y.) 552. But it is plain that this might not be a sound conclu-

sion in a case where a person ventures upon the track in front of a train too near him to enable him to get out of such a difficulty in time to avoid being run over. There is a degenerate statute, or a degenerate decision to the effect that if a failure to give signals contributes to an injury resulting from a collision with a railroad train at a crossing, within the meaning of S. C. Rev. Stat. 1893, § 1692, when such neglect *has any share or agency* in bringing about the disaster, although it was *not the efficient cause thereof*, and such injury might have occurred if the signals had been given the railroad company will be liable: Wragge v. South Carolina &c. R. Co., 47 S. C. 105; s. c. 33 L. R. A. 191; 4 Am. & Eng. Rail. Cas. (N. S.) 639; 25 S. E. Rep. 76. The statute is interpreted by the court to mean that the neglect to give the prescribed signals at crossings will render the railroad company liable for a collision to which such neglect *contributes*, although not to such a degree as to constitute, in legal theory, the proximate cause of the injury: Wragge v. South Carolina &c. R. Co., *supra*. But it must contribute in *some* degree, otherwise the operation of the statute would be mere confiscation, and the statute would be invalid.

<sup>45</sup> Pennsylvania Co. v. Hensil, 70 Ind. 569; s. c. 36 Am. Rep. 188; Louisville &c. R. Co. v. Penrod (Ky.), 56 S. W. Rep. 1; Butcher v. West Virginia &c. R. Co., 37 W. Va. 180; s. c. 18 L. R. A. 519; 16 S. E. Rep. 457; Chicago &c. R. Co. v. Wells, 42 Ill. App. 26; Leavitt v. Terre Haute &c. R. Co., 5 Ind. App. 513; s. c. 12 Rail. & Corp. L. J. 246; 31 N. E. Rep. 860; rehearing denied 5 Ind. App. 521; s. c. 39 N. E. Rep. 866; Chicago &c. R. Co. v. Logue, 47



gence,<sup>46</sup> to some other efficient cause, or to mere misadventure, according to the state of evidence.<sup>47</sup>

§ 1559. **Illustrative Cases where the Failure to Give the Statutory Signals was not the Proximate Cause of the Injury.**<sup>48</sup>—When, therefore, nothing is shown except the omission of the statutory signals and the accident, it is the duty of the trial court to declare, as a matter of law, that the plaintiff can not recover.<sup>49</sup> In accordance with this theory, it is a sound conclusion that if the conformation of the track is such that, after a person could have been seen upon it by the statutory lookout on the locomotive, the engine was so near to him that compliance with the statute, requiring the whistle to be sounded and the brakes to be put down, was inadequate to save him, the company will not be liable for such non-compliance.<sup>50</sup> So, an omission of the statutory signals does not render a railroad company liable for injuries to a *child* too young to understand their meaning, where the person in charge of the child could not have rescued it from danger had the signals been given.<sup>51</sup>

Ill. App 292; *McManamee v. Missouri &c. R. Co.*, 135 Mo. 440; s. c. 37 S. W. Rep. 119; 5 Am. & Eng. Rail. Cas. (N. S.) 474; *Louisville &c. R. Co. v. Pirschbacher*, 63 Ill. App. 141; *Pakalinsky v. New York &c. R. Co.*, 82 N. Y. 424.

<sup>46</sup> *Butcher v. West Virginia &c. R. Co.*, 37 W. Va. 180; s. c. 16 S. E. Rep. 457; *Parker v. Wilmington &c. R. Co.*, 86 N. C. 221; *Chicago &c. R. Co. v. Crisman*, 19 Colo. 30; s. c. 34 Pac. Rep. 286.

<sup>47</sup> *Houston &c. R. Co. v. Nixon*, 52 Tex. 19; *Atchison &c. R. Co. v. Walz*, 40 Kan. 433; s. c. 14 Pac. Rep. 787; *Saldana v. Galveston &c. R. Co.*, 43 Fed. Rep. 862; *Barber v. Richmond &c. R. Co.*, 34 S. C. 444; s. c. 13 S. E. Rep. 630; *State v. Baltimore &c. R. Co.*, 69 Md. 339; s. c. 12 Cent. Rep. 890; 14 Atl. Rep. 688. The driver of a team is not relieved from the exercise of care on approaching a crossing, by the failure of the company to sound the whistle or ring the bell, when he has just seen the train moving in his direction, although the view thereof was momentarily obscured: *Missouri &c. R. Co. v. Peay* (Tex.), 20 S. W. Rep. 57 (no off. rep.). Where, in an action for injuries at a railroad crossing, there was evidence that the plaintiff did not see the train until he had reached the track, and no signals were given,

it was not error to submit the question of defendant's failure to give signals to the jury: *International &c. R. Co. v. Dalwigh* (Tex. Civ. App.), 56 S. W. Rep. 136. For an example of a *complaint* in an action to recover damages for an injury at a crossing, setting out a collection of facts which sufficiently showed that the failure to give the statutory signals was the *proximate cause* of the accident,—see *Baltimore &c. R. Co. v. Young*, 153 Ind. 163; s. c. 54 N. E. Rep. 791.

<sup>48</sup> This section is cited in § 1606.

<sup>49</sup> *Goodwin v. Chicago &c. R. Co.*, 75 Mo. 73, 76; *Strother v. South Carolina &c. R. Co.*, 47 S. C. 375; s. c. 25 S. E. Rep. 272; 5 Am. & Eng. Rail. Cas. (N. S.) 430.

<sup>50</sup> *East Tennessee &c. R. Co. v. Swaney*, 5 Lea (Tenn.) 119. Compare *post*, § 1593. Where a traveler, approaching a crossing in a sleigh, came into plain view of the track, and the driver saw the approaching train and checked his horse, but the brute, becoming unmanageable, rushed forward against the locomotive, the fact that the bell was not rung was held not to render the company liable for the injuries resulting from the collision: *Cosgrove v. New York &c. R. Co.*, 13 Hun (N. Y.) 329.

<sup>51</sup> *Chrystal v. Troy &c. R. Co.*, 124



§ 1560. **For whose Protection Statutory Signals Intended.**<sup>52</sup>—But it has been well reasoned that this omission is negligence as matter of law only when injury results therefrom *to persons or animals endeavoring or intending to cross the track upon a street or highway crossing*; and this for the manifest reason that the object of the statute is to protect persons and animals in this situation, and not in other situations,<sup>53</sup>—the prevailing view being that such signals are intended only for the protection of persons or vehicles on the crossing, or about to use the crossing, and not (for example) for the protection of those driving along a highway parallel to the railroad;<sup>54</sup> nor of an *employee* of the railway company engaged in breaking stones for ballast near the track, who stepped upon the track at a point three hundred feet from the crossing, with his face turned away from an approaching engine;<sup>55</sup> nor of a trespasser on the track of a railway company at a place other than a crossing.<sup>56</sup> But in Kentucky, the failure to give signals of the approach of trains to street crossings in cities is negligence, not only as to persons about to use the crossings, but as to persons in charge of teams on adjacent premises.<sup>57</sup> Another court has held that a person whose team is standing by a car on a side track near a railroad depot, for the purpose of unloading the car, is within the protection of a statute requiring signals by trains at a crossing.<sup>58</sup> Another court has held that a statute requiring warning by bell or whistle when a train approaches a highway, extends to the protection of a passenger, leaving a train at a station from which there is no means of access to the highway, except across the railway tracks.<sup>59</sup> Another court has reasoned that while the statutory duty to ring the bell or sound the steam whistle and check the train on approaching crossings, is exacted primarily for the benefit of persons crossing the track, and not for those walking along it; yet, relatively to the latter,

N. Y. 519; s. c. 36 N. Y. St. Rep. 609; 26 N. E. Rep. 1103; rev'g s. c. 52 Hun (N. Y.) 55; 22 N. Y. St. Rep. 384. For an illustrative case where the failure of a locomotive engineer to *watch* a horse and wagon, which had just crossed the track within ten feet of the engine without any fright on the part of the horse, but which suddenly balked and backed against the engine, which had immediately returned over the crossing, did not exhibit a case of negligence on the part of the company,—see *Richmond &c. R. Co. v. Yeamans*, 86 Va. 860; s. c. 12 S. E. Rep. 946.

<sup>52</sup> This section is cited in § 1567.

<sup>53</sup> *Maney v. Chicago &c. R. Co.*, 49 Ill. App. 105; *Reynolds v. Great Northern R. Co.*, 69 Fed. Rep. 808;

s. c. 29 L. R. A. 695; 32 U. S. App. 577; 16 C. C. A. 435. *Contra*, see *Ransom v. Chicago &c. R. Co.*, 62 Wis. 178.

<sup>54</sup> *Reynolds v. Great Northern R. Co.*, 69 Fed. Rep. 808; s. c. 29 L. R. A. 695; 32 U. S. App. 577; 16 C. C. A. 435.

<sup>55</sup> *Christy v. Chesapeake &c. R. Co.*, 35 W. Va. 117; s. c. 12 S. E. Rep. 1111.

<sup>56</sup> *Post*, § 1705.

<sup>57</sup> *Louisville &c. R. Co. v. Penrod* (Ky.), 56 S. W. Rep. 1.

<sup>58</sup> *Chicago &c. R. Co. v. Metcalf*, 44 Neb. 848; s. c. 28 L. R. A. 824; 63 N. W. Rep. 51.

<sup>59</sup> *Anderson v. Grand Trunk R. Co.*, 27 Ont. Rep. 441.



as well as to the former, a failure to comply with the statute is *evidence of negligence* to be considered by the jury.<sup>60</sup> This, however, seems to be unsound, in that it proceeds in contravention of the principle that there can be no recovery, unless the omission of the statutory signals is found to be the *proximate cause* of the injury. In the absence of evidence tending fairly to show that such is the fact, it will be the duty of the judge to direct a verdict for the defendant.<sup>61</sup>

§ 1561. **Further of the Persons for whose Benefit Statutory Signals are Deemed to be Required.**<sup>62</sup>—The question must, then, be answered, in every case, by a *sound construction of the particular statute*. Some statutes are, by judicial construction, restrained to the benefit and protection of travellers who are crossing or approaching the railway track for that purpose, at a public highway crossing,<sup>63</sup> and consequently the protection of the statute does not extend to mere *trespassers* on the track.<sup>63a</sup> Another court has extended such a statute to crossings in cities, so as to include within its protection persons engaged with their teams upon a public street occupied in part by a railway track.<sup>64</sup> Another court extends the protection of the statute to travellers on a highway running parallel with the railway track.<sup>65</sup> For example, the Wisconsin statute requiring that a bell shall be rung and a whistle blown, on the approach of a train to a highway crossing, has been interpreted as meaning that a neglect of this duty shall make the company liable to *one travelling on a highway parallel to the track*, whose *horse takes fright* because of the approach of the train without warning, whereby the traveller is unable suitably to secure him.<sup>66</sup> Another court has held that whether a railway company's failure to give the statutory signals at highway crossings, whereby a person rightfully travelling on a hand-car on its track sustains injuries, is negligence on its part as to the latter, is a question for the jury, where the accident occurs *near a public crossing*, and reliance is placed upon the custom to give such signals.<sup>67</sup> Another court has held that the

<sup>60</sup> Central R. & C. Co. v. Raiford, 82 Ga. 400; s. c. 9 S. E. Rep. 169.

<sup>61</sup> Holman v. Chicago & C. R. Co., 62 Mo. 562; Stoneman v. Atlantic & C. R. Co., 58 Mo. 503; Craycroft v. Atchison & C. R. Co., 18 Mo. App. 487; Barr v. Hannibal & C. R. Co., 30 Mo. App. 248, 254.

<sup>62</sup> This section is cited in § 1567.

<sup>63</sup> Toomey v. Southern & C. R. Co., 86 Cal. 374; s. c. 24 Pac. Rep. 1074; 10 L. R. A. 139; 42 Alb. L. J. 475. On this question there is a learned note in 17 L. R. A. 253.

<sup>63a</sup> Texas & C. R. Co. v. Brown, 2

Tex. Civ. App. 281; s. c. 21 S. W. Rep. 434.

<sup>64</sup> Pennsylvania Co. v. Backes, 35 Ill. App. 375.

<sup>65</sup> Ransom v. Chicago & C. R. Co., 62 Wis. 178; s. c. 51 Am. Rep. 718. To the contrary, see East Tennessee & C. R. Co. v. Feathers, 10 Lea. (Tenn.) 103.

<sup>66</sup> Ransom v. Chicago & C. R. Co., 62 Wis. 178; s. c. 51 Am. Rep. 718. Compare *post*, § 1578.

<sup>67</sup> Garteiser v. Galveston & C. R. Co., 2 Tex. Civ. App. 230; s. c. 21 S. W. Rep. 631.



protection of such a statute does not extend to a farmer whose horses take fright while he is *plowing in his field* near a railway crossing.<sup>69</sup> Nor can *employees* of the railroad company injured at crossings, take advantage of the omission of the statutory signals,—such signals being intended for the protection of passengers, strangers, and travellers upon the highway.<sup>69</sup> It has been so held where a *brakeman* on the top of a freight train was injured by being brought in contact with an *overhead highway bridge*, where the injury would have been avoided if the whistle had been sounded, as required by the statute,<sup>70</sup> at grade crossings.<sup>71</sup> On the other hand, such a statute has been construed as not intended merely for the protection of travellers about to cross the railway track, but as extending to the protection of all persons exposed to the danger of a passing engine.<sup>72</sup> It seems scarcely necessary to add that the statutory warning required upon the approach of an engine or train to a highway crossing, is not only for the benefit of persons actually crossing the track, *but also for the benefit of those approaching the crossing.*<sup>73</sup>

§ 1562. **Duty to Give Signals and Use Care when Approaching Private Crossings, Disused Roads, etc.**<sup>74</sup>—In several jurisdictions the decisions unite in holding that, in the absence of any statutory obligation, a railway company which permits the public habitually and for a long time to pass over its road at a given point, puts itself in the position of granting them a *license* so to do, and relieves them from the imputation of trespassers, and is bound to anticipate that they will continue to do so, so long as it acquiesces therein, and is bound to exercise *reasonable care* in their behalf,—that is to say, a degree of care proportionate to the probable danger to them from the running of its trains.<sup>75</sup> If the railway company has been accustomed to give

<sup>68</sup> *Williams v. Chicago & C. R. Co.*, 135 Ill. 491; s. c. 26 N. E. Rep. 661; 11 L. R. A. 352; affirming s. c. 32 Ill. App. 339.

<sup>69</sup> *Evans v. Atlantic & C. R. Co.*, 62 Mo. 49.

<sup>70</sup> Code Ala., § 1144.

<sup>71</sup> *Louisville & C. R. Co. v. Hall*, 87 Ala. 708; s. c. 6 South. Rep. 277; 4 L. R. A. 710.

<sup>72</sup> *Lonergren v. Illinois & C. R. Co.*, 87 Iowa 755; s. c. 49 N. W. Rep. 852.

<sup>73</sup> *Henderson v. Canada & C. R. Co.*, 25 Ont. App. 437.

<sup>74</sup> This section is cited in §§ 1564, 1566.

<sup>75</sup> *Post*, § 1564; *Harriman v. Pittsburgh R. Co.*, 45 Ohio St. 11; s. c.

12 N. E. Rep. 451; *Swift v. Staten Island & C. R. Co.*, 123 N. Y. 645; s. c. 45 Am. & Eng. Rail. Cas. 180; 33 N. Y. St. Rep. 604; 25 N. E. Rep. 378; *Byrne v. New York & C. R. Co.*, 104 N. Y. 362; s. c. 58 Am. Rep. 512; *Taylor v. Delaware & Canal Co.*, 113 Pa. St. 162; s. c. 57 Am. Rep. 446; *Illinois & C. R. Co. v. Dick* (Ky.), 15 S. W. Rep. 665; s. c. 12 Ky. L. Rep. 772 (no off. rep.); *Lillstrom v. Northern & C. R. Co.*, 53 Minn. 464; s. c. 55 N. W. Rep. 624; 20 L. R. A. 587; *Hanks v. Boston & C. Railroad*, 147 Mass. 495; s. c. 18 N. E. Rep. 218; 7 N. Eng. Rep. 139; *Sweeney v. Old Colony & C. Railroad*, 10 Allen (Mass.) 368; *Murphy v. Boston & C. Railroad*, 133 Mass. 121;



the statutory or other signals on the approach of its train to such a crossing, it can not discontinue them without notice to the public, and it will become liable for a negligent omission to give them, resulting in an accident, without the fault of the person injured.<sup>76</sup> What precautions should be taken at such a crossing, in any special case, will ordinarily present a *question of fact for a jury*.<sup>77</sup> In a jurisdiction where the foregoing doctrine is not upheld in regard to ways across railway tracks created by *public user and acquiescence*,<sup>78</sup> it has been held that if the railway company constructs a way across its track in such a manner as to offer an inducement or invitation to the public to use it, it will become liable to a member of the public so using it, for an injury to him through the negligence of its servants in operating its train.<sup>79</sup> In determining whether the railway company have held out an inducement to the public to use such a crossing, stress has in some cases been laid on the fact that the crossing directly connected two parts of the same street.<sup>80</sup> But it has been reasoned that, "as an invitation to enter premises may be established even when the traveller is not invited to go beyond them, so there may be an invitation to cross them to the premises of others, but not necessarily to any public way beyond."<sup>81</sup> Whether the public have been thus invited to use a way which a railway company has established over its track, will, it seems, be a question for a jury, and their conclusion in respect of it will be especially deferred to in cases where they have taken a *view of the locus in quo*.<sup>82</sup> On like grounds, where a railway

O'Connor v. Boston &c. Railroad, 135 Mass. 352, 358; Barry v. New York &c. R. Co., 92 N. Y. 289; s. c. 44 Am. Rep. 377; Houston R. Co. v. Boozer, 70 Tex. 530; s. c. 8 S. W. Rep. 119. That persons lawfully using a private railroad crossing in the vicinity of a public crossing, are entitled to the benefit of the signals required to be given at the latter, and that, for failure to give them, negligence as to such persons will be imputed to the company,—see Cahill v. Cincinnati &c. R. Co. (Ky.), 13 Ky. L. Rep. 714; s. c. 49 Am. & Eng. Rail. Cas. 390; 18 S. W. Rep. 2. There is a decision in Missouri to the effect that a railroad company is under no duty of giving a signal at a private crossing, because the statute only requires it to give signals at public crossing: Maxey v. Missouri &c. R. Co., 113 Mo. 1; s. c. 20 S. W. Rep. 654.

<sup>76</sup> Westaway v. Chicago &c. R. Co., 56 Minn. 28; s. c. 57 N. W. Rep.

222; Nash v. New York &c. R. Co., 51 Hun (N. Y.) 594; s. c. 22 N. Y. St. Rep. 106.

<sup>77</sup> Byrne v. New York &c. R. Co., 104 N. Y. 362; s. c. 58 Am. Rep. 512; Taylor v. Delaware &c. Canal Co., 113 Pa. St. 162; s. c. 57 Am. Rep. 446; Swift v. Staten Island &c. R. Co., 123 N. Y. 645; s. c. 25 N. E. Rep. 378; 33 N. Y. St. Rep. 604; 45 Am. & Eng. Rail. Cas. 180.

<sup>78</sup> Post, § 1563.

<sup>79</sup> Murphy v. Boston &c. R. Co., 133 Mass. 121; Hanks v. Boston &c. R. Co., 147 Mass. 495; s. c. 7 N. Eng. Rep. 139; 18 N. E. Rep. 218.

<sup>80</sup> Sweeney v. Old Colony &c. Railroad, 10 Allen (Mass.) 368; O'Connor v. Boston &c. Railroad, 135 Mass. 352, 358.

<sup>81</sup> Hanks v. Boston &c. R. Co., 147 Mass. 495, 499.

<sup>82</sup> Hanks v. Boston &c. R. Co., 147 Mass. 495. Where the railway company had constructed a *plank crossing*, connecting an open freight-



company built *houses for its workmen* in such a place that access to them could be had only by crossing its track, it became liable to a workman who was struck and injured when so crossing by a locomotive tender which exhibited no light and made no noise.<sup>83</sup> Some of the decisions emphasize the conclusion that persons so using a foot-path across a railway track, established by public user and acquiescence, are *not trespassers*, and that the railway company owes a higher duty to avoid running over them than it owes to a mere trespasser.<sup>84</sup> Although the railway company may not be bound to give the statutory signals on approaching such a crossing, the statute not applying to it, yet it is a just conclusion that it is bound to give the public *some warning*.<sup>85</sup>

§ 1563. **Doctrine that a Continuous Crossing by the Public does not Raise an Implied License to Cross.**<sup>86</sup>—We now come to a class of cases which proceed upon a principle somewhat different from that upon which the cases cited in the preceding section proceed. The cases now to be considered hold that something more is necessary to raise a presumption of a license on the part of the railway company than the mere fact that the *public habitually cross* the track of the company at a certain place without opposition from the company.<sup>87</sup> In dealing with this question, we must constantly keep in mind the distinction between persons who come upon the railway track *by invitation*, express or implied, and those who come upon it of their own accord. The latter are either trespassers, or bare licensees. As the railway company has not invited them to come, it assumes no special

yard with an unenclosed lumber yard from which a private way used by many persons led to a highway, and there was other evidence tending to show an invitation or inducement to the public to use it, a verdict for the plaintiff for a negligent injury, was sustained: *Hanks v. Boston &c. R. Co.*, *supra*. It was held in the United States Circuit Court by McKennan, J., charging a jury, that, in the absence of any statutory obligation, proper and reasonable warning must be given of the approach of a railway train to a place which, although not a public crossing, is used as a crossing in the course of business, by a number of persons who are at work near the track: *Owens v. Pennsylvania R. Co.*, 41 Fed. Rep. 187.

<sup>83</sup> *McDermott v. New York &c. R. Co.*, 28 Hun (N. Y.) 325.

<sup>84</sup> *Post*, § 1691; *Taylor v. Delaware &c. Canal Co.*, 113 Pa. St. 162; s. c. 57 Am. Rep. 446; *Illinois &c. R. Co. v. Dick* (Ky.), 15 S. W. Rep. 665; s. c. 12 Ky. L. Rep. 772 (no off. rep.).

<sup>85</sup> *Swift v. Staten Island &c. R. Co.*, 123 N. Y. 645; s. c. 25 N. E. Rep. 378; 45 Am. & Eng. Rail. Cas. 180; 33 N. Y. St. Rep. 604.

<sup>86</sup> This section is cited in § 1562.

<sup>87</sup> *Chenery v. Fitchburg R. Co.*, 160 Mass. 211; s. c. 35 N. E. Rep. 554; 22 L. R. A. 575; *Wright v. Boston &c. R. Co.*, 142 Mass. 296; *Young v. Old Colony R. Co.*, 156 Mass. 178; s. c. 30 N. E. Rep. 560; *Atchison &c. R. Co. v. Parsons*, 42 Ill. App. 93; *Illinois &c. R. Co. v. Beard*, 49 Ill. App. 232 (use by the public of steps leading to a freight house platform); *Alabama &c. R. Co. v. Linn*, 103 Ala. 134; s. c. 15 S. W. Rep. 508.



duty of care toward them, beyond that of refraining from inflicting wanton or willful injury upon them, after discovering their exposed situation.<sup>88</sup> As in the case of persons coming upon the premises of other land-owners or occupiers,<sup>89</sup> such trespassers or licensees take the premises as they find them, and accept the dangers incident to the situation, and the railway company is not bound to anticipate their presence where they have no right to be, and to maintain a lookout to discover them, or to sound a warning in anticipation of their being there, when they are not known to be there, any more than in the case of those who make use of its track as a highway.<sup>90</sup> It has been reasoned that an implied invitation or license to the public to cross a railroad track at a certain place, can arise only from such appearances or circumstances as would lead ordinarily prudent and intelligent persons to understand that the crossing *was public*.<sup>91</sup>

§ 1564. **Necessity of Giving Signals at Farm or Private Crossings.**<sup>92</sup>—A railroad company is not generally under the obligation of giving signals or slackening the speed of its trains on approaching farm or private crossings.<sup>93</sup> But, although the statute requiring the giving of signals at crossings may not apply to *farm crossings*,<sup>94</sup> yet the duty of exercising reasonable care may require the giving of some warning at farm crossings, when they are peculiarly dangerous and when the train is approaching at great speed.<sup>95</sup>

<sup>88</sup> *Post*, § 1705; Vol. I, § 946; *et seq.*; *Wright v. Boston & C. R. Co.*, 142 Mass. 296; *Johnson v. Boston & C. Railroad*, 125 Mass. 75; *Wright v. Boston & C. Railroad*, 129 Mass. 440; *Morrissey v. Eastern Railroad*, 126 Mass. 377; *Atchison & C. R. Co. v. Parsons*, 42 Ill. App. 93.

<sup>89</sup> Vol. I, § 946, *et seq.*

<sup>90</sup> *Post*, § 1705.

<sup>91</sup> *Chenery v. Fitchburg R. Co.*, 160 Mass. 211; s. c. 35 N. E. Rep. 554; 22 L. R. A. 575.

<sup>92</sup> This section is cited in §§ 1562, 1566.

<sup>93</sup> *Ante*, § 1562; *Louisville & C. R. Co. v. Survant*, 44 S. W. Rep. 88; s. c. 19 Ky. L. Rep. 1576 (not to be rep.); *Houston & C. R. Co. v. Boozer*, 70 Tex. 530; *Annapolis & C. R. Co. v. Pumphrey*, 72 Md. 82; *Gurley v. Missouri & C. R. Co.*, 104 Mo. 211; *New Brunswick R. Co. v. Vanwart*, 17 Can. S. C. 35; *rev'g s. c. sub nom. Vanwart v. New Brunswick R. Co.*, 27 N. B. 59; *Sanborn v. Detroit & C. R. Co.*, 91 Mich. 538; s. c. 16 L. R.

A. 119; *Schindler v. Milwaukee & C. R. Co.*, 87 Mich. 400; *Johnson v. Louisville & C. R. Co.*, 91 Ky. 651; *Burk v. Delaware & C. Canal Co.*, 86 Hun (N. Y.) 519. *Contra*, see *Westaway v. Chicago & C. R. Co.*, 56 Minn. 28; *Chicago & C. R. Co. v. Metcalf*, 44 Neb. 44; s. c. 28 L. R. A. 824.

<sup>94</sup> *Post*, § 1565.

<sup>95</sup> *Czech v. Great Northern R. Co.*, 68 Minn. 38; s. c. 38 L. R. A. 302; 70 N. W. Rep. 791; 7 Am. & Eng. Rail. Cas. (N. S.) 374. See also *Nash v. New York & C. R. Co.*, 51 Hun (N. Y.) 594; *Owens v. Pennsylvania R. Co.*, 41 Fed. Rep. 187; *Cranston v. New York & C. R. Co.*, 32 N. Y. St. Rep. 592. A farm crossing is not a "*travelled road or street*," within the meaning of a statute requiring the bell or whistle of a locomotive to be sounded where a railway crosses such road or street: *Czech v. Great Northern R. Co.*, 68 Minn. 38; s. c. 38 L. R. A. 302; 70 N. W. Rep. 791; 7 Am. & Eng. Rail. Cas. (N. S.) 374.



§ 1565. **Circumstances under which Signals Need not be Given at Private Crossings.**<sup>96</sup>—We now come to a class of decisions which seem to proceed upon the implication that railway companies are under no duty to give signals at private crossings, where their governing statutes require them to give signals at *public* crossings, without mentioning private ones.<sup>97</sup>

§ 1566. **What Constitutes a Public Road or Street with Reference to the Statutory Duty of Giving Signals.**—Under a statute of Georgia,<sup>98</sup> the omission to blow the whistle and check the speed of the train on approaching a crossing over a road which, though used to a greater or less extent by the public, has *never been legally established* as a road, is not negligence *per se*,<sup>99</sup> though it is plain that it may be *evidence of negligence* to go to a jury, under principles already considered.<sup>100</sup> The term “*any other road*” in such a statute,<sup>101</sup> has been construed as referring to public highways only, and not to private crossings.<sup>102</sup> A road which is openly and notoriously used as a highway, and which has been recognized by the railroad company as such, by *planking* and maintaining it as a *public crossing*, is within the meaning and operation of a statute<sup>103</sup> requiring the whistle to be sounded or the bell rung on the approach of a train to a “travelled public road or street.” It is not necessary in order to make a highway such as the statute intends, that there should be a technical, absolute public right acquired by prescription or otherwise.<sup>104</sup> In the same State, it has been conceded that a public crossing over a railway may be established by a sufficiently *long user*, so as to put the railway company under the statutory duty of giving signals when its trains approach it.<sup>105</sup> But the same court has held that, for a railway com-

<sup>96</sup> This section is cited in § 1564.

<sup>97</sup> Philadelphia &c. R. Co. v. Fronk, 67 Md. 339; s. c. 9 Cent. Rep. 64; 10 Atl. Rep. 307; Annapolis &c. R. Co. v. Pumphrey, 72 Md. 82; 42 Am. & Eng. Rail. Cas. 599; 19 Atl. Rep. 8; Johnson v. Louisville &c. R. Co., 91 Ky. 651; s. c. 25 S. W. Rep. 754; New Brunswick R. Co. v. Vanwart, 17 Can. S. C. 35; reversing Vanwart v. New Brunswick R. Co., 27 N. B. 59; Spicer v. Chesapeake &c. R. Co., 34 W. Va. 514; s. c. 11 L. R. A. 385; 45 Am. & Eng. Rail. Cas. 28; 12 S. E. Rep. 553; Austin &c. R. Co. v. Saunders (Tex. Civ. App.), 26 S. W. Rep. 128; Woodyard v. Kentucky &c. R. Co. (Ky.), 12 Ky. L. Rep. 800; 15 S. W. Rep. 178 (not to be off. rep.) (no duty to give signals to trespasser walking in cut fifteen feet

deep, where no crossing of any kind); Czech v. Great Northern R. Co., 68 Minn. 38; s. c. 38 L. R. A. 302; 70 N. W. Rep. 791; 7 Am. & Eng. Rail. Cas. (N. S.) 374.

<sup>98</sup> Georgia Code, § 708.

<sup>99</sup> Comer v. Shaw, 98 Ga. 543; s. c. 25 S. E. Rep. 733.

<sup>100</sup> Ante, §§ 1562, 1564.

<sup>101</sup> Dak. Comp. Laws 1887, § 3116.

<sup>102</sup> Reynolds v. Great Northern R. Co., 69 Fed. Rep. 808; s. c. 29 L. R. A. 695; 32 U. S. App. 577; 16 C. C. A. 435.

<sup>103</sup> Rev. Stat. Mo. 1889, § 2608.

<sup>104</sup> Russell v. Atchison &c. R. Co., 70 Mo. App. 88.

<sup>105</sup> Easley v. Missouri &c. R. Co., 113 Mo. 236; s. c. 20 S. W. Rep. 1073.



pany merely to permit the public to use a crossing within a *switch-yard*, does not make it a public road or street crossing, within a statute requiring signals to be given.<sup>106</sup> A way provided by a railway company over its own grounds to its depot, has been held not to be a "*travelled public road*," within the meaning of the same statute;<sup>107</sup> but this seems untenable. On the other hand, evidence that a public road has been worked and travelled from ten to fifteen years has been held sufficient to show that it is a "*travelled public road*" within the meaning of the same statute.<sup>108</sup> A statute of another State requiring such signals at "*public highways*"<sup>109</sup> is not limited to roads which are defined to be public highways in another statute of the same State,<sup>110</sup> but includes a highway which is made public *by general use*.<sup>111</sup> Under a statute requiring signals to be given upon approaching "the place where the railroad shall cross any travelled public road or street,"—it is held that the road or street must be *travelled*, as well as *public*: it is not sufficient that there has been a mere *dedication* of the road or street to the public use.<sup>112</sup> A statute of the kind under consideration, which uses the word "public" as descriptive of the roads at which the stated precautions are required, is not to be restrained to roads which are laid out and established as public roads in the statutory manner, but applies equally to roads which have been *dedicated* by mere acts *in pais* by land-owners to the use of the public, provided the extent of travel upon them makes them public roads *in point of fact*.<sup>113</sup> A statute requiring signals to be given by the engineer in charge of the train when approaching the place where the railway track crosses "any public highway, or street, or travelled place,"<sup>114</sup> is erroneously, the writer thinks, restrained to such places as the public use for crossing by legal right; so that the failure to give signals at other places is

<sup>106</sup> *Gurley v. Missouri &c. R. Co.*, 104 Mo. 211; s. c. 16 S. W. Rep. 11; construing Rev. Stat. Mo. 1889, § 2608.

<sup>107</sup> *Bauer v. Kansas &c. R. Co.*, 69 Mo. 219.

<sup>108</sup> *State v. St. Joseph &c. R. Co.*, 46 Mo. App. 466.

<sup>109</sup> Rev. Stat. Ill., ch. 114, § 68.

<sup>110</sup> Rev. Stat. Ill., ch. 121, § 1.

<sup>111</sup> *Chicago &c. R. Co. v. Dillon*, 24 Ill. App. 203; s. c. aff'd on other grounds, 123 Ill. 570; s. c. 13 West. Rep. 286; 15 N. E. Rep. 181.

<sup>112</sup> *Byrne v. New York &c. R. Co.*, 94 N. Y. 12; reversing s. c. 28 Hun (N. Y.) 438. But it has been held in the same State that the fact that

a street had been *discontinued* by a resolution of the Commissioners of Highways, but not practically closed, will not relieve a railroad company from the statutory duty of giving warning, upon the approach of trains at a crossing on such street, where the discontinuance was conditional upon such company's opening another road and preparing it for travel, and the street was still used by the public because the condition had not been fulfilled: *Rodrian v. New York &c. R. Co.*, 28 N. Y. St. Rep. 625; 7 N. Y. Supp. 811.

<sup>113</sup> *Missouri &c. R. Co. v. Lee*, 70 Tex. 496; s. c. 7 S. W. Rep. 857.

<sup>114</sup> Gen. Stat. South Car., § 1483.



not imputable to the company as negligence.<sup>115</sup> Under this construction of the statute, the mere fact that all persons desiring to do so have been accustomed to use a certain *foot-path* at a crossing, with the company's knowledge and acquiescence, is not sufficient to establish a legal right to cross at that point.<sup>116</sup>

§ 1567. **Duty to Give Signals at Overhead Crossings.**—One court has said that "all the statutory regulations and liability on the subject of railroad crossings apply only to such as are constructed at even grade with the highway, and none of them are applicable to the crossings constructed above or below the highway."<sup>117</sup> But the language above quoted may well be challenged as being too sweeping. We have already noticed decisions to the effect that the statutory obligation of giving signals extends to the protection of a traveller driving parallel with the railway track, to the end that he may secure his horse from taking *fright*.<sup>118</sup> And it should seem that, in the absence of words expressive of a different intent, such a statute might well be construed as extending to the protection of travellers from the consequences of their *horses taking fright* on approaching a crossing which is constructed either above or below the railway track.<sup>119</sup> Other courts hold that the statutory obligation of giving warning signals from the locomotive, such as the ringing of the bell or the sounding of the steam whistle, has no application to cases where the railway passes above or below a highway, so that there is no danger of a collision.<sup>120</sup> In every case the solution of the question must depend upon the terms of the statute. A statute of Ohio,<sup>121</sup> providing that, in approaching a turnpike, highway, or town-road crossing upon the same level with the railroad, and in like manner when the road crosses any other travelled place by bridge or otherwise, the engineer shall sound the whistle and ring the bell, has been construed as requiring the company to sound the whistle and ring the bell on approaching a highway which crosses the railway *by a bridge* or otherwise.<sup>122</sup> The requirement of the Illinois statute, as to ringing the bell or sounding the

<sup>115</sup> *Barber v. Richmond &c. R. Co.*, 34 S. C. 444; s. c. 13 S. E. Rep. 630.

<sup>116</sup> *Hankinson v. Charlotte &c. R. Co.*, 41 S. C. 1; s. c. 19 S. E. Rep. 206.

<sup>117</sup> *Jenson v. Chicago &c. R. Co.*, 86 Wis. 589, 593; s. c. 57 N. W. Rep. 359; 22 L. R. A. 680, opinion by Orton, J.; *Missouri &c. R. Co. v. Thomas*, 87 Tex. 282; *Barron v. Chicago &c. R. Co.*, 89 Wis. 79; *Blanchard v. Lake Shore &c. R. Co.*, 126 Ill. 425.

<sup>118</sup> *Ante*, §§ 1560, 1561.

<sup>119</sup> *People v. New York &c. R. Co.*, 13 N. Y. 78.

<sup>120</sup> *McElroy v. Georgia &c. R. Co.*, 98 Ga. 257; s. c. 25 S. E. Rep. 439; *Cleveland &c. R. Co. v. Halbert*, 179 Ill. 196; s. c. 53 N. E. Rep. 623; *rever'g s. c.* 75 Ill. App. 592.

<sup>121</sup> *Rev. Stat. Ohio*, § 3336.

<sup>122</sup> *Toledo &c. R. Co. v. Jump*, 50 Ohio St. 651; s. c. 31 Ohio L. J. 26; 35 N. E. Rep. 1054.



whistle when an engine approaches a public crossing, does not apply where the place of crossing consists of a bridge so far above the tracks as to preclude all danger of collision; but the failure to give such signal may, in connection with other facts and circumstances, be considered in determining the question whether the company complied with the duty resting upon it *at common law*.<sup>123</sup>

§ 1568. **Duty to Give Signal before Starting Train at or near Crossings.**<sup>124</sup>—It is a sound conclusion that it is the duty of the engineer in charge of a train *standing still*, before starting his engine across a street, not only to give timely warning of his intention, but also to see whether his train will not be likely to strike a traveller or frighten his horses.<sup>125</sup> It is also a just conclusion that where a railway company stops a train upon a public crossing, leaving an *opening* sufficiently wide for travellers to pass through, it is bound, before moving the cars so as to close the opening, to ring the bell or sound the whistle, although it is under no statutory duty so to do; and that at least its failure so to do is evidence of negligence to be considered by the jury.<sup>126</sup> And the same rule has been applied where a train has been stopped across a public street for a greater length of time than permitted by a city ordinance, without being uncoupled, and a boy, following the example of others, attempts to pass through it, when the train starts without warning and injures him.<sup>127</sup>

§ 1569. **Duty to Give Warning before Starting Trains which have been Standing upon or near Crossings.**<sup>128</sup>—Where a railway train has stopped upon or near a public highway crossing, the duty of giving warning before starting is obvious.<sup>129</sup> This is especially so where the train has obstructed the crossing for an unreasonable length of time, and where persons, and especially children, may inadvertently attempt to crawl through.<sup>130</sup> For example, it has been held that a railway company is negligent in *leaving a freight train standing* across

<sup>123</sup> Cleveland &c. R. Co. v. Halbert, 179 Ill. 196; s. c. 53 N. E. Rep. 623; rev'g s. c. 75 Ill. App. 592.

<sup>124</sup> This section is cited in §§ 1597, 1608.

<sup>125</sup> Texas &c. R. Co. v. Lowery, 61 Tex. 149; *post*, § 1578.

<sup>126</sup> Schmitz v. St. Louis &c. R. Co., 119 Mo. 256; s. c. 23 L. R. A. 250; 24 S. W. Rep. 472; *post*, §§ 1678, 1693.

<sup>127</sup> Burger v. Missouri &c. R. Co., 112 Mo. 238.

<sup>128</sup> This section is cited in § 1597.

<sup>129</sup> Schmitz v. St. Louis &c. R. Co.,

119 Mo. 256; s. c. 23 L. R. A. 250; Cleveland &c. R. Co. v. Keely, 138 Ind. 600; Wilkins v. St. Louis &c. R. Co., 101 Mo. 93; Burger v. Missouri &c. R. Co., 112 Mo. 238; s. c. 20 S. W. Rep. 439.

<sup>130</sup> Whether negligence to move a train after it has *stood* longer than the statutory period of five minutes *across a public street*, without giving timely warning of an intention to do so, is a question *for the jury*: Lake Erie &c. R. Co. v. Mackey, 53 Ohio St. 370; s. c. 29 L. R. A. 757; 34 Ohio L. J. 259; 41 N. E. Rep. 980.



a public street for more than fifteen minutes, *without a watchman* to warn persons of the danger of attempting to cross by climbing over the drawheads of the cars.<sup>131</sup>

§ 1570. **Duty to Give Warning Signals in Case of Children.**<sup>132</sup>—Children have the right to be upon the highway as well as adults,<sup>133</sup> and the duty of giving warning signals by the use of the locomotive bell or whistle, on the approach of an engine or train to a railroad crossing, has been held to exist even in the case of an infant of such tender years as not to understand the meaning of the signal.<sup>134</sup> But at places other than highway crossings, the railway company is not under an obligation to provide specially for the safety of children or other *trespassers* coming upon its tracks, but they assume the risks of the dangers, subject only to the exception that the company is not to do them any willful or wanton injury;<sup>135</sup> and statutes requiring the giving of signals at highway crossings can not be invoked by such a trespasser or intruder.<sup>136</sup>

§ 1571. **Duty to Give Warning Signals where Trains are Backing.**—The danger to the public at crossings or other places where the public have a right to be in common with the railway company, of backing its cars without having a man standing on the foremost car to look out, to give warnings to the engineer and to the endangered traveller, and to apply the brake, is so obvious as not to require discussion.<sup>137</sup> A railway company, backing a train across a public street or highway *in the dark*, is bound to give warning of its approach, especially where another train is passing over the same crossing on another track at the same time, and in the same direction.<sup>138</sup> Where

<sup>131</sup> *San Antonio &c. R. Co. v. Bergsland*, 12 Tex. Civ. App. 97; s. c. 3 Am. & Eng. Rail. Cas. (N. S.) 304; 34 S. W. Rep. 155, 157. A railroad train *standing across a street* is within a statute (1 Rev. Stat. S. C., p. 576, § 1685), requiring that the bell be rung or the whistle sounded for at least thirty seconds before a train which is at a standstill less than one hundred rods from a crossing shall be moved: *Littlejohn v. Richmond &c. R. Co.*, 45 S. C. 181; s. c. 22 S. E. Rep. 789.

<sup>132</sup> This section is cited in § 1492.

<sup>133</sup> See Vol. I, §§ 324, 325, 326; *ante*, §§ 1432, 1433.

<sup>134</sup> *Palmer v. Missouri &c. R. Co.*, 53 Neb. 611; s. c. 74 N. W. Rep. 66.

<sup>135</sup> *Post*, § 1705, *et seq.*

<sup>136</sup> *Baltimore &c. R. Co. v. Bradford*, 20 Ind. App. 348; s. c. 67 Am. St. Rep. 252; 49 N. E. Rep. 388;

*Metallic &c. Co. v. Fitchburg R. Co.*, 109 Mass. 277; *Toomey v. Southern &c. R. Co.*, 86 Cal. 374; s. c. 10 L. R. A. 139; *Louisville &c. R. Co. v. Howard*, 82 Ky. 212.

<sup>137</sup> Negligence has been ascribed to the act of backing an engine and car across a street in a town at the rate of eight miles an hour without any person on the cars, and without giving any signal of its approach: *Lake Shore &c. R. Co. v. Boyts*, 16 Ind. App. 640; s. c. 45 N. E. Rep. 812.

<sup>138</sup> *Chicago &c. R. Co. v. Walsh*, 157 Ill. 672; s. c. 41 N. E. Rep. 900. See also *Missouri &c. R. Co. v. O'Connell* (Tex. Civ. App.), 43 S. W. Rep. 66 (no off. rep.); *Hoye v. Chicago &c. R. Co.*, 67 Wis. 1 (presents a question of negligence for the jury).



the public are in the habit of going around trains, at or near highway crossings, and those in the management of a train know that such is the practice, they are bound to move the train with reference to it, and to give proper signals when starting, and to have some one at the end of the train to guard against accident.<sup>139</sup> Numerous municipal ordinances have been enacted enforcing this duty. One of them requires that, in moving cars propelled by steam within the city limits, the bell of the engine shall be constantly sounded, and that, if any car, cars, or locomotives be backed within the city limits, a man shall be stationed on the top of the car at the end farthest from the engine, to give danger signals. The neglect to use these precautions is *negligence per se*, rendering the company liable in case of death or injury therefrom.<sup>140</sup>

§ 1572. **Duty to Give Warning Signals in Making the "Flying Switch."**—The practice of making the "flying switch," the "running switch," or of "shunting," or "kicking" cars, as it is variously termed, is a source of great danger to railway employes and to other persons on the track, and to persons at public crossings.<sup>141</sup> The danger being very great, the duty of providing means of giving signals, in the case of "shunting" cars, by stationing a man on the foremost car, or otherwise, is obvious, and in the case where this is done across the public highway, imperative. For example, negligence has been ascribed to the failure to give any signal on a train passing a crossing with a detached car following it, and in placing a brakeman on such detached car at its rear end, where he could not see a person going upon the track in front of it.<sup>142</sup> Statutory signals intended to be given by trains approaching crossings, must be given in cases where detached cars are shunted over crossings.<sup>143</sup> Plainly, if a railroad company sees fit to adopt this dangerous method of moving cars, it must exercise it in compliance with the law, or not at all.

<sup>139</sup> *Atchison &c. R. Co. v. Cross*, 58 Kan. 424; s. c. 49 Pac. Rep. 599. Evidence that deceased stopped to allow a train to pass on one of several tracks, and that immediately after the train had passed he stepped on the next track, and was struck and killed by a train which was backing at the rate of seven miles an hour, without any warning being given of its approach,—has been held sufficient to sustain a verdict against the railroad company: *Pennsylvania Co. v. Ellett*, 132 Ill. 654; s. c. 24 N. E. Rep. 559; 42 Am. & Eng. Rail. Cas. 64.

<sup>140</sup> *Bergman v. St. Louis &c. R. Co.*,

88 Mo. 678; s. c. 4 West. Rep. 594; *Eckert v. St. Louis &c. R. Co.*, 13 Mo. App. 352; s. c. 4 West. Rep. 596; *Gass v. Missouri &c. R. Co.*, 57 Mo. App. 574. Circumstances under which a railway company was liable for backing cars upon a boy in the night-time: *Bohan v. Milwaukee &c. R. Co.*, 58 Wis. 30 (Orton, J., dissenting).

<sup>141</sup> See further, as to this practice, *post*, §§ 1695, 1696.

<sup>142</sup> *Bowen v. New York &c. R. Co.*, 89 Hun (N. Y.) 594; s. c. 35 N. Y. Supp. 540; 70 N. Y. St. Rep. 144.

<sup>143</sup> *Baltimore &c. R. Co. v. Wheeler*, 63 Ill. App. 193.



## § 1573. Greater Duty to Give Signals where View Obstructed.—

Where the view is obstructed, so that the train can not be seen by the traveller as it approaches the crossing, the most obvious suggestion of social duty is that those in charge of it should give warning by means of the bell and steam whistle; and their failure to do so is evidence of negligence to go to a jury, sufficient to justify a finding of negligence,<sup>144</sup> and sufficient to warrant the court in giving an instruction to the jury, to the effect that if they find such to be the fact, and find that the plaintiff was injured without fault or negligence on his part, they will return a verdict in his favor;<sup>145</sup> and one court has characterized such an omission, under such circumstances, as *negligence per se*.<sup>146</sup>

## § 1574. Nature of Warnings which are to be Given—Bell, Whistle, or Both.—

With regard to the *nature of the warnings* which are to be given by the approaching train, the principle should be kept in mind that, although the statute law, or a valid municipal ordinance, may prescribe a particular warning at a particular distance,—yet if this proves insufficient for the protection of the travelling public, the railway company is bound—within practical limits, of course—to give such warnings as may be sufficient. It has been pointed out that the negligence of the railway company may as well consist in the insufficiency of the warning as in a failure to give any.<sup>147</sup> The same court has pointed out that it is highly important that the warning of an approaching train shall be given *by the whistle*, and at such point

<sup>144</sup> Beanstrom v. Northern &c. R. Co., 46 Minn. 193; s. c. 48 N. W. Rep. 778; Eilert v. Green Bay &c. R. Co., 48 Wis. 606; Simons v. Southern R. Co., 96 Va. 152; s. c. 12 Am. & Eng. Rail. Cas. (N. S.) 324; 31 S. E. Rep. 7; Willet v. Michigan &c. R. Co., 114 Mich. 411; s. c. 4 Det. L. N. 620; 9 Am. & Eng. Rail. Cas. (N. S.) 18; 72 N. W. Rep. 260.

<sup>145</sup> Funston v. Chicago &c. R. Co., 61 Iowa 452.

<sup>146</sup> Hinkle v. Richmond &c. R. Co., 109 N. C. 472; s. c. 13 S. E. Rep. 884; 11 Rail. & Corp. L. J. 81; 26 Am. St. Rep. 581. A decision which can not be commended, because it proceeds in violation of the principle to which nearly all the courts agree, that the fact that the statute law prescribes certain precautions does not relieve the railway company from using such *other* precautions as may be reasonably necessary for

the public safety (*ante*, §§ 1494, 1555), is to the effect that the presence of a *box-car* near a grade crossing preventing travellers from seeing or hearing an approaching train, and the existence of *fences, buildings, and cars* at and about the crossing, preventing the hearing of signals when the wind is unfavorable, are not sufficient to impose upon the engineer of an approaching train the duty of *keeping the whistle sounding* from the whistling post to the crossing, in addition to the requirement of the statute (Conn. Gen. Stat., § 3554), that the whistle be sounded at the eighty-rod point and the bell rung thereafter until the crossing is passed: Tessmer v. New York &c. R. Co. (Conn.), 44 Atl. Rep. 38.

<sup>147</sup> Chesapeake &c. R. Co. v. Steele, 84 Fed. Rep. 93; s. c. 29 C. C. A. 81; 54 U. S. App. 550.



or points as will most effectually give timely notice to the traveller upon the highway, where the approaches to a grade crossing are through *cuts* so that the traveller has no view of the track, and where the noise of an approaching train and the shriek of its whistle must be much obstructed and muffled.<sup>148</sup> Another court has well held that the ringing of the bell is not, as matter of law, the necessary notice of the approach of a train to a crossing established by mere user, but that, in the discharge of its obligations to persons notoriously in the habit of crossing its track at such a place, the company is bound to give some notice or warning reasonable and proper under the circumstances.<sup>149</sup> The sufficiency of the warning which is given is here, as in other cases, generally a question for the jury.<sup>150</sup> For example, it is a question for the jury whether the ringing of the bell, without blowing the whistle, is a sufficient warning.<sup>151</sup> Many of the statutes relating to this subject are construed as exonerating the railroad company if either the *bell* is rung or the *whistle* is sounded, without requiring the company to do *both*.<sup>152</sup>

§ 1575. Point at which Signals are to be Given—at what Distance from Crossing.—It has been reasoned that it is negligence on the part

<sup>148</sup> Chesapeake & C. R. Co. v. Steele, 84 Fed. Rep. 93; s. c. 29 C. C. A. 81; 54 U. S. App. 550.

<sup>149</sup> Byrne v. New York & C. R. Co., 104 N. Y. 362; s. c. 6 Cent. Rep. 392.

<sup>150</sup> *Ante*, § 1552.

<sup>151</sup> Pennsylvania R. Co. v. Coons, 111 Pa. St. 430; s. c. 2 Cent. Rep. 323. A court can not determine, as matter of law, that a loud, long blast of the whistle of a locomotive for a station signal, sounded 484 yards from a crossing, is a sufficient substitute for the two sharp blasts at a distance of 300 yards required by the statute: Simons v. Southern R. Co., 96 Va. 152; s. c. 12 Am. & Eng. Rail. Cas. (N. S.) 324; 31 S. E. Rep. 7.

<sup>152</sup> Terry v. St. Louis & C. R. Co., 89 Mo. 586; s. c. 6 West. Rep. 445; State v. Chicago & C. R. Co., 19 Mo. App. 104; s. c. 1 West. Rep. 401; Hoover v. Kansas City & C. R. Co., 69 Mo. App. 557; St. Louis & C. R. Co. v. Pflugmacher, 9 Ill. App. 300; Ohio & C. R. Co. v. Reed, 40 Ill. App. 47; Spicer v. Chesapeake & C. R. Co., 34 W. Va. 514; s. c. 11 L. R. A. 385; 45 Am. & Eng. Rail. Cas. 28; 12 S. E. Rep. 553; McCormick v. Kansas City & C. R. Co., 50 Mo. App. 109; Tyler v. Old Colony R. Co., 157

Mass. 336; s. c. 32 N. E. Rep. 227. As the Missouri statute leaves it optional with the railroad company *either* to ring the bell or sound the whistle on approaching a crossing, a complaint which alleges *in one count*, the omission to ring the bell, and in another count the omission to sound the whistle, neither count alleging the *omission of both*, is insufficient,—the theory being that each count must state a sufficient cause of action in itself: Terry v. St. Louis & C. R. Co., 89 Mo. 586; s. c. 6 West. Rep. 445. The Missouri statute contains an exception as to *cities*, having obvious reference to the danger of *frightening the horses of travellers*; but this applies only to the sounding of the steam whistle, and leaves it negligence to omit the ringing of the bell: Coffin v. St. Louis & C. R. Co., 22 Mo. App. 601; s. c. 4 West. Rep. 885. Under the Missouri statute, an instruction that it is the duty of a railroad company to ring the engine bell or sound the whistle *continuously*, for eighty rods before reaching a crossing, is erroneous,—the statute requiring it to be done *at intervals*: Alexander v. Hannibal & C. R. Co., 19 Mo. App. 312; s. c. 1 West. Rep. 440.



of an engineer running a train, to omit to give warning by sounding the whistle at the distance required by the *rules of the company*;<sup>153</sup> but the court does not say that it is negligence on the part of the railroad company, the defendant in the action, but leaves that to be inferred. If so, it must be because the public have fallen into the habit of acting on the faith that the signals required by the rules of the company will be given; for surely the railroad company can not be made liable to a member of the public for the violation of one of its own rules intended for his protection, with which he is not in privity; though the existence of the rule and its violation may be an evidential circumstance bearing upon the question of negligence. The true theory of such a case seems to be that if the company erects a "whistle post" near a public crossing and requires its engineers to sound the steam whistle on reaching that post, and if the public are accustomed to act upon the assumption that this rule will be obeyed,—it will be negligence on the part of the company toward any member of the public injured by reason of its disobedience.<sup>154</sup> Coming now to the *construction of statutes*, we find that it has been held that the failure of a railroad company to sound the whistle three times when not less than eighty rods from a crossing, and to ring the bell continuously from the time of sounding the whistle until the crossing is passed, as required by the Indiana statute, is *negligence per se*, although the whistle is sounded once;<sup>155</sup> that a statute<sup>156</sup> requiring a bell or whistle to be sounded at a distance of at least eighty rods from a highway crossing, and to be kept ringing or whistling until the crossing is reached, applies to trains which start from a point less than eighty rods distant from a crossing;<sup>157</sup> that to sound the whistle at a point four hundred feet *beyond* the whistling post, located eighty rods from a crossing, does not excuse a railroad company for neglecting to sound it at the post or between that and the crossing, as required by another statute,<sup>158</sup> although the bell is continuously rung from the post to the crossing;<sup>159</sup> that a place containing forty or fifty dwelling-houses scattered along a railroad track is a "*village*," within the meaning of a statute<sup>160</sup> requiring the engineer of a railway train to ring the bell on entering into, or while moving within, or passing through, any village;<sup>161</sup> that the duty of ringing the bell and sounding the whistle

<sup>153</sup> Brown v. Texas &c. R. Co., 42 La. An. 350; s. c. 7 South. Rep. 682.

<sup>154</sup> Hinkle v. Richmond &c. R. Co., 109 N. C. 472; s. c. 11 Rail. & Corp. L. J. 81; 13 S. E. Rep. 884; 26 Am. St. Rep. 581.

<sup>155</sup> Pittsburgh &c. R. Co. v. Burton, 139 Ind. 357; s. c. 37 N. E. Rep. 150.

<sup>156</sup> Starr & C. Ill. Stat., ch. 114, § 68.

<sup>157</sup> Lake Shore &c. R. Co. v. Johnson, 135 Ill. 641; s. c. 26 N. E. Rep. 510; aff'g s. c. 35 Ill. App. 430.

<sup>158</sup> Gen. Stat. Conn., § 3554.

<sup>159</sup> Bates v. New York &c. R. Co., 60 Conn. 259; s. c. 22 Atl. Rep. 528.

<sup>160</sup> Code Ala., § 1144.

<sup>161</sup> Alabama &c. R. Co. v. Linn, 103 Ala. 134; s. c. 15 South. Rep. 508.



at a street crossing imposed by another statute,<sup>162</sup> ceases as soon as the locomotive has passed the crossing;<sup>163</sup> that a statute requiring the locomotive whistle to be sounded eighty rods *before* reaching a crossing, does not prohibit the railway company from stopping the locomotive and moving it in the opposite direction after the crossing has been *passed*, and before reaching a point eighty rods beyond it.<sup>164</sup>

§ 1576. Further of the Places at which Signals are to be Given.—

A statute of Kansas<sup>165</sup> requiring the steam whistle to be "sounded three times, at least eighty rods from the place where the railroad shall cross any public road or street, except in cities and villages,"—has been construed as exonerating the railroad company from the imputation of negligence in not giving such a signal within the limits of a city.<sup>166</sup> But it is submitted, for reasons already given,<sup>167</sup> that such a statute ought not to be construed as abrogating the common law, or as exonerating the railroad company from giving signals which may be reasonably required for the public safety, although not within the requirements of the statute. The Illinois statute,<sup>168</sup> requiring the bell to be rung or the whistle to be sounded by a locomotive, at least eighty rods from every highway crossing, applies to streets within the limits of incorporated *cities and villages*.<sup>169</sup> The Mississippi statute,<sup>170</sup> providing that a bell shall be rung or whistle blown three hundred yards from the crossing of a railroad by a highway, does not apply to *streets in towns*.<sup>171</sup> A statute of Texas<sup>172</sup> requiring the whistle to be blown or the bell to be rung when the locomotive is within at least eighty rods of the crossing of a public road or street, does not apply to the case where *two railroads cross each other*, but in such a case the train must be brought to a full stop.<sup>173</sup>

<sup>162</sup> Rev. Stat. Mo. 1879, § 806.

<sup>163</sup> Therefore, where the plaintiff, being on a railroad track *beyond* a crossing, was injured by a train, an instruction to the jury that, if no bell was rung or whistle blown, they may infer negligence, and render a verdict accordingly, is erroneous, as the ringing of the bell and blowing of the whistle are only required at crossings, and not beyond them: *Zimmerman v. Hannibal & C. R. Co.*, 71 Mo. 476.

<sup>164</sup> *Cohoon v. Chicago & C. R. Co.*, 85 Wis. 570; s. c. 55 N. W. Rep. 900.

<sup>165</sup> Kan. Comp. L. 1879, ch. 23, § 60.

<sup>166</sup> *Missouri & C. R. Co. v. Pierce*, 33 Kan. 61.

<sup>167</sup> *Ante*, §§ 1494, 1555.

<sup>168</sup> *Starr & C. Ill. Stat.*, ch. 114, § 68; *Id.*, ch. 131, § 1.

<sup>169</sup> *Mobile & C. R. Co. v. Davis*, 31 Ill. App. 490; *Mobile & C. R. Co. v. Davis*, 130 Ill. 146; s. c. 42 Am. & Eng. Rail. Cas. 70; 22 N. E. Rep. 850; rev'g s. c. 24 Ill. App. 250.

<sup>170</sup> *Miss. Code*, § 1047.

<sup>171</sup> *Louisville & C. R. Co. v. French*, 69 Miss. 121; s. c. 12 South. Rep. 338.

<sup>172</sup> *Rev. Stat. Tex.*, art. 4232.

<sup>173</sup> *Gulf & C. R. Co. v. York*, 74 Tex. 364; s. c. 12 S. W. Rep. 68. In New York, where a railroad crossed a street in the city of Troy almost at grade, and, about forty feet beyond such street, crossed a *private way* used by the public as a driveway, to the knowledge both of its owner and the employés of the railroad,



§ 1577. **What will not Excuse the Failure to Perform the Statutory Duty of Giving Signals.**—Upon the question what will excuse a failure to comply with the statutory duty of ringing the bell or sounding the whistle on approaching a highway crossing, it has been held that it is not excused by the fact that the engineer is engaged in *arranging the air pumps* at the time, in the absence of any sudden or unexpected emergency requiring him to be so engaged.<sup>174</sup> The continuous ringing of the bell of a locomotive before the crossing of a public road or street, required by the Missouri statute<sup>175</sup> to be begun when the engine is eighty rods from the crossing, is a duty the failure to comply with which is not excused by the fact that the engine starts towards the crossing which it is about to traverse, from a point less than eighty rods from it.<sup>176</sup>

§ 1578. **Liability for Frightening Travellers' Horses by Giving the Statutory Signals and by Failing to Give Them.**<sup>177</sup>—The decisions on this head are quite inconsistent, and place the railroad company in a position where "there is nor flying hence, nor tarrying here." As

it was held that the statutory signal must be given eighty rods from the crossing of the private way: *Cranston v. New York & C. R. Co.*, 32 N. Y. St. Rep. 592; s. c. 11 N. Y. Supp. 215. The ringing of a bell or the blowing of a whistle at a distance of eighty rods from a railroad crossing, without continuing to ring the bell until the crossing is passed, is not a compliance with the Texas Act of 1883, p. 28, requiring the use of *both* at that distance, and the continuous ringing of the bell until the crossing is passed: *Galveston & C. R. Co. v. Duelin* (Tex. Civ. App.), 23 S. W. Rep. 596; 24 S. W. Rep. 334; s. c. aff'd 86 Tex. 450; s. c. 25 S. W. Rep. 406. But it has been held that blowing a whistle at least eighty rods before a crossing is reached, without continuing to blow it, if the bell continues to ring until the crossing is passed, is a sufficient compliance with Tex. Rev. Stat., art. 4232, providing that the whistle shall be blown or the bell rung at a distance of at least eighty rods from a crossing, "and that such bell shall be kept ringing until it shall have crossed such public road or stopped": *Missouri & C. R. Co. v. Kirschoffer* (Tex. Civ. App.), 24 S. W. Rep. 577 (no off. rep.). Under the Missouri statute (Mo. Rev. Stat., § 2608), requiring the whistle to be

sounded at least eighty rods from the crossing, and at intervals until the crossing is passed, the railroad company is not required to "*continue*" sounding the whistle until the engine has passed the crossing: *Kirkpatrick v. Missouri & C. R. Co.*, 71 Mo. App. 263. Under a statute of Texas (Rev. Stat. Tex. 1895, art. 4507), requiring the whistle to be blown at a distance of at least eighty rods from the place of crossing, it need not be blown when "*within*" eighty rods from the crossing: *Houston & C. R. Co. v. O'Neal*, 91 Tex. 671; s. c. 47 S. W. Rep. 95; rev'g 45 S. W. Rep. 921. Construction of the statute of Kentucky (Ky. Stat., § 786), with the conclusion that the required signal must be given within fifty rods of every crossing outside the town or city limits, whether the engine, when it arrives at the fifty-rod limit, is inside or outside the limits of the *city or town*: *Illinois & C. R. Co. v. Commonwealth* (Ky.), 56 S. W. Rep. 409.

<sup>174</sup> *Petrie v. Columbia & C. R. Co.*, 29 S. C. 303; s. c. 7 S. E. Rep. 515.

<sup>175</sup> Mo. Rev. Stat. 1889, § 2668.

<sup>176</sup> *Herring v. Wabash R. Co.*, 80 Mo. App. 562; s. c. 2 Mo. App. Rep. 707.

<sup>177</sup> This section is cited in §§ 1561, 1568, 1586.



elsewhere seen,<sup>178</sup> a railroad company is not liable in damages for operating its road in the usual and proper way and with reasonable care, although the horses of travellers are frightened thereby. In compliance with this theory it has been held by one court that the sounding of a whistle by an engineer when he first sees a team on the track is proper, though the horse be thereby frightened and contributes to the injury, which follows;<sup>179</sup> and, by another court, that negligence can not be predicated, as matter of law, upon the act of a railroad company in sounding its whistle at a crossing where the railroad passes *above* a highway, in the absence of any showing that the whistling was unnecessary;<sup>180</sup> and, manifestly, in the absence of statutory direction, it will generally be a *question for the jury* as to what is a reasonable use, by a railroad company, of bell or whistle, in the operation of its trains, where horses have been frightened thereby.<sup>181</sup> On the other hand, the railroad company is, by many statutes and ordinances, required, under a penalty, to ring its bell and blow its steam whistle on approaching every highway or street crossing a certain distance away, and to keep ringing or blowing at frequent intervals until the train passes the crossing. A railroad company which fails to comply with this statutory duty, whereby the approaching travellers are warned in time to take the necessary precautions to prevent accidents from their horses taking fright, becomes liable for the resulting damages, in the absence of contributory negligence on the part of the traveller.<sup>182</sup> For example, a railroad company failing to comply with a statutory duty to ring a bell when approaching a highway crossing, is liable for injuries from a horse taking fright at the approach of a train and throwing the occupants of the carriage over a dangerous embankment left by the depression of its track below the level of the highway, although there was no contact between the train and the carriage.<sup>183</sup> In the view of another court, this is so, although the traveller is not approaching the crossing, but is travelling on the highway parallel with the railway track,—the view being that the purpose of the statute requiring the warnings to be given, is not restrained to avoiding collisions upon the crossing.<sup>184</sup> Statutes also exist,<sup>185</sup> providing that, within town limits, the steam whistle need not be blown at road crossings, but that the locomotive bell shall be

<sup>178</sup> *Ante*, § 1417, *et seq.*; *post*, § 1908.

<sup>179</sup> *Schaefer v. Chicago & C. R. Co.*, 62 Iowa 624.

<sup>180</sup> *Cincinnati & C. R. Co. v. Gaines*, 104 Ind. 526; s. c. 54 Am. Rep. 334.

<sup>181</sup> *Southern R. Co. v. Torian*, 95 Va. 453; s. c. 28 S. E. Rep. 569.

<sup>182</sup> *Pollock v. Eastern R. Co.*, 124 Mass. 158; *Prescott v. Eastern R.*

*Co.*, 113 Mass. 370, note; *Texas & C. R. Co. v. Chapman*, 57 Tex. 75; *Voak v. Northern & C. R. Co.*, 75 N. Y. 320.

<sup>183</sup> *Grand Trunk R. Co. v. Sibbald*, 20 Can. S. C. 259.

<sup>184</sup> *Ransom v. Chicago & C. R. Co.*, 62 Wis. 178; s. c. 51 Am. Rep. 718.

Compare *ante*, §§ 1560, 1561, 1562.  
<sup>185</sup> Ga. Code, § 710.



sounded instead. If, in violation of such a statute, the engineer blows the whistle, frightening a horse, the railroad company will be liable for the damages.<sup>186</sup> But this does not render it unlawful to use the steam whistle in making the appropriate signals to the switchman, within town limits, as a warning to adjust the switches.<sup>187</sup> So, where the statute directs that, under certain circumstances, the locomotive bell shall be rung and the whistle sounded, except that the requirement as to the sounding of the whistle shall not apply to street crossings, this, while not prohibiting the sounding of locomotive whistles within the limits of a city, leaves a *question for a jury* under a proper state of the evidence, whether the privilege was abused by sounding the whistle unnecessarily, or with undue frequency, whereby the horses of a traveller were frightened.<sup>188</sup> On the other hand, where a traveller who is run over at a city crossing predicates his action for damages upon the failure of the railroad company to ring its bell or sound its whistle as the train approaches the crossing, the defendant may produce in evidence a city ordinance prohibiting the use of the whistle, and the ringing of bells on engines while passing through the city, and it will be error to exclude it.<sup>189</sup> If the railroad company, in executing its privilege and duty of giving a warning by the use of its steam whistle on approaching a highway crossing, acts outside of its implied right by sounding its whistle *with unnecessary frequency*, or in a manner which, while not necessary to warn travellers at the crossing, has a tendency to frighten ordinarily gentle horses, this will be imputed to it as negligence.<sup>190</sup>

<sup>186</sup> Georgia R. Co. v. Carr, 73 Ga. 557.

<sup>187</sup> Akridge v. Atlanta &c. R. Co., 90 Ga. 232; s. c. 16 S. E. Rep. 81.

<sup>188</sup> Mayer v. New York &c. R. Co., 55 Hun (N. Y.) 608; s. c. 29 N. Y. St. Rep. 183; 8 N. Y. Supp. 461.

<sup>189</sup> Pennsylvania Co. v. Hensil, 70 Ind. 569; s. c. 36 Am. Rep. 188.

<sup>190</sup> Phila. &c. R. Co. v. Killip, 7 Reporter 440; Phila. &c. R. Co. v. Stinger, 78 Pa. St. 219; s. c. 2 Cent. L. J. 555; Pennsylvania R. Co. v. Barnett, 59 Pa. St. 259. In the case of *Pennsylvania Railroad Company v. Ogier* (35 Pa. St. 71), it appeared that there was a point on the highway from which the deceased might have seen six hundred and twenty-three feet along the railway in the direction in which the train was approaching, and might have stopped the progress of his horse and es-

caped danger. "But," says Thompson, J., "there were other considerations to be taken into account here. If there was no notice by blowing the whistle, a thing required to be done before reaching the point, and usually done, a traveller accustomed to expect this would not only not be so likely to look out for danger, or be in such preparedness to avoid it, as he otherwise might have been, and this without any culpable negligence on his part. For if, by the negligence or omission of those in charge of the train, his vigilance was allayed, they are not at liberty to impute the consequence of their acts to his want of vigilance, a quality of which they have deprived him." Under a statute requiring *either* the whistle to be sounded or the bell to be rung in case of a train approaching a public crossing, the



§ 1579. **Effect of the Failure to Give Signals upon the Question of Contributory Negligence.**<sup>191</sup>—While the failure of the railway company to give reasonable or statutory signals on approaching a highway crossing will not, in the absence of statutes creating a different rule,<sup>192</sup> charge it with liability in case of the contributory negligence of the traveller,<sup>193</sup>—yet it will have an important bearing<sup>194</sup> in the decision of the question whether or not he has been guilty of contributory negligence.<sup>195</sup>

§ 1580. **Question of Contributory Negligence Continued.**—In order to deal fairly with this question, it ought to be borne in mind that where a railway and an ordinary highway intersect, both the railway company and the ordinary traveller have a right to cross; that, while the railway company has an undoubted right of precedence at the

ringing of the bell should be substituted for the further blowing of the whistle, after it becomes apparent to the servants in charge of the engine that a team on the highway has become frightened: *Louisville &c. R. Co. v. Smith* (Ky.), 53 S. W. Rep. 269. But this duty does not arise until the horses are seen by those in charge of the engine in a condition of fright. The fact that the persons in charge of an engine might, by the exercise of ordinary care, have discovered that a team on a highway parallel with the railroad had become frightened by the sounding of the whistle for a crossing, does not make the company liable for injuries resulting from the failure to substitute the ringing of the bell for the further blowing of the whistle, there being no duty to keep a lookout on the highway: *Louisville &c. R. Co. v. Smith*, *supra*.

<sup>191</sup> This section is cited in § 1606.

<sup>192</sup> Under the Tenn. Stat. (T. & S. Code, §§ 1166–1168; Mill & V. Code, §§ 1298–1300), the contributory negligence of the person injured will not defeat a recovery, but will go in *mitigation of damages*: *Railway Co. v. Howard*, 90 Tenn. 144; s. c. 19 S. W. Rep. 116; *Western &c. R. Co. v. Roberson*, 61 Fed. Rep. 592.

<sup>193</sup> *Williams v. Chicago &c. R. Co.*, 64 Wis. 1; *Krauss v. Walkill &c. R. Co.*, 69 Hun (N. Y.) 482; s. c. 52 N. Y. St. Rep. 838; 23 N. Y. Supp. 432; *Chicago &c. R. Co. v. Crisman*, 19 Colo. 30; s. c. 34 Pac. Rep. 286; *Chicago &c. R. Co. v. Nuney*, 19 Colo.

36; s. c. 34 Pac. Rep. 288; *Horn v. Baltimore &c. R. Co.*, 54 Fed. Rep. 301; *Lindeman v. New York &c. R. Co.*, 42 Hun (N. Y.) 306; *Sala v. Chicago &c. R. Co.*, 85 Iowa 678; s. c. 52 N. W. Rep. 664; *Matta v. Chicago &c. R. Co.*, 69 Mich. 109; s. c. 13 West. Rep. 717; 37 N. W. Rep. 54; *Louisville &c. R. Co. v. Richards*, 100 Ala. 365; s. c. 13 So. Rep. 944; *Chicago &c. R. Co. v. Hedges*, 105 Ind. 398; s. c. 3 West. Rep. 897.

<sup>194</sup> *Rodrian v. New York &c. R. Co.*, 55 Hun (N. Y.) 606; s. c. 28 N. Y. St. Rep. 625; 7 N. Y. Supp. 811.

<sup>195</sup> *Chicago &c. R. Co. v. Hedges*, 105 Ind. 398; s. c. 3 West. Rep. 897. In Kentucky, when “willful negligence,” within the meaning of a statute, is established, the railway company is liable, no matter how negligent the person killed may have been: *Claxton v. Lexington &c. R. Co.*, 13 Bush (Ky.) 636; *Eskridge v. Cincinnati &c. R. Co.*, 89 Ky. 367. In Massachusetts, there is a statute which, in case of the neglect of the railway company to give the statutory signals, puts it under the burden of proving that the person injured or killed, in addition to the mere want of ordinary care, was guilty of gross or willful negligence, or was acting in violation of law, and that such gross or willful negligence, or unlawful act, contributed to the injury: *Manley v. Boston &c. R. Co.*, 159 Mass. 493; s. c. 34 N. E. Rep. 951. And this will generally be a question for the jury.



crossing, over the ordinary traveller, yet this right is predicated upon its obligation to give the traveller reasonable warning of the approach of its train, to the end that he may save himself from the danger of being run over, by stopping and allowing it to pass; and greater than all, that it is the railroad company and not the traveller that is driving the instrument of danger; that it is the traveller and not the railroad company that is hurt in case of a collision; and that a compliance with the simple duty of giving adequate signals in no way impedes the progress of the train or obstructs the operation of the railway. It is the duty of those driving an instrument of such great danger, to sound a warning for the protection of all persons; the capable and the incapable; the aged and infirm as well as the young and strong; adults as well as children; the inattentive as well as the careful;—and it is, hence, not a sound view that those driving a railway train have the right to assume that every person approaching the point of danger will perform his duty of stopping, looking and listening, or of looking and listening, or will perform whatever duty the statute law or judicial theory imposes upon him. It is, therefore, not a sound or a humane view that the duty of the railway company is performed by giving such notice of the approach of its train at a highway crossing as would enable a traveller to hear it coming in time to avoid danger, provided such traveller *performs his duty to stop, look and listen*; but it is the duty of the railway company to give him such a warning as will draw his attention to his danger if he is inattentive, and such as will not punish him with death or maiming for failing to perform his duty to stop, look and listen.<sup>196</sup> This warning, especially where its nature and character are definitely prescribed by statute, he has a right to expect,<sup>197</sup> and naturally will expect, in compliance with the ordinary presumption of right-acting, already considered,<sup>198</sup> justifying the conclusion that those who are driving a machine of such great danger will perform so slight a duty as giving warning signals by means of bell or steam whistle. At the time when the doctrine of comparative negligence prevailed in one jurisdiction, it was well held that where the railroad company drove its train upon a hazardous crossing, without sounding bell or whistle, and a traveller proceeded upon the track without being properly attentive to his own safety, the negligence of the parties to the collision was measured by such a standard that the negligence of the railroad company was *gross*, in

<sup>196</sup> *Faust v. Philadelphia R. Co.*, 191 Pa. St. 420; s. c. 43 Atl. Rep. 329.

<sup>197</sup> *Harper v. Barnard*, 99 Iowa 159; s. c. 68 N. W. Rep. 599; *Mynning v. Detroit &c. R. Co.*, 64 Mich. 93; s. c.

7 West. Rep. 327; *aff'd on rehearing* 67 Mich. 677; 35 N. E. Rep. 811, and see next section.

<sup>198</sup> Vol. I, §§ 190, 191.



comparison with that of the traveller, which was *slight*, and hence that damages might be recovered for the injury.<sup>199</sup>

§ 1581. **The Same Subject Continued.**—These observations are especially applicable in the cases of what are called “*wild trains*,” that is to say, special or irregular trains, running on no schedule time, and having the duty of keeping out of the way of regular trains. The traveller, accustomed to the crossing, knows generally that such trains are liable to come at any time, but he does not expect them at the particular time when he attempts to cross. This the engineer driving the “wild train” knows, or is bound to know; and therefore the duty which rests upon him of giving warning on approaching a highway crossing, is even greater than in case of a regular train which the travelling public will, upon their experience, expect. On the other hand, it has been held that a traveller at a railroad crossing is not necessarily guilty of negligence in driving upon the track without stopping to look or listen when he knows that no regular train is due, and no notice has been given of an extra or “*wild engine*” by a red flag on the preceding train, as required by the rules of the company.<sup>200</sup> The same observation applies with reference to the *sudden starting up* of trains or cars which have been standing, and especially those which obstruct the highway crossing. For the railway company thus to obstruct a highway crossing for an unreasonable length of time is to commit an indictable public nuisance, and for it to start suddenly its train which has been so obstructing the highway, without giving any warning to travellers who may be attempting to pass around it or pass through it, is simply to add one criminal act to another. It is to be regretted that judicial casuistry, or the inclination of judges to do their thinking on the side of railroad companies, in too many cases tolerates this species of injury, and casts the blame upon the innocent traveller. Sometimes subordinate courts enter upon a struggle for justice in endeavoring to escape the trammels of decisions of this character. This seems to have been the case with an intermediate appellate court in Missouri, which decided that a person who, when twenty-five feet from a railroad crossing, sees a *train standing* on the track with the engine heading in a direction to take the train from the crossing, is not, as matter of law, guilty of such contributory negligence, in failing to look further before stepping on the track, as will prevent a recovery for an injury caused by suddenly “*kicking*” one

<sup>199</sup> Wabash &c. R. Co. v. Wallace, N. H. 200; s. c. 11 L. R. A. 364; 20 Atl. Rep. 976; 45 Am. & Eng. Corp.

<sup>200</sup> Lyman v. Boston &c. R. Co., 66 Cas. 163.



of the cars of the train back, without giving any *signal*.<sup>201</sup> With regard to the defense of contributory negligence, the tables are sometimes turned, and the railroad company, suing, let us say, an electric street railway company, for an injury caused by the electric car running into its railway train, may be cast in the suit by reason of its contributory negligence, in failing to warn the electric railway company, by sounding the whistle or ringing the bell upon its train when approaching the crossing, as required by statute.<sup>202</sup>

§ 1582. Further of the Contributory Negligence of the Traveler.—We must conclude, then, that while, as hereafter seen,<sup>203</sup> the failure of the railway company to give the proper or statutory signals on approaching the crossing, will not exonerate the traveller from making such use of his faculties as he can, to discover the approaching train, but he must *look and listen*,<sup>204</sup> and, according to some theories, *stop and listen*;<sup>205</sup> yet where he does this, and fails to see or hear the

<sup>201</sup> Pinney v. Missouri &c. R. Co., 71 Mo. App. 577. In so holding the court was obliged to distinguish no less than eight decisions of Missouri courts, seven of which were binding upon the appellate court as authority: Hayden v. Missouri &c. R. Co., 124 Mo. 566; Loring v. Kansas City &c. R. Co., 128 Mo. 349; Kelsay v. Missouri &c. R. Co., 129 Mo. 362; Lane v. Missouri &c. R. Co., 132 Mo. 4; Huggart v. Missouri &c. R. Co., 134 Mo. 673; s. c. 36 S. W. Rep. 220; Jones v. Barnard, 63 Mo. App. 501; Yancey v. Wabash &c. R. Co., 93 Mo. 433; Boyd v. Wabash &c. R. Co., 105 Mo. 371.

<sup>202</sup> New York &c. R. Co. v. New Jersey &c. R. Co., 60 N. J. L. 52; s. c. 37 Atl. Rep. 627; 38 L. R. A. 516.

<sup>203</sup> Post, §§ 1605, 1642.

<sup>204</sup> Ormsbee v. Boston &c. R. Co., 14 R. I. 102; s. c. 51 Am. Rep. 354; Maryland &c. R. Co. v. Neubeur, 62 Md. 391; Moore v. Keokuk &c. R. Co., 89 Iowa 223; s. c. 56 N. W. Rep. 430; Dlauhi v. St. Louis &c. R. Co., 105 Mo. 645; s. c. 16 S. W. Rep. 281; Rodrian v. New York &c. R. Co., 125 N. Y. 526; s. c. 35 N. Y. St. Rep. 815; 26 N. E. Rep. 741; Beyel v. Newport News &c. R. Co., 34 W. Va. 538; s. c. 45 Am. & Eng. Rail. Cas. 188; 12 S. E. Rep. 532; Missouri &c. R. Co. v. Moore, 4 Tex. App. Cas. 323; s. c. 15 S. W. Rep. 714; Louisville &c. R. Co. v. Stommel, 126 Ind. 35; s. c. 25 N. E. Rep. 863; Leak v. Georgia &c.

R. Co., 90 Ala. 161; s. c. 8 Rail. & Corp. L. J. 517; 8 South. Rep. 245; Cadwallader v. Louisville &c. R. Co., 128 Ind. 518; s. c. 27 N. E. Rep. 161; Ward v. Richmond &c. R. Co., 43 Fed. Rep. 422; s. c. 8 Rail. & Corp. L. J. 495; Durbin v. Oregon R. &c. Co., 17 Ore. 5, 11; s. c. 11 Am. St. Rep. 778; 17 Pac. Rep. 5; Cincinnati &c. R. Co. v. Howard, 124 Ind. 280; s. c. 8 L. R. A. 593; 24 N. E. Rep. 892; Chicago &c. R. Co. v. Crisman, 19 Colo. 30; s. c. 34 Pac. Rep. 286; Drake v. Chicago &c. R. Co., 51 Mo. App. 562; Weir v. Canadian &c. R. Co., 16 Ont. Ct. App. 100; Damrill v. St. Louis &c. R. Co., 27 Mo. App. 202; Chicago &c. R. Co. v. Robinson, 8 Ill. App. 140; Pennsylvania R. Co. v. Richter, 42 N. J. L. 180; Pittsburgh &c. R. Co. v. Bennett, 9 Ind. App. 92; s. c. 35 N. E. Rep. 1033; Hogan v. Tyler, 90 Va. 19; s. c. 17 S. E. Rep. 723. Although the railway company fails to give the statutory signals, and the traveller stops, looks and listens, at a distance of one hundred and fifty feet from the crossing, yet if, between that point and the crossing, the view of the track is not obstructed, and he drives at a slow pace toward and on to the track without again looking for approaching trains, he can not recover for the injury: Drake v. Chicago &c. R. Co., 51 Mo. App. 562.

<sup>205</sup> Post, § 1647.



approaching train, the law excuses him in acting upon the presumption that the proper or statutory signals will be sounded by it as it approaches the crossing, and contributory negligence will not be imputed to him, because he enters upon the crossing in reliance upon that assumption.<sup>206</sup> If, therefore, the evidence is in such a state as to warrant the jury in drawing the conclusion that the traveller would not have ventured upon the crossing if the proper signals had been given, they may find a verdict for the plaintiff.<sup>207</sup> On the other hand, where the railway company neglects to give the proper or statutory signals, and the traveller is free from contributory negligence, it will be liable in damages to him, provided its neglect was the proximate cause of the injury, within principles elsewhere stated,<sup>208</sup>—that is to say, provided if the traveller had been properly warned he might have kept out of the way of the train.<sup>209</sup>

**1583. Effect of such Failure on Contributory Negligence where the View is Obstructed.**—The rule which exonerates the traveller from the imputation of contributory negligence where he makes such use of his faculties as best he can, has a clearer application in cases where the view is obstructed;<sup>210</sup> or where, by reason of the direction of the wind, or other concurrent noises, or trains upon a parallel track, he is unable to hear the rumbling of the approaching train.<sup>211</sup> From the foregoing, the doctrine may be extracted that the concurrence of obstructions, preventing the traveller from seeing the approaching

<sup>206</sup> *Sanborn v. Detroit &c. R. Co.*, 91 Mich. 538; s. c. 16 L. R. A. 119; 52 N. W. Rep. 153; 50 Am. & Eng. Rail. Cas. 114.

<sup>207</sup> *Hinkle v. Richmond &c. R. Co.*, 109 N. C. 472; s. c. 13 S. E. Rep. 884; 11 Rail. & Corp. L. J. 81; 26 Am. St. Rep. 581.

<sup>208</sup> Vol. I, § 44, *et seq.*; *ante*, § 1558.

<sup>209</sup> *Longenecker v. Pennsylvania &c. R. Co.*, 105 Pa. St. 328; *Bitner v. Utah &c. R. Co.*, 4 Utah 502; s. c. 11 Pac. Rep. 620.

<sup>210</sup> To take an illustrative case: The plaintiff drove up to a railroad crossing. He could not see the track in either direction, because of piles of lumber. The defendant's train came along, ringing no bell, as it should have done, and struck the plaintiff's team as he was crossing. It was held that the plaintiff was not guilty of contributory negligence sufficient to justify a nonsuit: *Strong v. Sacramento &c. R. Co.*, 61 Cal. 326. See also *Evans v. Concord R. Co.*, 66 N. H. 194; s.

c. 21 Atl. Rep. 105; *Cook v. New York &c. R. Co.*, 59 Hun (N. Y.) 617, *mem.*; s. c. 35 N. Y. St. Rep. 525; 15 N. Y. Supp. 45; *McDuffie v. Lake Shore &c. R. Co.*, 98 Mich. 356; s. c. 57 N. W. Rep. 248; *Gulf &c. R. Co. v. Creeland* (Tex. Civ. App.), 26 S. W. Rep. 153 (no off. rep.); *McNown v. Wabash R. Co.*, 55 Mo. App. 585; *Casey v. New York &c. R. Co.*, 78 N. Y. 580; *Perkins v. Buffalo &c. R. Co.*, 32 N. Y. St. Rep. 41; s. c. 10 N. Y. Supp. 356; *Pearce v. Humphreys*, 34 Fed. Rep. 282. In one case, where the statutory signals were not given, and the traveller did not listen, and could not have seen the train if he had looked, it was held, by a divided court, that the question of his negligence was for the jury, and that the court was not bound to instruct them that the plaintiff could not recover: *Petty v. Hannibal &c. R. Co.*, 88 Mo. 306.

<sup>211</sup> *Smedis v. Brooklyn &c. R. Co.*, 88 N. Y. 18.



train, and the failure of those in charge of it to give the proper or statutory signals will, in case of an injury to the traveller, take the question of the negligence of the railway company and the contributory negligence of the traveller to a jury. But this seems incompatible with the view, which is put forward in one case, that, where the traveller finds his view of the track obstructed, he is required to use greater care before attempting to cross than if it were unobstructed, regardless of the failure of the railway company to give the proper signals.<sup>212</sup> Where a train thus approaches stealthily, without giving signals, and the view of the traveller is obstructed, it will frequently become a question for the jury, whether he could have seen the approaching train in time to avoid the accident which happened to him, by the exercise of reasonable care.<sup>213</sup> The question of negligence and contributory negligence was held to be *for the jury* under the following circumstances:—Where a traveller, at a *private* railroad crossing, whose view of the main track was obstructed by cars standing upon the next track, which had been opened to form a passage for teams to cross, did not stop, but listened for the approach of trains, and was struck while crossing, and there was no evidence that there was any signal given of the approach of the train;<sup>214</sup> where a woman, who was killed at a crossing, regarded the crossing as dangerous, and, before crossing, waited at home for trains to pass, had a safe horse, had her watch with her, and stopped before crossing, but the view was obstructed and the train failed to give the statutory signals;<sup>215</sup> where the traveller approached the crossing very slowly, but the view was obstructed, and it was difficult to tell by the sense of hearing whether a train was approaching on that road, or on another, and neither the bell was rung, nor the whistle sounded.<sup>216</sup>

<sup>212</sup> Chicago &c. R. Co. v. Crisman, 29 Colo. 30; s. c. 34 Pac. Rep. 286.

<sup>213</sup> Casey v. New York &c. R. Co., 78 N. Y. 518; aff'g s. c. 8 Daly (N. Y.) 220.

<sup>214</sup> Pearce v. Humphreys, 34 Fed. Rep. 282.

<sup>215</sup> Evans v. Concord R. Co., 66 N. H. 194; s. c. 21 Atl. Rep. 105.

<sup>216</sup> Cook v. New York &c. R. Co., 59 Hun (N. Y.) 617, *mem.*; s. c. 35 N. Y. St. Rep. 525; 15 N. Y. Supp. 45. And so, where, for several hundred feet before reaching the crossing, the traveller had a view of the track for a long distance, except as it was obstructed by a building, a train standing on a side-track, and the smoke and steam emitted by the engine attached thereto, and a cut forty to sixty rods west of the cross-

ing through which the track passed, and the engine was run at a great speed, and no signals were sounded, and he stopped after passing such building, and looked up and down the track and listened for a train, and his view may have been cut off by the building and by the smoke and steam and by the cut before reaching the building: McDuffie v. Lake Shore &c. R. Co., 98 Mich. 356; s. c. 57 N. W. Rep. 248. Contrary to the doctrine of the text, two courts have held that it is not contributory negligence *as matter of law* for the traveller to fail to look and listen where the view is so obstructed that an approaching train can not be seen very near the crossing, and where the statutory signals are omitted by the train: McNown v.



§ 1584. **Effect of Failure to Give Signals in Connection with the Omission of Other Precautions.**—Where, in addition to its failure to give the statutory or reasonable signals upon approaching a crossing, the railway company omits other precautions, the conclusion of general negligence will be, of course, more clear,—as where it approaches the crossing of a village highway, without giving the statutory signals, behind time, and running at a high rate of speed;<sup>217</sup> or, where it approaches a crossing in the night-time at an unusual rate of speed, without giving the statutory signals and having no light on the forward car;<sup>218</sup> or, where it approaches a crossing where no blow-posts have been erected, as required by statute, without sounding the whistle or checking the speed;<sup>219</sup> or where it approaches a crossing where no gate has been erected, and where no watchman is kept, and where the view of the track is obstructed, without giving the statutory signals.<sup>220</sup>

§ 1585. **Examples of Negligence in Running Trains without Signals.**—Where there is evidence tending to show that the train was running, at the time of the collision, at an unusual rate of speed, without ringing the bell or blowing the whistle, with no lookouts on backing trains, with two or more trains passing at the same crossing, and that such crossing was a much travelled thoroughfare, in the absence of any statute prescribing the duties of railroads in these particulars, whether such conduct was negligence on the part of the servants of the company will be a question of fact for the jury.<sup>221</sup> Negligence has been predicated upon the act of a railroad engineer in running his engine over a street crossing in the heart of a populous city, which

Wabash R. Co., 55 Mo. App. 585; Gulf & C. R. Co. v. Creeland (Tex. Civ. App.), 26 S. W. Rep. 153 (no off. rep.). Another court has reached the same conclusion in a case where the engine, which did the mischief, was approaching at the rate of six miles an hour, without giving the customary signals, at a crossing in a station yard, where there were eight tracks, the attention of the traveller, a female, being attracted by a train on another track: *Hollinger v. Canadian & C. R. Co.*, 20 Ont. App. 244; s. c. 55 Am. & Eng. Rail. Cas. 269. And see, as being somewhat like this last case, *Casey v. New York & C. R. Co.*, 78 N. Y. 518; aff'g s. c. 8 Daly (N. Y.) 220.

<sup>217</sup> *Omaha & C. R. Co. v. O'Donnell*, 22 Neb. 475; s. c. 35 N. W. Rep. 235.

<sup>218</sup> *Lake Erie & C. R. Co. v. Zoffinger*, 107 Ill. 199.

<sup>219</sup> *Brunswick & C. R. Co. v. Hoover*, 74 Ga. 426.

<sup>220</sup> This constitutes "willful neglect" under the Kentucky statute: *Louisville & C. R. Co. v. Schick*, 14 Ky. L. Rep. 833; s. c. 21 S. W. Rep. 1036. That the mere ringing of an engine bell when approaching a grade crossing, unprotected by gates or a flagman, is not, as matter of law, a sufficient precaution against collision with vehicles, where the train is backing slowly and a number of cars intervene between the engine and crossing,—see *McCaffrey v. Delaware & C. Canal Co.*, 62 Hun (N. Y.) 618; s. c. 41 N. Y. St. Rep. 221; 16 N. Y. Supp. 495.

<sup>221</sup> *Bilbee v. London & C. R. Co.*, 18 C. B. (N. S.) 584, 592.



has just been cleared by a train going in the opposite direction, where his train can not be seen by those on the street, he not giving any notice whatever;<sup>222</sup> upon the act of a conductor of a railway company in failing to give the statutory signals, when moving a freight train rapidly on a descending grade, with brakes set and without using steam, making comparatively little noise, and striking a team whose owner had used due care in looking and listening;<sup>223</sup> and where a train was run at a public crossing near a city, where there was a parallel track, and no blow-posts were erected, no whistle sounded, nor the train checked, as required by law, and the exercise of ordinary or reasonable care was not otherwise shown; but the presumption of negligence arose through the failure to observe the statutory precautions;<sup>224</sup> and also in the cases noted in the margin.<sup>225</sup>

§ 1586. **Whether Negligence in the Omission of Signals is a Question of Law or of Fact.**<sup>226</sup>—As already seen,<sup>227</sup> the failure of a train approaching a crossing to give the *statutory* signals is generally held to be *negligence per se*, though there is some untenable judicial authority which reduces it to *prima facie evidence of negligence* merely. Where there is no statute, it seems to be a sound conclusion that the omission to give such signals is not negligence *per se*, but that whether it is negligence or not will be a *question of fact* depending upon the nature of the crossing, the speed of the train, and the other means, if any, provided by the railway company to prevent accidents to travellers.<sup>228</sup> Thus, although there is a statute requiring a railway company to ring the bell or sound the whistle when approaching a “travelled public road,” and although this statute does not apply to the *switch crossing* provided by the railway company across its own ground for ingress to and egress from its station, yet whether it may not constitute negligence to omit these precautions at such a place is

<sup>222</sup> *Smeltz v. Pennsylvania R. Co.*, 186 Pa. St. 364; s. c. 15 Lanc. L. Rev. 265; 40 Atl. Rep. 479.

<sup>223</sup> *Hughes v. Chicago & C. R. Co.*, 88 Iowa 405; s. c. 55 N. W. Rep. 470.

<sup>224</sup> *Brunswick & C. R. Co. v. Hoover*, 74 Ga. 426.

<sup>225</sup> Gross negligence to run over a crossing at twenty-five miles an hour without giving signals: *Cook v. Missouri & C. R. Co.*, 19 Mo. App. 329; s. c. 1 West. Rep. 451. Negligence to run a locomotive and train across a public street in a populous city, without sounding the whistle, ringing the bell or giving any warning: *Aurelius v. Lake Erie & C. R. Co.*, 19

Ind. App. 584; 49 N. E. Rep. 857. Negligence to back a freight train into a hearse returning from a funeral under the circumstances stated in *Demaine v. Washington & C. R. Co. (Va.)*, 27 S. E. Rep. 437.

<sup>226</sup> This section is cited in § 1492.

<sup>227</sup> *Ante*, § 1557; Vol. I, §§ 10, 11.

<sup>228</sup> *Austin v. Staten Island & C. R. Co.*, 39 N. Y. St. Rep. 76; s. c. 14 N. Y. Supp. 923; *Rupard v. Chesapeake & C. R. Co.*, 88 Ky. 280; s. c. 11 S. W. Rep. 70; 10 Ky. L. Rep. 1023; *Chesapeake & C. R. Co. v. Steele*, 84 Fed. Rep. 93; s. c. 29 C. C. A. 81; 54 U. S. App. 550.



none the less a question of fact for a jury.<sup>229</sup> So, it is a question for the jury whether or not the locomotive whistle ought to be sounded, in order to drive a cow from a track which is not required to be fenced.<sup>230</sup> So, it has been held a question of fact for the jury whether the failure of those in charge of a train to give the statutory signals of its approach to a public crossing, was such negligence as to render the company liable for an injury to a person rightfully on a *hand-car* with which the train collided near such crossing.<sup>231</sup> As already seen,<sup>232</sup> a railroad company may become liable for exercising even its statutory duty of sounding its steam whistle on approaching a crossing, in an unreasonable and wanton manner, whereby the *horses* of travellers are *frightened*. Whether it acted negligently, wantonly or recklessly in such a case may present a question of fact for a jury;<sup>233</sup> and the same may be said of the propriety of its action in failing to give special warning to travellers where its locomotive stands near a crossing blowing off steam, the noise of which has a tendency to frighten horses.<sup>234</sup> It seems scarcely necessary to add that the question whether the statutory signals were in fact given from a train approaching a highway crossing, is for the jury in case of conflicting evidence.<sup>235</sup>

§ 1587. **Evidence: Presumptions—Burden of Proof.**—No inference of negligence in the operation of a train *in other particulars*, arises from a failure to give the statutory signals on approaching highway crossings.<sup>236</sup> Under a statute of Missouri,<sup>237</sup> a person suing for damages sustained at a highway crossing by a train of the defendant, makes out his case by proving that the statutory signals were not given, and the burden of rebutting the case so made rests upon the company.<sup>238</sup>

<sup>229</sup> *Hodges v. St. Louis &c. R. Co.*, 71 Mo. 50.

<sup>230</sup> *Terre Haute &c. R. Co. v. Jones*, 11 Ill. App. 322.

<sup>231</sup> *Garteiser v. Galveston &c. R. Co.*, 2 Tex. Civ. App. 230; s. c. 21 S. W. Rep. 631.

<sup>232</sup> *Ante*, § 1417, *et seq.*; § 1578; *post*, § 1909.

<sup>233</sup> *Dugan v. St. Paul &c. R. Co.*, 43 Minn. 414; s. c. 45 N. W. Rep. 851.

<sup>234</sup> *Lewis v. Eastern &c. R. Co.*, 60 N. H. 187.

<sup>235</sup> *Cleveland &c. R. Co. v. Halbert*, 75 Ill. App. 592.

<sup>236</sup> *Omaha &c. R. Co. v. Krayenbuhl*, 48 Neb. 553; s. c. 4 Am. & Eng. Rail. Cas. (N. S.) 483; 67 N. W. Rep. 447.

<sup>237</sup> Missouri Act 1881, p. 79; amended Rev. Stat. Mo., § 806.

<sup>238</sup> *Huckshold v. St. Louis &c. R. Co.*, 90 Mo. 548; s. c. 7 West. Rep. 764. Admissibility of evidence as to the points on the defendant's railway track at which signals for the crossing where the accident took place were *usually* given: *Galveston &c. R. Co. v. Harris* (Tex. Civ. App.), 36 S. W. Rep. 776 (no off. rep.). No presumption under Tennessee statute that a road overseer has placed a crossing signal at a place where a much travelled road is crossed by a railroad: *Alabama &c. R. Co. v. McDonough*, 97 Tenn. 255; s. c. 5 Am. & Eng. Rail. Cas. (N. S.) 169; 37 S. W. Rep. 15.



§ 1588. **Instructions on the Duty of Giving Signals.**—One court, indulging in a fanciful hypercriticism, has condemned an instruction to the effect that it was the duty of a railway company to give “due warning,” since the jury might infer from this that it was bound to do more than the statute required,—to ring the bell or sound the steam whistle.<sup>239</sup> The imagination of the same court, two judges dissenting, condemned an instruction to the effect that the railway company was liable if it failed to give such signals “as to enable A. [the plaintiff] to ascertain the approach of said train and to avoid being injured.”<sup>240</sup> A subordinate appellate court, in the same State, have condemned an instruction to the effect that those in charge of a railway train approaching a highway crossing, are bound to give “reasonable warning,” or “sufficient warning,” of its approach, because these terms might be understood by the jury to mean more than the statute requires.<sup>241</sup> Another court, in a case which seems not to have been governed by any statute, have held that an instruction requiring not only that warnings of the approach of trains should be given in the usual and customary manner, but also in such manner as ordinary care and diligence require, and that if the warnings are given in the customary manner alone, the company will be relieved from liability,—is substantially correct.<sup>242</sup> The Supreme Court of Texas have held that it is not error to instruct the jury that, while it was the duty of the defendant’s servants to ring the bell or sound the whistle, yet their failure to do so is immaterial, where the decedent was *aware* of the presence of the train.<sup>243</sup>

<sup>239</sup> Chicago &c. R. Co. v. Robinson, 106 Ill. 142.

<sup>240</sup> Chicago &c. R. Co. v. Dougherty, 110 Ill. 521 (Mulkey and Walker, JJ., dissenting).

<sup>241</sup> Lake Shore &c. R. Co. v. Elson, 15 Ill. App. 80; Peoria &c. R. Co. v. Berry, 15 Ill. App. 155.

<sup>242</sup> Georgia &c. R. Co. v. Freeman, 83 Ga. 583; s. c. 10 S. E. Rep. 277.

<sup>243</sup> McDonald v. International &c. R. Co., 86 Tex. 1; s. c. 22 S. W. Rep. 739; reversing s. c. (Tex. Civ. App.) 20 S. W. Rep. 847, and 21 S. W. Rep.

774. Instruction to find for plaintiff if his injuries were caused by defendant’s negligence in failing to ring its engine bell at a distance of eighty rods from the crossing and thereafter, as required by Mo. Rev. Stat. 1889, § 2608, not erroneous, though the evidence failed to show that the engine was as far as eighty rods from the crossing when it started: Herring v. Wabash R. Co., 80 Mo. App. 562; s. c. 2 Mo. App. Rep. 707.



## CHAPTER LI.

DUTY OF TRAINMEN TO KEEP A LOOKOUT AND AVOID INJURY TO PERSONS  
NEGLIGENTLY EXPOSED ON THE TRACK.

## SECTION

1592. Duty to maintain a lookout upon the train.

1593. Statutes and ordinances enforcing this duty.

1594. Duty to maintain a lookout upon backing trains.

1595. Duty to keep a lookout for street cars.

1596. Failure to keep a lookout in case of a traveller who is himself negligent.

1597. Doctrine that if the traveller was negligent, the railway company is not liable, unless, after discovering his exposed situation, it failed to exercise due care.

## SECTION

1598. What after discovering the perilous situation of the traveller.

1599. The same rule where the trainmen have reason to believe that a person is exposed to danger.

1600. Doctrine that the railroad company is under no duty to discover trespassers exposed to being run over at public crossings.

1601. Right to assume that the traveller will look out for himself.

1602. Evidence which tends to prove that the trainmen knew of the danger of the traveller.

§ 1592. **Duty to Maintain a Lookout upon the Train.**<sup>1</sup>—All that is said in this chapter implies an obligation upon the part of the railway company to maintain a constant and vigilant lookout ahead, for the purpose of discovering the presence of persons or animals on the crossing or in dangerous proximity to it, and of giving them timely warning, or of checking the speed of the train so as to avoid injuring them.<sup>2</sup> It is said that the lookout thus required to be kept is such as reasonably prudent and cautious persons would exercise under similar circumstances;<sup>3</sup> but, as the care demanded here, as in every other situation, is a degree of care proportionate to the danger, this situation demands nothing less than a constant and unremitting watchfulness.

<sup>1</sup> This section is cited in § 1629.<sup>2</sup> *Texas & C. R. Co. v. Curlin*, 13 Tex. Civ. App. 505; s. c. 36 S. W. Rep. 1003; *McBride v. Northern & C. R. Co.*, 19 Or. 64; s. c. 23 Pac. Rep. 814; 42 Am. & Eng. Rail. Cas. 146;*Eswin v. St. Louis & C. R. Co.*, 96 Mo. 290; s. c. 9 S. W. Rep. 577.<sup>3</sup> *Gulf & C. R. Co. v. Pendery*, 14 Tex. Civ. App. 60; s. c. 36 S. W. Rep. 793. As to the extent of this duty, see *Battishill v. Humphrey*, 64 Mich. 494; s. c. 7 West. Rep. 806.



The reason is that the travelling public may of right, and constantly do, cross railway tracks at public crossings, which fact imposes upon the railway company the obligation of anticipating the possibility of persons being upon the track at such places, and of keeping a lookout therefor; and they can not assume that persons will not put themselves in positions of danger, when attempting to cross the railway track.<sup>4</sup> Hence, to run an engine over a public crossing *in a city*, at the rate of fifteen or sixteen miles an hour, without keeping a lookout ahead, when the noise of another train tended to obstruct the sound of the bell, has been characterized as *gross negligence*.<sup>5</sup> It is reasoned that greater care should be observed by those in charge of a railroad train, with respect to controlling its speed and keeping a close lookout ahead at a crossing, *where an ordinance prohibits the ordinary signals by bell and whistle*.<sup>6</sup> If the railroad company has, by its own affirmative act, as by removing the planking from a crossing, rendered the crossing difficult or dangerous, it may become liable to a man whose team is stalled or delayed upon the crossing in consequence of its defective condition and the failure of the defendant to keep a proper lookout, and to give the proper warning of the approach of a train.<sup>7</sup>

§ 1593. **Statutes and Ordinances Enforcing this Duty.**<sup>8</sup>—Many statutes and ordinances have been enacted enforcing this duty; but the almost settled habit of the courts of condoning the failure of railway companies to comply with the duty thus prescribed, and of casting the responsibility for collisions between trains and travellers at public highway crossings wholly upon the victim of the accident, has rendered these enactments of little avail. One of the most conspicuous of these statutes is one which has long been in existence in the State of Tennessee. It enacts that “every railroad company shall keep the engineer, fireman or some other person upon the locomotive, always on the lookout ahead; and when any person, animal or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes

<sup>4</sup> Baltimore &c. R. Co. v. Anderson, 85 Fed. Rep. 413; s. c. 56 U. S. App. 137; 29 C. C. A. 235.

<sup>5</sup> Crowley v. Louisville &c. R. Co. (Ky.), 55 S. W. Rep. 434.

<sup>6</sup> Baltimore &c. R. Co. v. Golway, 6 App. Cas. (D. C.) 143.

<sup>7</sup> Johnson v. Great Northern R. Co., 7 N. D. 284; s. c. 75 N. W. Rep. 250; 11 Am. & Eng. Rail. Cas. (N. S.) 76. For a representative case, where the wagon of a driver broke down on a private crossing and the driver flagged an approaching train,

but it did not stop, but came on at a speed of forty miles an hour, the engineer not being on the lookout and seeing no one until within one hundred yards of the crossing, and then paid no attention to the driver and those with him because he supposed them to be section hands,—and it was held error to direct a verdict for the defendant,—see Staggs v. Mobile &c. R. Co., 77 Miss. 507; s. c. 27 South. Rep. 597.

<sup>8</sup> This section is cited in § 1559.



put down, and every possible means employed to stop the train and prevent an accident.”<sup>9</sup> It is perceived that this statute requires the railroad company to keep a “*person*” on the locomotive to maintain a lookout ahead. A later statute of the same State,<sup>10</sup> requires every railroad company to keep an *engineer, fireman, or other person* on the locomotive always on the lookout ahead; and the next section,<sup>11</sup> makes every railroad company which fails to observe this precaution, or cause it to be observed, by its agents or servants, responsible for all damages resulting from any accident or collision that may occur. It will be observed that the letter of both of these statutes requires the railroad companies to maintain *some person* on the locomotive to keep “a lookout ahead.” It is known that travellers are in much greater danger from trains *backing* in the night, because the headlight is not visible to warn them, than from trains moving forward. This statute is now construed as applying to an engine and tender when *backing* over a crossing at night.<sup>12</sup>

**§ 1594. Duty to Maintain a Lookout upon Backing Trains.**—Such being the plain duty of the railway company, it is clearly guilty of negligence in *backing a train* over a public crossing, especially in a populous place, without a brakeman on the end of the train as a lookout, unless other means are employed for the protection of travellers.<sup>13</sup>

<sup>9</sup> *Thompson & S. Tenn. Code*, § 1166; *Mill & V. Tenn. Code*, § 1298.

<sup>10</sup> *Shannon's Tenn. Code*, § 1574, subsec. 4. This statute is held to be nothing more nor less than a declaration of the common law: *East Tennessee & C. R. Co. v. Pratt*, 85 Tenn. 9; s. c. 1 S. W. Rep. 618.

<sup>11</sup> *Ibid.*, § 1575.

<sup>12</sup> *Iron Mountain R. Co. v. Dies*, 98 Tenn. 655; s. c. 41 S. W. Rep. 860; distinguishing *Nashville & C. R. Co. v. Seaborn*, 85 Tenn. 391.

<sup>13</sup> *Cooper v. Lake Shore & C. R. Co.*, 66 Mich. 261; s. c. 10 West. Rep. 184; 33 N. W. Rep. 306; *Wiley v. Long Island R. Co.*, 76 Hun (N. Y.) 29; s. c. 59 N. Y. St. Rep. 157; 27 N. Y. Supp. 722; *Hollinger v. Canadian & C. R. Co.*, 21 Ont. 705; *Green v. Chicago & C. R. Co.*, 110 Mich. 648; s. c. 3 Det. L. N. 544; 68 N. W. Rep. 988; 6 Am. & Eng. Rail. Cas. (N. S.) 317; *Walter v. Baltimore & C. R. Co.*, 6 App. Cas. (D. C.) 20; s. c. 23 Wash. L. Rep. 226; *Galveston & C. R. Co. v. Eitzen* (Tex. Civ. App.), 2 Am. Neg. Rep. 249; s. c. 39 S. W. Rep.

625 (no off. rep.); *Laible v. New York & C. R. Co.*, 13 App. Div. 574; s. c. 43 N. Y. Supp. 1003; *Robinson v. Western & C. R. Co.*, 48 Cal. 409; *Louisville & C. R. Co. v. Head*, 80 Ind. 117; *Kansas & C. R. Co. v. Pointer*, 14 Kan. 37. That it is proper in such cases to admit *evidence* that there was no one upon the end of the tender of a locomotive while it was running backwards,—see *Clampit v. Chicago & C. R. Co.*, 84 Iowa 71; s. c. 50 N. W. Rep. 673; 49 Am. & Eng. Rail. Cas. 468. That an *instruction* as to negligence in failing to look out for persons on a railroad track, is in relation to the same matter as negligence for a “failure to see” the person killed, as *alleged in the petition*,—see *McMarshall v. Chicago & C. R. Co.*, 80 Iowa 757; s. c. 45 N. W. Rep. 1065. Reversing the prevailing doctrine on the subject, it has been held that a traveller, who is negligent in going on a track without listening or looking, may still recover if the accident could have been avoided had there been a



§ 1595. **Duty to Keep a Lookout for Street Cars.**—It has been held that the failure of railroad employes to keep a proper *lookout* for street cars which may be approaching the crossing is not, as a matter of law, negligence, rendering the railroad company liable for an injury to a *passenger on a street car*, injured by a collision, although such failure may justify the jury in *inferring negligence as a fact*.<sup>14</sup>

§ 1596. **Failure to Keep a Lookout in Case of a Traveller who is Himself Negligent.**—This duty on the part of a railway company to keep a lookout ahead of its trains at railway crossings is reduced to meaningless verbiage, unless it is followed up by the corresponding rule that where a person negligently exposes himself to injuries upon the crossing, the railroad company will be liable if, by the maintenance of a lookout, it *might have discovered the traveller* in his exposed situation in time, by the exercise of reasonable care, to have avoided killing or injuring him.<sup>15</sup> This is a necessary deduction from the proposition so often announced, that, although the traveller may have been guilty of contributory negligence in going upon the track, yet the railway company is liable if it could have prevented the accident by the exercise of due care.<sup>16</sup> The duty of exercising due care necessarily includes the duty of looking out for and discovering whether any traveller, in the lawful use of the highway, may have become, with or without negligence, exposed to being run over upon the crossing where travellers have the general right to be. The expression is meaningless if the doctrine is allowed that the railway company owes no duty to travellers in such cases, until its servant *actually discovers them*. The cases which hold the contrary seem to have no counterpart in the jurisprudence of any other English-speaking country, and form a disgraceful chapter in American jurisprudence. The sound doctrine is that if the railway company, in the keeping of that vigilant and constant lookout which is demanded by the principles of

lookout on the rear end of a *backing train*, as the city ordinance required: *Bergman v. St. Louis & C. R. Co.*, 88 Mo. 678; *Walter v. Baltimore & C. R. Co.*, 6 App. Cas. (D. C.) 20; s. c. 23 Wash. L. Rep. 226.

<sup>14</sup> *Gulf & C. R. Co. v. Pendery*, 87 Tex. 553; s. c. 29 S. W. Rep. 1038.

<sup>15</sup> *Eswin v. St. Louis & C. R. Co.*, 96 Mo. 290; s. c. 9 S. W. Rep. 577; *Crowley v. Louisville & C. R. Co. (Ky.)*, 55 S. W. Rep. 434; *Johnson v. Great Northern & C. R. Co.*, 7 N. D. 284; s. c. 75 N. W. Rep. 250; 11 Am. & Eng. Rail. Cas. (N. S.) 76.

<sup>16</sup> Vol. I, § 230; *Duffy v. Missouri*

& C. R. Co., 19 Mo. App. 380; s. c. 2 West. Rep. 198; *Bullock v. Wilmington & C. R. Co.*, 105 N. C. 180; s. c. 10 S. E. Rep. 988; 42 Am. & Eng. Rail. Cas. (N. S.) 93; *Houston & C. R. Co. v. Carson*, 66 Tex. 345; *Louisville & C. R. Co. v. Orr (Ala.)*, 26 South. Rep. 35; *Bunting v. Central & C. R. Co.*, 16 Nev. 277; *Nolan v. New York & C. R. Co.*, 20 Misc. (N. Y.) 619; s. c. 46 N. Y. Supp. 447. Compare *Texas & C. R. Co. v. Gilleland (Tex. Civ. App.)*, 36 S. W. Rep. 1134 (no off. rep.); *Texas & C. R. Co. v. Curlin (Tex. Civ. App.)*, 36 S. W. Rep. 1003.



the common law and imposed in many cases by the statute law, *might have discovered* the traveller in time, by the exercise of such care as his perilous situation demanded, in checking the speed of the train or otherwise, to avoid injury to him, and failed to do so, the railway company is liable in damages.<sup>17</sup> Under this rule, where the servants of the railway company driving the train could have seen the perilous position of the traveller, the liability of the railway company with respect to his injury will be precisely the same as though they had seen it and had nevertheless negligently run over him.<sup>18</sup> It is an apt illustration of the doctrine arising everywhere in the law of negligence, that *negligent ignorance* operates, for juridical purposes, the same as actual knowledge.<sup>19</sup>

§ 1597. **Doctrine that if the Traveller was Negligent, the Railway Company is not Liable, unless, after Discovering his Exposed Situation, it Failed to Exercise Due Care.**<sup>20</sup>—The antithetical doctrine is that the failure of the railway company, through its servants in charge of the train, to discover, or to use ordinary or reasonable care to discover, the perilous situation of a traveller at a highway crossing, in time to enable them, by the exercise of the like ordinary or reasonable care, to avoid running over him, is negligence, although the traveller may have been negligent in getting himself into the perilous situation; but it proceeds to destroy the value of this proposition by the further proposition that, if the traveller did not use ordinary care and prudence, and if the trainmen, *after they discovered his danger*, could not have prevented the injury by the exercise of the like care and caution, then the railway company is not liable.<sup>21</sup> This miserable doctrine is rendered worse by the application to the traveller of the “any degree” doctrine.<sup>22</sup> Thus applied, it carries with it the proposition that a traveller can not recover damages from a railway company for injuries received at a highway crossing, if his own negligence *in any degree* contributed to the injury, unless the railway company, having had an opportunity to avert the danger, *after becoming aware of it*, failed to use ordinary care and caution to that end.<sup>23</sup> Under the operation of

<sup>17</sup> *Dlaui v. St. Louis &c. R. Co.*, 139 Mo. 291; s. c. 40 S. W. Rep. 890; *Sullivan v. Missouri &c. R. Co.*, 117 Mo. 214; s. c. 23 S. W. Rep. 149; *Pittsburgh &c. R. Co. v. Lewis (Ky.)*, 38 S. W. Rep. 482; s. c. 18 Ky. L. Rep. 958 (not to be rep.); *Lake Shore &c. R. Co. v. Schade*, 57 Ohio St. 650; aff’g s. c. 15 Ohio C. C. 424; 8 Ohio C. D. 316.

<sup>20</sup> *Lake Shore &c. R. Co. v. Schade*,

15 Ohio C. C. 424; s. c. 8 Ohio C. D. 316; s. c. aff’d 57 Ohio St. 650.

<sup>19</sup> Vol. I, § 8.

<sup>20</sup> This section is cited in § 1675.

<sup>21</sup> *Galveston &c. R. Co. v. Matula*, 79 Tex. 577; s. c. 19 S. W. Rep. 376.

<sup>22</sup> Vol. I, § 169.

<sup>23</sup> *Butcher v. West Virginia &c. R. Co.*, 37 W. Va. 180; s. c. 16 S. E. Rep. 457; 18 L. R. A. 519.



this wretched doctrine, the railway company may run its train with the backs of its engineer and fireman turned to the front, and if its train runs over a traveller at a crossing, who has been guilty of negligence *in any degree*, however slight, in exposing himself to the peril, he can not recover damages. This doctrine is so profoundly opposed to public policy that it drives the mind to an unconscious search for the motives of the judges who could have announced it. Such a doctrine can have no proper office, except under circumstances where the railway company is under no duty to keep watch and discover the perilous situation of persons who may become exposed in front of its locomotive or train. Such has been held to be the case where a *train stands upon a public crossing*, and a traveller is injured while negligently attempting to pass between the cars. Here it has been held—but wrongly, the writer submits—that the duty of the railway company to use care toward the traveller does not begin until its employes see or have notice of his peril, and that they are entitled to go about their ordinary duties without keeping a watch for such persons.<sup>24</sup> But the true theory here is that the duty of the railroad company toward the traveller commences either when its employes have notice of his peril, or when, in the exercise of the care of prudent and careful men, they ought to see and know of it.<sup>25</sup> Whether the railway company is bound to maintain such a watch while its train is *lawfully* obstructing the highway, may be a debatable question. But after its train has obstructed the highway beyond a reasonable length of time, or beyond the length of time prescribed by statute or ordinance, then it becomes a purpresture of the highway, a public nuisance, and a criminal act. The right of the public to pass is resumed, and any one attempting to pass represents not only his own right but the general right of the public. At this period of time the railroad company ought to be held bound to take notice of the fact that members of the public will attempt to pass, in the exercise of their lawful right, and they ought to be bound to maintain a watch, and to prevent the train from moving while members of the public are attempting so to pass; and the fact that the current of judicial opinion is to the contrary<sup>26</sup>

<sup>24</sup> *Magoon v. Boston &c. R. Co.*, 67 Vt. 177; s. c. 31 Atl. Rep. 156. Another court has held that the conductor of a freight train, which has stood across a street for twenty minutes or more, is not guilty of *wanton*, *reckless*, or *gross* negligence, in giving a signal to the engineer to start the train while some one is attempting to pass between the cars, unless

he has *notice* of such person's attempt, although he *could have discovered* him if he had gone to the crossing and looked: *Chicago &c. R. Co. v. Surowieski*, 67 Ill. App. 682; s. c. 2 Chic. L. J. Wkly. 102.

<sup>25</sup> *Magoon v. Boston &c. R. Co.*, 67 Vt. 177; s. c. 31 Atl. Rep. 156.

<sup>26</sup> *Post*, §§ 1693, 1694; *ante*, §§ 1568, 1569.



illustrates the extent to which the minds and consciences of the judges have been dominated and enslaved by railway influences.

§ 1598. **What after Discovering the Perilous Situation of the Traveller.**<sup>27</sup>—But nearly all courts agree that if the railway company, *after discovering* the perilous situation of the traveller at or near the crossing, fails to exercise ordinary or reasonable care to avoid running over him, and in consequence of so failing, does run over him, the company will be liable in damages.<sup>28</sup> As in other cases,<sup>29</sup> the ordinary or reasonable care required in this situation, is a care proportionate to the appearances of danger, and it may demand the use of every means and appliance in the power of the engineer and trainmen to stop the train; since that would, under such circumstances, be the care which would be expected of ordinarily prudent men.<sup>30</sup> It has been said to be the duty of those in charge of the train in such a situation, to sound the whistle and take every reasonable precaution to prevent a collision.<sup>31</sup> If a collision has taken place upon the track, with a carriage, and it has been afterwards placed upon an adjoining track, and another engine there runs upon it and demolishes it, whose engineer has notice of its dangerous position, then, notwithstanding

<sup>27</sup> This section is cited in §§ 1627, 1675.

<sup>28</sup> Vol. I, § 237; *Kelley v. Hannibal &c. R. Co.*, 75 Mo. 138; *Bullock v. Wilmington &c. R. Co.*, 105 N. C. 180; s. c. 42 Am. & Eng. Rail. Cas. 93; 10 S. E. Rep. 988; *Piper v. Chicago &c. R. Co.*, 77 Wis. 247; s. c. 46 N. W. Rep. 165; *Missouri &c. R. Co. v. Peay*, 7 Tex. Civ. App. 400; s. c. 26 S. W. Rep. 768; *Kansas &c. R. Co. v. Cranmer*, 4 Colo. 524; *Pence v. Chicago &c. R. Co.*, 79 Iowa 389; s. c. 42 Am. & Eng. Rail. Cas. 126; 44 N. W. Rep. 686; *International &c. R. Co. v. Garcia*, 75 Tex. 583; s. c. 42 Am. & Eng. Rail. Cas. 115; 13 S. W. Rep. 223; *International &c. R. Co. v. Sein*, 11 Tex. Civ. App. 386; s. c. 33 S. W. Rep. 558; *Atchison &c. R. Co. v. Walz*, 40 Kan. 433; s. c. 19 Pac. Rep. 787; *Little Rock &c. R. Co. v. Harrell*, 58 Ark. 454; s. c. 25 S. W. Rep. 117; *Texas &c. R. Co. v. McCarty* (Tex. Civ. App.), 35 S. W. Rep. 675 (no off. rep.); *Wilson v. Southern &c. Co.*, 13 Utah 352; s. c. 4 Am. & Eng. Rail. Cas. (N. S.) 40; 44 Pac. Rep. 1040; *Heddles v. Chicago &c. R. Co.*, 74 Wis. 239; s. c. 42 N. W. Rep. 237; *Hinkle v. Richmond &c. R. Co.*, 109 N. C. 472; s. c. 11

*Rail. & Corp. L. J.* 81; 26 Am. St. Rep. 581; 13 S. E. Rep. 884; *Houston &c. R. Co. v. Carson*, 66 Tex. 345.

<sup>29</sup> Vol. I, §§ 25, 26.

<sup>30</sup> *Bullock v. Wilmington &c. R. Co.*, 105 N. C. 180; s. c. 42 Am. & Eng. Rail. Cas. 93; 10 S. E. Rep. 988; *Houston &c. R. Co. v. Carson*, 66 Tex. 345; *Heddles v. Chicago &c. R. Co.*, 74 Wis. 239; s. c. 42 N. W. Rep. 237; *Little Rock &c. R. Co. v. Harrell*, 58 Ark. 454; s. c. 25 S. W. Rep. 117; *International &c. R. Co. v. Sein*, 11 Tex. Civ. App. 386; s. c. 33 S. W. Rep. 558.

<sup>31</sup> *Heddles v. Chicago &c. R. Co.*, 74 Wis. 239; s. c. 42 N. W. Rep. 237. In the application of the doctrine of the text, it has been held that when the engineer *sees a horse* apparently approaching the track in front of the train, and can not tell whether or not he is harnessed, it is his duty to stop the train entirely, when he sees that the horse is attached to a covered wagon, whose occupants are inside, and not upon the lookout: *Hinkle v. Richmond &c. R. Co.*, 109 N. C. 472; s. c. 11 Rail. & Corp. L. J. 81; 26 Am. St. Rep. 581; 13 S. E. Rep. 884.



the negligence of the owner in not removing it before it is struck a second time,<sup>32</sup> the railway company may become liable for the second collision; although it was not due to wantonness or willfulness on the part of its servants, and although it may not have been liable for the first collision.<sup>33</sup>

<sup>32</sup> *Missouri &c. R. Co. v. Peay*, 7 Tex. Civ. App. 400; s. c. 26 S. W. Rep. 768.

<sup>33</sup> *Missouri &c. R. Co. v. Peay*, *supra*. A miscalculation made by the engineer as to distance and speed, when seeing a team of horses, a traction engine, etc., crossing the track at a distance in front of his train, whereby, instead of maintaining the diminished speed to which he had reduced the train, he increased speed and collided with the vehicle, renders the company liable to pay damages: *Atchison &c. R. Co. v. Walz*, 40 Kan. 433; s. c. 19 Pac. Rep. 787. The fact that the engineer did not slacken speed or blow the whistle on seeing a boy about nine years of age standing six or eight feet from the track, where the bell was ringing and the gates were down, was not ascribed to the company as negligence, where the boy stepped directly in front of the train, and it could not be stopped in time to avoid the accident: *Theobald v. Chicago &c. R. Co.*, 75 Ill. App. 208. The engineer under such circumstances need not "assume that such a boy will not take the ordinary and reasonable precaution of looking both ways before he steps upon the track, or that the boy is in fact ignorant of the approach of the oncoming train." Hence, where plaintiff was injured by collision with defendant's train at a crossing, and only eight seconds elapsed between the time the engineer saw plaintiff's horses and the happening of the accident, it was error to instruct the jury that if the engineer, after seeing the horses, omitted to do any act which might have prevented the accident or might have lessened the damage to plaintiff, defendant was guilty of negligence: *Lewis v. Long Island R. Co.*, 162 N. Y. 52; s. c. 56 N. E. Rep. 548; rev'g s. c. 30 App. Div. 410; 51 N. Y. Supp. 558. It was so held where an engineer saw ahead of his train a sleigh loaded with several tons of green hemlock logs, and failed to

comprehend at the instant that it was stalled on the crossing, and unable to move, and consequently failed to take immediate proceedings to stop his train: *Garland v. Maine &c. R. Co.*, 85 Me. 519; s. c. 27 Atl. Rep. 615. The precautions prescribed by Mill & V. (Tenn.) Code, § 1298, to prevent accident where an engineer *sees a person*, animal or other obstruction on the track, are not required to be observed in the exact order in which they are named in the statute, but in the order best calculated and most effectual to prevent the accident, under all the circumstances: *Memphis &c. R. Co. v. Scott*, 87 Tenn. 494; s. c. 11 S. W. Rep. 317. The Supreme Court of Texas is to be credited with holding that, although the fact that a traveller places himself in a position to be injured by the train is not a defense to an action for such injuries, where the defendant *saw the danger* in time to prevent them and took no steps therefor, yet the negligence of a person who steps upon the track of a railroad immediately in front of an engine which he knows is approaching, will prevent a recovery from the company, although the engineer was grossly negligent in not slackening or stopping the train, or keeping proper lookout: *McDonald v. International &c. R. Co.*, 86 Tex. 1; s. c. 22 S. W. Rep. 939; rev'g s. c. 20 S. W. Rep. 847; 21 S. W. Rep. 774. But this decision is obviously unsound. No matter how gross the negligence of the person who thus exposes himself may be, this does not license the railroad company to murder him, if it can avoid doing so by the exercise of reasonable care: *Texas &c. R. Co. v. Gilleland* (Tex. Civ. App.), 36 S. W. Rep. 1134 (no off. rep.). One court has held that it is not negligence for the fireman on a railroad train to fail to mention to the engineer that he *sees* a team *approaching* a crossing at a distance of about eighty feet from it: *Dyson v. New York &c. R. Co.*, 57 Conn. 9; s. c. 17 Atl. Rep. 137. The



§ 1599. **The Same Rule where the Trainmen have Reason to Believe that a Person is Exposed to Danger.**—The doctrine here under consideration applies equally to the case where the trainmen either become aware, or *have reason to believe* that a person, exposed on the track, will not leave it in time to escape the approaching train;<sup>34</sup> and they may become justly imputable with reckless and wanton negligence in running a train at a high rate of speed across a street where people are constantly passing and repassing, although they may not be aware of the peril of the particular person who is run down and killed, or of another who was killed in attempting to save the life of the former, in time to stop the train and avoid the calamity.<sup>35</sup>

§ 1600. **Doctrine that the Railroad Company is under no Duty to Discover Trespassers Exposed to being Run Over at Public Crossings.**—Cases are occasionally met with which go to the wild and unjust length of holding, in substance, and even in words, that a railroad company is under no duty of discovering persons who negligently expose themselves at public crossings,—or, at least, that a failure so to discover them and to avoid injuring them, will not make the company liable to pay damages. One court has held that a railroad com-

view of the court is that no general duty rests upon the engineer with respect to a traveller whom he sees approaching a crossing; but that he has ordinarily the right to assume that he will regard the signals, if they have been given, and will stop when he reaches the track, and is called upon to act only when the traveller is so near the track as to alarm him: *Dyson v. New York & C. R. Co.*, 57 Conn. 9. A decision of the Supreme Court of Michigan is substantially to the effect that where the traveller is guilty of the *grossest negligence* in exposing himself to danger, so much so that the *slightest precaution* on his part would have prevented the injury which he would receive, he can not recover damages from the railway company merely because the engineer *might have discovered* his perilous position, in time, by the exercise of reasonable care, to have avoided injuring him: *Redson v. Michigan & C. R. Co.* (Mich.), 79 N. W. Rep. 939. The propriety of this decision is doubtful. It punishes the gross negligence of the traveller, while ignoring the fact that it is the railroad company that is driving the instrument of danger, and that it is the railroad

company that hurts the traveller, whereas the traveller does not, in consequence of his negligence, hurt the railroad company. It has been held (one judge dissenting) that an instruction to the jury to the effect that if they should believe, from the evidence, that the engineer in charge of the train *had an opportunity to see the team on the main track*, "and could have stopped his train with safety to the same and to the passengers and railway employés on same, in his then situation, and could prudently have avoided the collision with the team, his failure so to stop amounts to negligence, and renders the defendant liable for damages; and such liability attaches, even though plaintiffs contributed to the injury by their own carelessness and negligence,"—was not erroneous. It was held that, although the instruction was carelessly drawn, the principle of law embodied therein was not erroneous: *Bunting v. Central & C. R. Co.*, 16 Nev. 277.

<sup>34</sup> *International & C. R. Co. v. Garcia*, 75 Tex. 583; s. c. 42 Am. & Eng. Rail. Cas. 115; 13 S. W. Rep. 223.

<sup>35</sup> *Louisville & C. R. Co. v. Orr* (Ala.), 26 South. Rep. 35.



pany is not required, before starting a train which has been standing on the street, to make a personal inspection, with the view of seeing whether there are persons exposed to danger, in addition to giving the statutory signals;<sup>36</sup> and this in the face of the well-known fact that the cases are very numerous where travellers, and especially children, have been injured in this way. In a case in another court, it appeared that the plaintiff was travelling on foot on a country road crossing defendant's railroad, and carrying a sack of provisions, which he deposited on the side of the track, and sat down outside of the track between two ties, at a distance of six or eight inches from the rail, and "dropped off into a sleep." He was somewhat intoxicated. A train came by soon after and ran over him. It was held that his negligence was such that he could not recover, even though the track was straight for four or five hundred yards, so that he could be plainly seen by the engineer.<sup>37</sup>

§ 1601. **Right to Assume that the Traveller will Look Out for Himself.**<sup>38</sup>—The engineer who is driving a railway train, and who discovers an adult person, apparently possessed of his faculties, on the track in front of the train, may rightfully assume, until admonished to the contrary, that such person, if warned by the customary signals, will look out for his own safety, and quit the track in time to avoid being run over.<sup>39</sup> This right to assume that the person thus exposed on the track will, if warned, take care of himself, rests on the *presumption of right-acting*, already considered.<sup>40</sup> This rule applies in the case where the traveller is *deaf*, in the absence of knowledge of his deafness on the part of the trainmen, or of facts tending to arouse their suspicions that he does not hear the signals.<sup>41</sup> If they see a person, apparently in the possession of all his faculties, in the vicinity of the track, they may rightfully assume that he will not attempt to cross immediately in front of the train; and hence they may proceed without abating the speed of the train, and will not be imputable with

<sup>36</sup> East St. Louis Connecting R. Co. v. Jenks, 54 Ill. App. 91.

<sup>37</sup> Denman v. St. Paul & C. R. Co., 26 Minn. 357.

<sup>38</sup> This section is cited in §§ 1491, 1627.

<sup>39</sup> Indiana & C. R. Co. v. Wheeler, 115 Ind. 253; s. c. 15 West. Rep. 133; 17 N. E. Rep. 563; Boyd v. Wabash & C. R. Co., 105 Mo. 371; s. c. 16 S. W. Rep. 909; Ohio & C. R. Co. v. Walker, 113 Ind. 196; s. c. 15 N. E. Rep. 234; International & C. R. Co. v. Garcia, 75 Tex. 583; s. c. 42 Am. & Eng. Rail.

Cas. 115; 13 S. W. Rep. 223; Cleveland & C. R. Co. v. Miller, 149 Ind. 490; s. c. 49 N. E. Rep. 445; 9 Am. & Eng. Rail. Cas. (N. S.) 684; Bump v. New York & C. R. Co., 55 N. Y. Supp. 962; s. c. 38 App. Div. 60; 29 Civ. Proc. Rep. 141; Heddles v. Chicago & C. R. Co., 77 Wis. 228; s. c. 46 N. W. Rep. 115.

<sup>40</sup> Vol. I, § 401.

<sup>41</sup> International & C. R. Co. v. Garcia, 75 Tex. 583; s. c. 42 Am. & Eng. Rail. Cas. 115; 13 S. W. Rep. 223.



negligence for doing so.<sup>42</sup> It has been quaintly observed that the engineer of a passenger train need not anticipate that the driver of a team which he sees approaching the track, is asleep; nor need he stop his train or check its speed, although he may observe that the driver is reclining on his load.<sup>43</sup> It is hardly necessary to say, in conclusion, that, for an engineer to act upon this presumption until the contrary appears, will not charge the railway company with the *willful* or *wanton* infliction of an injury, in case the traveller is so stupid or negligent as not to get out of the way.<sup>44</sup> It should be kept in mind, however, that whether the engineer will have a right to indulge in this assumption, can not, as a general rule, be declared by the judge, but must be determined by the jury under proper instructions.<sup>45</sup>

**§ 1602. Evidence which Tends to Prove that the Trainmen Knew of the Danger of the Traveller.**—It may be difficult in many cases to prove, where that fact is material, that the trainmen knew of the perilous situation of the traveller upon or near the crossing. Where the just and reasonable rule obtains that they are bound to keep a lookout, and that their negligent ignorance in failing to discover him operates precisely as their knowledge at the time of running him down would have operated,<sup>46</sup> there is no need of such evidence. But where the theory which obtains in the particular jurisdiction makes it necessary, it may be difficult to obtain it; since the engineer and fireman will not give evidence which will convict themselves of criminal negligence. Nor will the sound of the whistle or the ringing of the bell in all cases afford such evidence; since that may be the usual or statutory precaution pursued in all cases when the train approaches the crossing; though an unusual number of blasts from the steam whistle might afford it. It has been held that evidence that the switchman

<sup>42</sup> *Boyd v. Wabash & C. R. Co.*, 105 Mo. 371; s. c. 16 S. W. Rep. 909.

<sup>43</sup> *Indiana & C. R. Co. v. Wheeler*, 115 Ind. 253; s. c. 15 West. Rep. 133; 17 N. E. Rep. 563.

<sup>44</sup> *Cleveland & C. R. Co. v. Miller*, 149 Ind. 490; s. c. 49 N. E. Rep. 445; 9 Am. & Eng. Rail. Cas. (N. S.) 684.

<sup>45</sup> *Chicago & C. R. Co. v. Goebel*, 20 Ill. App. 163; s. c. aff'd 119 Ill. 515; s. c. 10 N. E. Rep. 369. A railroad engineer is not entitled to assume that a person at a public crossing will under all circumstances get off in time to avoid injury. The public have the right to go on public crossings, and the Georgia statute imposes a duty on engineers to have their engines under such control,

that they can be stopped at such crossings whenever necessary to prevent injury: *Georgia & C. R. Co. v. Evans*, 87 Ga. 673; s. c. 13 S. E. Rep. 580. Another court has held that an engineer on a train, who sees a boy approaching the track, although he has a right to assume that the boy will stop in time to escape injury, can not rest on that assumption so long as to make it impossible for him to control the train, or to give warning in time to prevent injury, if the boy continues on his course: *Heddles v. Chicago & C. R. Co.*, 77 Wis. 228; s. c. 46 N. W. Rep. 115.

<sup>46</sup> Vol. I, § 8.



on a switch engine, by which plaintiff was injured, called to plaintiff when he was about twenty feet from the crossing, and that the engine slowed up, coming nearly to a stop at a distance of but fifteen feet from the crossing, sufficiently shows that the employés operating the engine knew that the plaintiff was on the track and saw his danger.<sup>47</sup>

<sup>47</sup> *Missouri &c. R. Co. v. Reynolds* (Tex. Civ. App.), 26 S. W. Rep. 879 (no off. rep.).



## CHAPTER LII.

## CONTRIBUTORY NEGLIGENCE OF TRAVELLERS AT RAILWAY CROSSINGS.

ART. I. General Doctrines and Questions, §§ 1605-1633.

ART. II. Duty of Traveller to Stop, Look and Listen, §§ 1637-1661.

ART. III. Contributory Negligence of Traveller in Various Particulars at Railway Crossings, §§ 1664-1684.

## ARTICLE I. GENERAL DOCTRINES AND QUESTIONS.

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1605. No recovery where traveller guilty of negligence proximately contributing to the injury, although railway company also negligent.

1606. No recovery if traveller negligent, although railway company may have neglected the statutory or customary precautions.

1607. Theory that there can be no recovery where the traveller could have avoided the consequences of the defendant's negligence.

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and willful negligence" under Massachusetts statute.

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1631. Injury to one who is travelling on Sunday.

1632. Weight of evidence to establish contributory negligence.

1633. Instructions submitting question of contributory negligence of traveller to jury.

§ 1605. **No Recovery where Traveller Guilty of Negligence Proximately Contributing to the Injury, although Railway Company also Negligent.**<sup>1</sup>—In a great majority of the cases where a recovery of damages from railway companies is sought on account of injuries received by travellers at places where public highways intersect railways, the right of recovery is determined by the question of the contributory negligence of the traveller.<sup>2</sup> In considering this question, the leading rule is that there can be no recovery of damages where the negligence of the traveller contributed proximately to the injury, although the railway company was also guilty of negligence.<sup>3</sup>

§ 1606. **No Recovery if Traveller Negligent, although Railway Company may have Neglected the Statutory or Customary Precautions.**<sup>4</sup>—Under this rule, there can be no recovery if the negligence of the traveller contributed as a proximate cause to his injury, although the railway company may also have been negligent in omitting any or all statutory, customary or proper precautions,—unless, under a principle already explained,<sup>5</sup> its negligence was of that char-

<sup>1</sup> This section is cited in §§ 1552, 1553, 1582, 1638, 1643, 1648.

<sup>2</sup> More than 1,200 cases, collected in this chapter alone, vindicate the above statement.

<sup>3</sup> *Eaton v. Erie R. Co.*, 51 N. Y. 544. See also *Maginnis v. New York & C. R. Co.*, 52 N. Y. 215; *Spillane v. Missouri & C. R. Co.*, 135 Mo. 414; s. c. 37 S. W. Rep. 198; *Baltimore & C. R. Co. v. Whitacre*, 35 Ohio St.

627; *Carr v. Missouri & C. R. Co.*, 58 Kan. 814; s. c. 49 Pac. Rep. 1117; *Texas & C. R. Co. v. Brown*, 2 Tex. Civ. App. 281; s. c. 21 S. W. Rep. 424; *Baltimore & C. R. Co. v. McPeck*, 16 Ohio C. C. 87.

<sup>4</sup> This section is cited in §§ 1608, 1627, 1637, 1638, 1648, 1666, 1695.

<sup>5</sup> Vol. I, § 206, *et seq.*; §§ 265, 266, 276.



acter which the law characterizes as *willful* or *wanton negligence*. It may omit to warn the traveller by giving the statutory, customary or proper *signals*, usually the ringing of the *bell*, or the sounding of the *whistle*;<sup>6</sup> it may drive its train at an excessive or prohibited rate of *speed*;<sup>6a</sup> or it may be negligent in not lighting a highway crossing;<sup>7</sup> it may omit to have gates or gatemen at a crossing;<sup>8</sup> its gates may be negligently left up, indicating to the traveller that no train is coming;<sup>9</sup> its gateman or other servant may, by signs or otherwise, notify the traveller to cross;<sup>10</sup> it may be guilty of negligence in other respects, luring the traveller into a feeling of safety, or tempting him to his death;—and yet the doctrine of many courts condones the conduct of the railway company and allows the consequence of the catastrophe to rest upon the maimed traveller, or in case of his death, upon his family. Some of the courts break away from this severe doctrine and hold that a traveller who has been tempted to go upon the crossing because of the failure of those driving an approaching train to give the statutory signals, may recover damages in case the train runs upon

<sup>6</sup> Toledo &c. R. Co. v. Riley, 47 Ill. 514; Hinckley v. Cape Cod R. Co., 120 Mass. 257; Steves v. Oswego &c. R. Co., 18 N. Y. 422; Rothe v. Milwaukee &c. R. Co., 21 Wis. 256; Galena &c. R. Co. v. Dill, 22 Ill. 264; Harlan v. St. Louis &c. R. Co., 64 Mo. 480; s. c. 5 Cent. L. J. 221; rehearing denied, 65 Mo. 22; 6 Cent. L. J. 229; Spencer v. Utica &c. R. Co., 5 Barb. 337; Havens v. Erie &c. R. Co., 41 N. Y. 296; reversing s. c. 53 Barb. (N. Y.) 328. But see Galena &c. R. Co. v. Loomis, 13 Ill. 548; Chicago &c. R. Co. v. Reid, 24 Ill. 144 (statute requiring sounding of bell or whistle imperative); Harty v. Central &c. R. Co., 42 N. Y. 468; Squire v. Central &c. R. Co., 4 Jones & Sp. (N. Y.) 436; Levy v. Great Western R. Co., 48 N. Y. 675; Hewett v. New York &c. R. Co., 3 Lans. (N. Y.) 83; Haight v. New York &c. R. Co., 7 Lans. (N. Y.) 11; Mitchell v. New York &c. R. Co., 2 Hun (N. Y.) 535; Langan v. St. Louis &c. R. Co., 6 Cent. L. J. 175; Meyer v. Lindell R. Co., 6 Cent. L. J. 425; Zeigler v. Railroad, 5 S. C. 221; Cincinnati &c. R. Co. v. Gaines, 104 Ind. 526; s. c. 2 West. Rep. 262; Connersville &c. R. Co. v. Butler (Ind.), 1 West. Rep. 110 (no off. rep.); Swanson v. Central R. Co. of New Jersey (N. J.), 44 Atl. Rep. 852; International &c. R. Co. v. Graves, 59 Tex. 330; Griffith v. Penn-

sylvania R. Co., 13 Lanc. L. Rev. 193; Severy v. Chicago &c. R. Co., 6 Okla. 153; s. c. 50 Pac. Rep. 162; Chicago &c. R. Co. v. Houston, 95 U. S. 697; s. c. 24 L. ed. 542; Salter v. Utica &c. R. Co., 75 N. Y. 273; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Durbin v. Oregon R. &c. Co., 17 Ore. 5; s. c. 11 Am. St. Rep. 778; 17 Pac. Rep. 5; Cincinnati &c. R. Co. v. Howard, 124 Ind. 280; s. c. 8 L. R. A. 593; 24 N. E. Rep. 892; Blackwell v. St. Louis &c. R. Co., 47 La. An. 268; s. c. 16 South. Rep. 818.

<sup>6a</sup> Schneider v. Chicago &c. R. Co., 99 Wis. 378; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 81; 75 N. W. Rep. 169; Wabash &c. R. Co. v. Weisbeck, 14 Ill. App. 525; Jelinski v. Belt R. Co., 86 Ill. 535 (excessive or prohibited speed alone does not amount to willfulness or wantonness); Norton v. North Carolina R. Co., 122 N. C. 910; s. c. 29 S. E. Rep. 886; Louisville &c. R. Co. v. McCombs (Ky.), 54 S. W. Rep. 179 (although the plaintiff might, notwithstanding his negligence in going upon the track, have gotten safely across it if the train had not been running so fast).

<sup>7</sup> Balser v. Chicago &c. R. Co. (Ohio), 9 Ohio S. & C. P. Dec. 523.

<sup>8</sup> Ante, § 1527, *et seq.*

<sup>9</sup> Ante, § 1531; *post*, §§ 1613, 1614.

<sup>10</sup> *Post*, § 1615.



him, although he may have been guilty of negligence.<sup>11</sup> There is room for the conclusion that the injured traveller should have no right of action, although the statutory signals were not given, if other *signals or warnings* were given, which would have apprised him of the approach of the train, if he had exercised ordinary care.<sup>12</sup>

§ 1607. **Theory that there can be no Recovery where the Traveller could have Avoided the Consequences of the Defendant's Negligence.**—A theory prevails under the Code of Georgia,<sup>13</sup> which may be called "*the upset doctrine*," because it upsets and inverts the usual statements of the theory of contributory negligence, by holding that there can be no recovery for an injury caused by the negligence of the defendant, provided the plaintiff could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence.<sup>14</sup> The theory itself is not as absurd as was the application of it to a case where a man was killed by a railway train, at a crossing, where the evidence tended to show that he was *lying on the track* when the train approached.<sup>15</sup> Here, it should seem that the question would have been whether the railway company, by the exercise of ordinary or reasonable care, could have avoided the consequences of the negligence of the deceased. Another statement of this foolish doctrine, as applied to an injury at a railway crossing, which is extracted from the official syllabus of a decision of the Supreme Court of that State, is to the

<sup>11</sup> Russell v. Carolina &c. R. Co., 118 N. C. 1098; s. c. 24 S. E. Rep. 512. Compare *ante*, § 1579, *et seq.* As the failure of the railway company to give the customary, proper, or statutory signals on approaching the crossing, does not make it liable for an injury of which such failure was not the proximate cause, it followed that such failure was immaterial where an injury was visited upon one who *knew* of the approach of the train, and was knocked down by her horse, which she was holding, becoming frightened by the noise of the passing train, for which the railroad company could not be held liable: Herbert v. Southern &c. R. Co., 121 Cal. 227; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 94; 53 Pac. Rep. 651. That it is error to refuse to strike out evidence of the failure to give signals where it appears that such failure could not have been the cause of the accident,—see Ohio Valley R. Co. v. Young, 19 Ky. L. Rep. 158; s. c. 39 S. W. Rep. 415 (not to be rep.); *ante*, §§ 1558, 1559. The

contrary was held under a statute of South Carolina (Rev. Stat. S. C., § 1692), providing that a railway company which neglects to give the statutory signals on approaching a crossing, shall be liable for all damages caused by a collision to which such negligence *contributed*, unless the person injured was guilty of *gross or willful negligence* which contributed to the injury: Strother v. South Carolina &c. R. Co., 47 S. C. 375; s. c. 25 S. E. Rep. 272; 5 Am. & Eng. Rail. Cas. (N. S.) 430. But this decision is utter nonsense, since the fact that the traveller saw or heard the approaching train prevents the failure to give statutory signals from even "contributing" to the collision.

<sup>12</sup> Atlantic &c. R. Co. v. Reiger, 95 Va. 418; s. c. 28 S. E. Rep. 590.

<sup>13</sup> Ga. Code, §§ 2791, 2792.

<sup>14</sup> As to this theory, see Vol. I, § 223.

<sup>15</sup> Southwestern R. Co. v. Johnson, 60 Ga. 667.



effect that a failure on the part of the traveller to use ordinary care at a railway crossing, by stepping upon a track *at an untimely moment*, is not a complete bar to a recovery of damages against the company, unless, by the use of ordinary care, the consequences due to the company's negligence could have been avoided.<sup>16</sup> Under the doctrine of comparative negligence, still lingering in that State, as will be presently shown,<sup>17</sup> it has been held that, although a traveller approaching a railroad crossing on a public highway, does not observe the care and diligence which would be exercised under similar circumstances by an ordinarily prudent person,—yet he is not necessarily precluded from recovering damages for a personal injury received at the crossing, if, after it is apparent to him that the engineer of the approaching train is disobeying the statute with regard to the giving of signals, he exercises ordinary care and diligence in endeavoring to escape the consequences of the engineer's negligence.<sup>18</sup>

§ 1608. **How under the Disappearing Rule of Comparative Negligence.**<sup>19</sup>—Under the nearly obsolete rule of *comparative negligence*,<sup>20</sup> which has disappeared from Illinois, but which still lingers in Georgia, *slight negligence* upon the part of the traveller will not exonerate the company from liability for a *willful* or *reckless* disregard of the safety of such traveller.<sup>21</sup> It is the duty of each party to use such a reasonable degree of foresight, skill, capacity, and actual care and diligence as to enable each to exercise in safety the privilege of crossing.<sup>22</sup> In estimating the relative degree of negligence, where both are at fault, it is not sufficient, to entitle the injured person to recover, that the managers of the train were guilty of *greater negligence* than he.<sup>23</sup> And in cases where the conduct of the managers of the

<sup>16</sup> *Richmond &c. R. Co. v. Johnston*, 89 Ga. 560; s. c. 15 S. E. Rep. 908.

<sup>17</sup> *Post*, § 1608.

<sup>18</sup> *Comer v. Barfield*, 102 Ga. 485; s. c. 31 S. E. Rep. 89.

<sup>19</sup> This section is cited in § 1607.

<sup>20</sup> Vol. I, § 259, *et seq.* The writer apologizes for allowing so much of the text of his original work as related to this subject to stand, on the ground that there is no telling how soon the backward swing of the pendulum of judicial thought may revive the doctrine in Illinois, Kansas, and elsewhere.

<sup>21</sup> *Augusta &c. R. Co. v. McElmurry*, 24 Ga. 75; *Chicago &c. R. Co. v. Triplett*, 38 Ill. 432.

<sup>22</sup> *Railroad Co. v. Houston*, 95 U. S. 697; s. c. 6 Cent. L. J. 132; 5 Reporter 164; *Chicago &c. R. Co. v. McKean*, 40 Ill. 218; *Chicago &c. R. Co. v. Fears*, 53 Ill. 115; *Fletcher v.*

*Atlantic &c. R. Co.*, 64 Mo. 484; *Wilds v. Hudson River R. Co.*, 29 N. Y. 315; *Gonzales v. New York &c. R. Co.*, 50 How. Pr. (N. Y.) 126; s. c. *aff'd* 6 Robt. (N. Y.) 93, 297; but finally *rev'd*, 38 N. Y. 440; *Eaton v. Erie R. Co.*, 51 N. Y. 544.

<sup>23</sup> *Chicago &c. R. Co. v. Lee*, 68 Ill. 576; *Illinois &c. R. Co. v. Goddard*, 72 Ill. 567; *Artz v. Chicago &c. R. Co.*, 34 Iowa 153; s. c. 38 Iowa 293; 44 Iowa 284; *Chicago &c. R. Co. v. Gretzner*, 46 Ill. 74; *Evansville &c. R. Co. v. Lowdermilk*, 15 Ind. 120. According to one theory, if the plaintiff exercised reasonable care, though he may have been guilty of *some* negligence or want of caution, he is still entitled to recover for an injury sustained in consequence of defendant's negligence: *Baltimore &c. R. Co. v. Fitzpatrick*, 35 Md. 32.



train was so *grossly negligent* as to evince a reckless disregard of life, the courts have refused to take particular notice of acts of the injured person, which, under other circumstances, might justly have prevented a recovery.<sup>24</sup> In some of the cases it is laid down that, in order to recover, the traveller must be without fault,<sup>25</sup> while in others the strictness of this rule is qualified by the proviso that his fault must be such as to be the *proximate cause* of the collision.<sup>26</sup> Still other cases go to the length of holding that "he who is guilty of *greater negligence*, or wrong, must be considered the original aggressor, and accountable accordingly."<sup>27</sup> In determining the relative degree of negligence, it has been laid down "that in proportion to the negligence of defendant should be measured the degree of care required of the plaintiff,—that is to say, the *more gross* the negligence manifested by the defendant, the *less degree* of care will be required of plaintiff to enable him to recover."<sup>28</sup> The rule that the traveller may recover where the degree of negligence of the company is *greater* than his, as in the Georgia case cited above,<sup>29</sup> was expressly denied in Illinois. It was only where his negligence was *slight* as compared with that of the other party, which was *gross*, that he might recover.<sup>30</sup> And now the doctrine of comparative negligence has gone by the board in Illinois, and also in Kansas.<sup>31</sup>

<sup>24</sup> *Lafayette &c. R. Co. v. Adams*, 26 Ind. 76; *Augusta &c. R. Co. v. McElmurry*, 24 Ga. 75. *Willful negligence* can be attributed to the company only where it has notice of the particular emergency in time, by the use of ordinary diligence, the means being at hand, to avoid the collision: *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335, 364. See further as to willful negligence, *ante*, § 1606, *et seq.*; Vol. I, §§ 206, 207, 208, 265, 266, 276.

<sup>25</sup> *Grippen v. New York &c. R. Co.*, 40 N. Y. 34; *Reynolds v. New York &c. R. Co.*, 58 N. Y. 248; *O'Brien v. Phila. &c. R. Co.*, 3 Phila. (Pa.) 76; *Bunn v. Delaware &c. R. Co.*, 6 Hun (N. Y.) 303.

<sup>26</sup> *Spencer v. Illinois &c. R. Co.*, 29 Iowa 55; *Kennayde v. Pacific R. Co.*, 45 Mo. 255; *Harlan v. St. Louis &c. R. Co.*, 64 Mo. 480; s. c. 5 Cent. L. J. 221; rehearing denied, 65 Mo. 22; 6 Cent. L. J. 229; *Central R. Co. v. Moore*, 24 N. J. L. 824. See Vol. I, § 216, *et seq.*; *ante*, § 1568.

<sup>27</sup> *Macon &c. R. Co. v. Davis*, 27 Ga. 113, 119. This is a very common and erroneous statement of the law of comparative negligence [*Illinois &c. R. Co. v. Hammer*, 72 Ill. 351,

352; *Chicago &c. R. Co. v. Harwood*, 8 Cent. L. J. 464 (no off. rep.)], as it prevailed in Illinois and Georgia. See *O'Keefe v. Chicago &c. R. Co.*, 32 Iowa 467.

<sup>28</sup> *Galena &c. R. Co. v. Jacobs*, 20 Ill. 478, 496.

<sup>29</sup> *Macon &c. R. Co. v. Davis*, 27 Ga. 113, 119.

<sup>30</sup> *Illinois &c. R. Co. v. Maffit*, 67 Ill. 431; *Chicago &c. R. Co. v. Lee*, 68 Ill. 576; *Illinois &c. R. Co. v. Goddard*, 72 Ill. 567; *Illinois &c. R. Co. v. Benton*, 69 Ill. 174; *Chicago &c. R. Co. v. Hatch*, 79 Ill. 137; *Lake Shore &c. R. Co. v. Berlinsk*, 2 Ill. App. 427.

<sup>31</sup> Vol. I, §§ 263, 264. An instruction was held erroneous because it declared the law to be that when plaintiff's negligence was slight and defendant's gross, or of a higher degree than that of plaintiff, the latter would be entitled to recover: *Illinois &c. R. Co. v. Goddard*, 72 Ill. 567. In another case, by the same court, it was held sufficient that the degree of negligence of which defendant was guilty clearly preponderated over that of plaintiff, but the difference in degree must be consider-



§ 1609. **Traveller Required to Exercise Ordinary or Reasonable Care.**—The degree of care to be exercised by the traveller at a railway crossing of the public highway, is that measure of care and caution which is described as *ordinary or reasonable care*.<sup>32</sup> Speaking with reference to the subject of injuries at railway crossings, this measure of care has been defined to be that proper care that ordinarily prudent people exercise in the ordinary affairs of life;<sup>33</sup> ordinary care, and not great care and prudence;<sup>34</sup> such care as a reasonably prudent person would exercise under like circumstances;<sup>35</sup> such care as a man of ordinary prudence would exercise;<sup>36</sup> such care as should reasonably be expected from an ordinarily prudent person under like circumstances;<sup>37</sup> such reasonable care and caution as a man of ordinary prudence and judgment might exercise under like circumstances;<sup>38</sup> such care as would be exercised by a prudent man under all the facts and circumstances attendant upon and surrounding his approach to and crossing the track.<sup>39</sup> Therefore, in a case where the person injured was *riding as the guest of another*, an instruction to the jury making the want of care of such guest depend upon acts of assistance, advice, or control of the driver's actions, was held to be incorrect,—the test being a want of ordinary care.<sup>40</sup> On the other hand, an

able, or the plaintiff's negligence slight: *Chicago &c. R. Co. v. Payne*, 49 Ill. 499. But this decision, in this particular, was overruled in *Joliet v. Seward*, 86 Ill. 402; and see *Earlville v. Carter*, 2 Ill. App. 38.

<sup>32</sup> As to what this degree of care is, so far as it has been defined or announced, see Vol. I, §§ 23, 24; *Galveston &c. R. Co. v. Kutac*, 72 Tex. 643; s. c. 11 S. W. Rep. 127; *Wichita &c. R. Co. v. Davis*, 37 Kan. 743; s. c. 16 Pac. Rep. 78; *Wabash &c. R. Co. v. Central Trust Co.*, 23 Fed. Rep. 738; *Wabash R. Co. v. Jenkins*, 84 Ill. App. 511; *Omaha &c. R. Co. v. O'Donnell*, 22 Neb. 475; s. c. 35 N. W. Rep. 235; *Chicago &c. R. Co. v. Kuster*, 22 Ill. App. 188; *Kennedy v. Hannibal &c. R. Co.*, 105 Mo. 270; s. c. 15 S. W. Rep. 983; *aff'd* 16 S. W. Rep. 837; *Chicago &c. R. Co. v. Pollard*, 53 Neb. 730; s. c. 74 N. W. Rep. 331; *Pennsylvania Co. v. Reidy*, 72 Ill. App. 343; s. c. 30 *Chicago Leg. News* 81; *Illinois &c. R. Co. v. Borders*, 61 Ill. App. 55; *Gulf &c. R. Co. v. Younger*, 10 Tex. Civ. App. 141; s. c. 29 S. W. Rep. 948; *Galveston &c. R. Co. v. Matula*, 79 Tex. 577; s. c. 19 S. W. Rep. 376; *Omaha &c. R. Co. v. Talbot*, 48 Neb.

627; s. c. 67 N. W. Rep. 599; *Slater v. Burlington &c. R. Co.*, 71 Iowa 209; s. c. 32 N. W. Rep. 264.

<sup>33</sup> *Galveston &c. R. Co. v. Matula*, 79 Tex. 577; s. c. 19 S. W. Rep. 376.

<sup>34</sup> *Gulf &c. R. Co. v. Younger*, 10 Tex. Civ. App. 141; s. c. 29 S. W. Rep. 948.

<sup>35</sup> *Chicago &c. R. Co. v. Kuster*, 22 Ill. App. 188.

<sup>36</sup> *Indianapolis &c. R. Co. v. Stout*, 53 Ind. 143; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351; *Bernhard v. Rensselaer &c. R. Co.*, 1 Abb. App. Dec. (N. Y.) 131; s. c. 32 Barb. (N. Y.) 165; 18 How. Pr. (N. Y.) 427; 19 How. Pr. (N. Y.) 199; *McGrath v. Hudson &c. R. Co.*, 32 Barb. (N. Y.) 144; s. c. 19 How. Pr. (N. Y.) 211; *Central R. Co. v. Moore*, 24 N. J. L. 824; *Continental Improvement Co. v. Stead*, 95 U. S. 161; *Cleveland &c. R. Co. v. Crawford*, 24 Ohio St. 639.

<sup>37</sup> *Omaha &c. R. Co. v. O'Donnell*, 22 Neb. 475; s. c. 37 N. W. Rep. 235.

<sup>38</sup> *Wichita &c. R. Co. v. Davis*, 37 Kan. 743; s. c. 16 Pac. Rep. 78.

<sup>39</sup> *Chicago &c. R. Co. v. Pollard*, 53 Neb. 730; s. c. 74 N. W. Rep. 331.

<sup>40</sup> *Galveston &c. R. Co. v. Kutac*, 72 Tex. 643; s. c. 11 S. W. Rep. 127.



instruction to the effect that the plaintiff will not be precluded from a recovery unless guilty of such negligence as an ordinarily prudent man would not have been guilty of under like circumstances, has been held not erroneous.<sup>41</sup>

§ 1610. **Care to be Exercised by Traveller should be in Proportion to the Danger.**—As in other cases,<sup>42</sup> this ordinary or reasonable care is a degree of care such as the circumstances, the appearances, or the probabilities of danger, would reasonably suggest; in other words, it is a degree of care *in proportion to the danger*. It has been well said that the degree of care which he must exercise depends upon the obstructions, the location, the surroundings, and the circumstances of the particular case.<sup>43</sup> It is entirely consistent with this statement of doctrine to say that it is the duty of one approaching a railway crossing to do so *cautiously*,—especially where the crossing is, to his knowledge, *peculiarly dangerous*.<sup>44</sup> Nor is it an exaggerated expression of this doctrine, though this language might not be apt in instructing a jury, to say that the traveller must *use every precaution* to ascertain whether a train is coming, else he can not recover damages if a train runs upon him.<sup>45</sup> On the other hand, circumstances may admit of a relaxation of the strained and exacting care and attention which the law would make it the duty of the traveller to use. Thus, it has been reasoned that where one, familiar with the time for the approach of a regular train, reaches a crossing after he supposes the train to have passed, he is not bound to use the same degree of care as though the train were just due, especially where obstructions interfere with sight and sound.<sup>46</sup>

§ 1611. **Traveller Bound to Know that he must Yield Precedence to Railway Trains.**—A traveller upon a public highway approaching a railroad crossing is *bound to know* that he must yield precedence to passing trains, and to know that there may be peril in attempting to cross.<sup>47</sup>

<sup>41</sup> Galveston &c. R. Co. v. Duerm (Tex. Civ. App.), 23 S. W. Rep. 596; s. c. 24 S. W. Rep. 334 (no off. rep.); s. c. aff'd 86 Tex. 450; 25 S. W. Rep. 403.

<sup>42</sup> Vol. I, §§ 25, 26; Mercier v. New Orleans &c. R. Co., 23 La. An. 264; Beisegel v. New York &c. R. Co., 14 Abb. Pr. (N. S.) (N. Y.) 29; Chicago &c. R. Co. v. Jacobs, 63 Ill. 178; Karle v. Kansas &c. R. Co., 55 Mo. 476; Chicago &c. R. Co. v. Kusel, 63 Ill. 180, note; Whalen v. St. Louis &c. R. Co., 60 Mo. 323; Louisville &c.

R. Co. v. Stommel, 126 Ind. 35; s. c. 25 N. E. Rep. 863.

<sup>43</sup> St. Louis &c. R. Co. v. Knowles, 6 Kan. App. 790; s. c. 51 Pac. Rep. 230.

<sup>44</sup> Illinois &c. R. Co. v. Batson, 81 Ill. App. 142.

<sup>45</sup> Allen v. Pennsylvania R. Co. (Pa.), 11 Cent. Rep. 207; 12 Atl. Rep. 493 (no off. rep.).

<sup>46</sup> Bower v. Chicago &c. R. Co., 61 Wis. 457.

<sup>47</sup> Cleveland &c. R. Co. v. Miller, 149 Ind. 490; s. c. 49 N. E. Rep. 445; 9 Am. & Eng. Rail. Cas. (N. S.) 684.



§ 1612. **Right of the Traveller to Assume that the Railway Company will do its Duty with Reference to Gates, Signals, etc.**<sup>48</sup>—Next, let us consider what, if anything, will excuse the traveller from taking the precautions of looking and listening; of stopping and looking; or of stopping, looking, and listening,—referred to in preceding paragraphs. And first let us consider the application of the proposition that it is not negligence in one not to anticipate that another person will be negligent or fail to do his duty.<sup>49</sup> This principle ought to be of peculiar force with reference to the conduct of a person who is driving an instrument of great danger, which may become at railway crossings a mere murder-machine, if it is allowed to approach at an excessive or an unlawful rate of speed, or without such signals or warnings as will apprise the travelling public of its coming. Applying this principle to the situation under consideration, it may be said that a traveller has the right to assume, until his senses admonish him to the contrary, that a railway company will observe its own rules,<sup>50</sup> will not drive a train upon the crossing at an unusual<sup>51</sup> or unlawful<sup>52</sup> rate of speed, and without giving the statutory or customary signals,<sup>53</sup> or without violating any other legal duty prescribed for the promotion of the safety of the public at such places.<sup>54</sup> It has been said that travellers at railway crossings have a right to assume that the trains will be run over the crossings with great caution, and with due regard for their rights;<sup>55</sup> and that one approaching a railway crossing has the right to assume that engineers in charge of locomotives will take into consideration the peculiar character and known condition of the crossing, and will accordingly exercise care for their protection.<sup>56</sup> It

<sup>48</sup> This section is cited in §§ 1448, 1531, 1653, 1658, 1697.

<sup>49</sup> Vol. I, § 191.

<sup>50</sup> *Lyman v. Boston & C. R. Co.*, 66 N. H. 200; s. c. 11 L. R. A. 364; 20 Atl. Rep. 976; 45 Am. & Eng. Corp. Cas. 163.

<sup>51</sup> *Ramsey v. Louisville & C. R. Co.*, 89 Ky. 99; s. c. 20 S. W. Rep. 162; 12 Ky. L. Rep. 559.

<sup>52</sup> *Hart v. Devereux*, 41 Ohio St. 565; *Piper v. Chicago & C. R. Co.*, 77 Wis. 247; s. c. 46 N. W. Rep. 165; *Sullivan v. Missouri & C. R. Co.*, 117 Mo. 214; s. c. 23 S. W. Rep. 149; *Studley v. St. Paul & C. R. Co.*, 48 Minn. 249; s. c. 51 N. W. Rep. 115.

<sup>53</sup> *Texas & C. R. Co. v. Fuller*, 13 Tex. Civ. App. 151; s. c. 36 S. W. Rep. 319; *Baltimore & C. R. Co. v. Conoyer*, 149 Ind. 524; s. c. 9 Am. & Eng. Rail. Cas. (N. S.) 348; 48 N. E. Rep. 252; rehearing denied 49 N. E. Rep. 452; *Petty v. Hanni-*

*bal & C. R. Co.*, 88 Mo. 306; s. c. 8 West. Rep. 297; *Donohue v. St. Louis & C. R. Co.*, 91 Mo. 357; s. c. 6 West. Rep. 851; *Pittsburgh & C. R. Co. v. Lewis*, 38 S. W. Rep. 482.

<sup>54</sup> *Staal v. Grand Trunk R. Co.*, 57 Mich. 239; s. c. 23 N. W. Rep. 795. This principle renders it proper that, in determining the question of contributory negligence of the traveller in failing to see the approaching train, its *unlawful speed* should be considered: *Piper v. Chicago & C. R. Co.*, 77 Wis. 247; s. c. 46 N. W. Rep. 165.

<sup>55</sup> *Thayer v. Flint & C. R. Co.*, 93 Mich. 150; s. c. 53 N. W. Rep. 216.

<sup>56</sup> *Chicago & C. R. Co. v. Adler*, 129 Ill. 335; s. c. 21 N. E. Rep. 846; aff'g 28 Ill. App. 102. The principle has been applied in cases of collisions between railway trains at points where railway tracks intersect each other, with the conclusion



would be difficult to say, with confidence, that this principle is in fact treated by the courts as one of general application. It contradicts the rule that the traveller is imputable with contributory negligence for failing to exercise his faculties on approaching a railway crossing, although the railway company may be negligent in failing to give the prescribed warnings. Clearly, if the traveller has *seen* the approach of an engine or train, the law will not justify him in relying upon a custom of running at a particular rate of speed, at the point where he is run upon by it, and provided his view is not obstructed nor his attention diverted.<sup>57</sup> But one can not possibly agree with the proposition put forth in a decision of another court, that the traveller has no right to assume that no train is approaching, where his view is obstructed, from the fact that no whistle is sounded, and that such fact can not even be considered in determining the question of his contributory negligence.<sup>58</sup>

**§ 1613. Right of Traveller to Rely upon Gate and Flagman.<sup>59</sup>—**

Many decisions—to use a form of expression which has come into vogue—concede that the traveller approaching a railway crossing has the right to rely upon the fact that the gate is open, or that the flagman is absent from his post, and to assume from those indications that no train is approaching and that he may safely proceed to cross;<sup>60</sup> and so where the gates are up, and a flag flying, indicating that a train will stop before reaching the crossing;<sup>61</sup> and so where the traveller, having waited several minutes, starts to cross on the gates being raised.<sup>62</sup> While, as we shall soon see,<sup>63</sup> some courts condone the fault

that the men in charge of the train which has the right of way, are not imputable with negligence in assuming that the train upon the other road will stop, in obedience to its statutory obligation: *New York &c. R. Co. v. Grand Rapids &c. R. Co.*, 116 Ind. 60; s. c. 15 West. Rep. 548; 18 N. E. Rep. 182.

<sup>57</sup> *McCadden v. Abbot*, 92 Wis. 551; s. c. 66 N. W. Rep. 694.

<sup>58</sup> *Cincinnati &c. R. Co. v. Howard*, 124 Ind. 280; s. c. 8 L. R. A. 593; 24 N. E. Rep. 892.

<sup>59</sup> This section is cited in §§ 1530, 1606.

<sup>60</sup> *Indianapolis &c. R. Co. v. Neubacher*, 16 Ind. App. 21; s. c. 43 N. E. Rep. 576; rehearing denied in 44 N. E. Rep. 669 (gate open, flagman absent, and no signal of danger); *Clark v. Boston &c. R. Co.*, 164 Mass. 434; s. c. 41 N. E. Rep. 666;

*Conaty v. New York &c. R. Co.*, 164 Mass. 572; s. c. 42 N. E. Rep. 103 (traveller starts across on the raising of the gates, after waiting some time); *Pennsylvania Co. v. Stegmeier*, 118 Ind. 305; s. c. 20 N. E. Rep. 843; *Chicago &c. R. Co. v. Blaul*, 175 Ill. 183; s. c. 51 N. E. Rep. 895; aff'g s. c. 70 Ill. App. 518 (flagman absent); *Cleveland &c. R. Co. v. Schneider*, 45 Ohio St. 678; s. c. 14 West. Rep. 538; 17 N. E. Rep. 321 (gates open and gateman present); *Whelan v. New York &c. R. Co.*, 38 Fed. Rep. 15 (gates open); *Central Trust Co. v. Wabash &c. R. Co.*, 27 Fed. Rep. 159.

<sup>61</sup> *Clark v. Boston &c. R. Co.*, 164 Mass. 434; s. c. 41 N. E. Rep. 666.

<sup>62</sup> *Conaty v. New York &c. R. Co.*, 164 Mass. 572; s. c. 42 N. E. Rep. 103.

<sup>63</sup> *Post*, § 1614.



of the railroad company in luring the traveller to his death or injury by deceptive appearances, and visit all the blame on the traveller, yet, even these courts concede that a traveller approaching a crossing guarded by gates, is not required to exercise the same vigilance in looking and listening as when he approaches one not so guarded.<sup>64</sup> One of these courts has made the concession that the question whether he was guilty of contributory negligence in not stopping to look and listen where the gate was open, and other usual signals of approaching trains were not given, becomes a question of fact for a jury.<sup>65</sup> The prevailing opinion possibly is that, while a traveller is not relieved from the duty of exercising care in crossing a railroad track by the fact that the *safety gates are standing open*, such fact is to be considered by the jury in determining whether he exercised due care under the circumstances.<sup>66</sup> But it has been held that where the railroad company has been accustomed to keep a flagman at a crossing, the fact of his absence or withdrawal does not excuse a traveller from the charge of negligence in omitting to use his senses. He has no right to interpret the absence as an assurance of safety, and to admit evidence of such custom, as a circumstance bearing on the question of the plaintiff's negligence, is error;<sup>67</sup> and the fact that a person injured at a railway crossing, had, at times, seen a flagman at the crossing where he was injured, in the absence of evidence that he had habitually seen a flagman there, does not justify him in assuming, in the absence of the flagman, that it is safe for him to cross the tracks without looking up and down the tracks for an approaching train; and for him so to assume is negligence.<sup>68</sup>

§ 1614. **Doctrine that the Traveller has no Right to Rely upon Gate and Flagman.**<sup>69</sup>—Contrary to this, some of the courts hold that the traveller approaching the railway crossing has no right to rely upon the fact that the appearances created by the railway company admonish him that there is no danger of a near approaching train, and no right to conclude that a train is not approaching because the

<sup>64</sup> *Bond v. New York & C. R. Co.*, 69 Hun (N. Y.) 476; s. c. 52 N. Y. St. Rep. 637; 23 N. Y. Supp. 450.

<sup>65</sup> *Wilson v. New York & C. R. Co.*, 18 R. I. 491; s. c. 29 Atl. Rep. 300.

<sup>66</sup> *Roberts v. Delaware & C. Canal Co.*, 177 Pa. St. 183; s. c. 35 Atl. Rep. 723; *Ross v. Delaware & C. R. Co.*, 12 N. J. L. J. 235; *Merrigan v. Boston & C. R. Co.*, 154 Mass. 189; *Hooper v. Boston & C. R. Co.*, 81 Me. 260; *Lindeman v. New York & C. R. Co.*, 42 Hun 306; s. c. aff'd without opin-

ion, 112 N. Y. 682; *Fitzgerald v. Long Island R. Co.*, 50 Hun 605; s. c. 21 N. Y. St. Rep. 942; aff'd without opinion, 117 N. Y. 653; *Callaghan v. Delaware & C. R. Co.*, 52 Hun (N. Y.) 276; *Startz v. Pennsylvania & C. R. Co.*, 42 N. Y. St. Rep. 457.

<sup>67</sup> *McGrath v. New York & C. R. Co.*, 59 N. Y. 468.

<sup>68</sup> *Whalen v. New York & C. R. Co.*, 58 Hun (N. Y.) 431.

<sup>69</sup> This section is cited in §§ 1530, 1543, 1606, 1613.



gates are up and the flagman is absent from his post, but is under the obligation of taking reasonable precautions for his safety, the same as though these appearances did not exist, which precautions include the ordinary duty of looking or listening.<sup>70</sup> On the same principle, the fact that an *automatic gong* placed at a crossing to warn travellers of approaching trains, is not sounding when a traveller approaches the crossing, does not relieve him from the obligation of looking or listening before entering upon the track, although he knows of the existence of the gong, and does not know that it is out of order.<sup>71</sup> Another court has, however, conceded that a traveller is not bound to exercise the same degree of care in approaching a railway crossing at which a gong is placed to warn travellers of approaching trains, and which is silent, as where there is, to his knowledge, no gong at the crossing.<sup>72</sup> If the traveller *knows* that the *gates* are not being operated at the time, certainly he has no right to rely upon their operation, and the railway company has the right to have the jury so instructed.<sup>73</sup> Similarly, where a flagman is kept at a particular crossing at periods only, his absence does not constitute an invitation to a traveller to cross, so as to excuse his negligence in so doing.<sup>74</sup>

§ 1615. **Right of Traveller to Rely on Direction or Invitation of Gateman, Conductor, Brakeman, etc.**<sup>75</sup>—The decisions in the two preceding sections relate to cases where the mere negligence of the rail-

<sup>70</sup> *Martin v. Baltimore &c. R. Co.*, 2 Marv. (Del.) 123; s. c. 42 Atl. Rep. 442; *Ellis v. Boston &c. R. Co.*, 169 Mass. 600; s. c. 48 N. E. Rep. 839; *Dawe v. Flint &c. R. Co.*, 102 Mich. 307; s. c. 60 N. W. Rep. 838; *Conkling v. Erie R. Co.* (N. J. L.), 43 Atl. Rep. 666; *Blount v. Grand Trunk R. Co.*, 61 Fed. Rep. 375 (gates up but view of track unobstructed); *Pennsylvania R. Co. v. Pfuelb*, 60 N. J. L. 278; s. c. 7 Am. & Eng. Rail. Cas. (N. S.) 738; 37 Atl. Rep. 1100; *aff'd* in 61 N. J. L. 287; s. c. 41 Atl. Rep. 1116 (gates up, but another train just passed through on another track without gates having been lowered); *Romeo v. Boston &c. R. Co.*, 87 Me. 540; s. c. 33 Atl. Rep. 24 (gates open and view of track unobstructed); *Walker v. Kinnare*, 76 Fed. Rep. 101; s. c. 46 U. S. App. 150; 22 C. C. A. 75 (gates up and flagman absent); *Rangeley v. Southern R. Co.*, 95 Va. 715; s. c. 30 S. E. Rep. 386 (gates up); *Greenwood v. Philadelphia &c. R. Co.*, 124 Pa. St. 572; s. c. 3 L. R.

A. 44; 46 Phila. Leg. Int. 306; 23 W. N. C. 425; 17 Atl. Rep. 188; *Lake Shore &c. R. Co. v. Frantz*, 127 Pa. St. 297; s. c. 4 L. R. A. 389; 24 W. N. C. 321; 18 Atl. Rep. 22 (gates up).

<sup>71</sup> *Conkling v. Erie R. Co.* (N. J. L.), 43 Atl. Rep. 666.

<sup>72</sup> *Kimball v. Friend*, 95 Va. 125; s. c. 3 Va. Law Reg. 650; 8 Am. & Eng. Rail. Cas. (N. S.) 451; 27 S. E. Rep. 901.

<sup>73</sup> *Rainey v. New York &c. R. Co.*, 68 Hun (N. Y.) 495; s. c. 52 N. Y. St. Rep. 677; 23 N. Y. Supp. 80.

<sup>74</sup> *Whalen v. New York &c. R. Co.*, 58 Hun (N. Y.) 431; s. c. 35 N. Y. St. Rep. 556; 12 N. Y. Supp. 527. As to the extent to which the traveller may rely upon the appearances which confront him at the crossing, see, further, *North Eastern R. Co. v. Wanless*, L. R. 7 H. L. 12; *Palmer v. New York &c. R. Co.*, 112 N. Y. 234, 241; *Tobias v. Michigan &c. R. Co.*, 103 Mich. 330; *Glushing v. Sharp*, 96 N. Y. 676; *Chicago &c. R. Co. v. Hutchinson*, 120 Ill. 587.

<sup>75</sup> This section is cited in § 1606.



way company has created *deceptive appearances* at the gate, which lulled the traveller into a feeling of security, and prevented him from exercising his faculties to discover approaching trains, as he otherwise would. The cases now to be considered are those where there is an *affirmative invitation or direction* from some employé of the railway company, having the apparent authority to give such invitation or make such direction, the obedience of which results in injury or death to the traveller. Contributory negligence is not imputed to the traveller because he obeys such an invitation or direction, without exercising his own faculties and relying upon his own discoveries, but at most the question of his negligence will be committed to the *decision of the jury*,—unless the circumstances are such that it is plainly rash for him to do so;<sup>76</sup> as where the *flagman signals* to him that the way is clear, and he thereupon proceeds to cross without stopping to look or listen, and is run over;<sup>77</sup> or where a standing train has been separated at a crossing to allow a passage to the public, and he attempts to pass through upon the *direction of a conductor or brakeman*, contrary to his previous intention, and is injured by the closing of the gap;<sup>78</sup> or where a boy twelve or thirteen years of age attempts to climb from the bumpers of a standing freight train, which has a locomotive attached to it, which obstructs a public crossing, contrary to a city ordinance, upon the *invitation of a flagman* stationed by the railway company to guard the crossing, and to tell the public when to cross and when not to cross;<sup>79</sup> or where a driver approaching a railway crossing stops, upon discovering that the gates are down, and does not proceed until the gates are raised, and he is *signaled to advance* by the gateman,—although he allows his team to go upon the track down a descending grade at a trot, his view being obstructed by buildings and by a stationary train.<sup>80</sup> But, plainly, the direction of the employé of the railway company to the traveller to pass, will not justify him in attempting to do so, where the *danger* of doing so is *obvious* to his senses;<sup>81</sup> though it will, no doubt, constitute a circumstance to be considered by the jury upon the question of the traveller's negligence. Thus, where the plaintiff was waiting at a depot for a train, and was told by the station agent that it had arrived,

<sup>76</sup> Alabama &c. R. Co. v. Anderson, 109 Ala. 299; s. c. 19 South. Rep. 516; Henning v. Caldwell, 45 N. Y. St. Rep. 373; Fusili v. Missouri &c. R. Co., 45 Mo. App. 535; Callaghan v. Delaware &c. R. Co., 52 Hun (N. Y.) 276. But see Chicago &c. R. Co. v. Spring, 13 Ill. App. 174.

<sup>77</sup> Alabama &c. R. Co. v. Anderson, 109 Ala. 299; s. c. 19 South. Rep. 516.

<sup>78</sup> Eddy v. Powell, 49 Fed. Rep. 814; s. c. 4 U. S. App. 259; 1 C. C. A. 448.

<sup>79</sup> Faulk v. Central R. &c. Co., 91 Ga. 360; s. c. 18 S. E. Rep. 304.

<sup>80</sup> Bond v. New York &c. R. Co., 69 Hun (N. Y.) 476; s. c. 52 N. Y. St. Rep. 637; 23 N. Y. Supp. 450.

<sup>81</sup> Lake Shore &c. R. Co. v. Pinchin, 112 Ind. 592; s. c. 11 West. Rep. 247; 13 N. E. Rep. 677.



and was *invited by the agent* to cross the track, upon which he was struck, the fact that he was acting under the advice of an agent of the defendant was permitted to go to the jury, as evidence tending to excuse his failure to look.<sup>82</sup> So, where the statute merely required that the *gate* of a crossing should be kept closed during the passage of trains, and the company had a gate-keeper in charge for that purpose, who erroneously informed a person who wished to cross that the gate was open, and invited him to "*come on*," this was held to render the company liable for injuries resulting to him from accepting the invitation.<sup>83</sup>

§ 1616. **Negligence of the Traveller after the Discovery that the Train is upon Him.**<sup>84</sup>—Let us now suppose that the traveller has made the attempt to cross, without contributory fault on his part, and that he is upon the track, or so near thereto that he can neither turn back nor go on, in time to avoid an approaching train. What conduct, if any, under these circumstances, will be imputed to him as contributory negligence? In this situation the principle applies that negligence will not be imputed to a person who, under an impulse of sudden terror, acts erroneously, commits an error of judgment, or, in general, acts differently from the manner in which a man exercising reasonable or ordinary care would act, under other circumstances.<sup>85</sup>

<sup>82</sup> Warren v. Fitchburg R. Co., 8 Allen (Mass.) 227; Spencer v. Illinois & C. R. Co., 29 Iowa 55, 60. As to the effect of an *invitation to cross the track*, see, further, Sweeny v. Old Colony & C. R. Co., 10 Allen (Mass.) 368; s. c. 1 Thomp. Neg., 1st ed., 408; North-Eastern & C. R. Co. v. Wanless, 43 L. J. (Q. B.) 185; s. c. L. R. 7 H. L. 12; 22 Week. Rep. 561; 30 L. T. (N. S.) 275; Wanless v. North-Eastern R. Co., 25 L. T. (N. S.) 103; L. R. 6 Q. B. 481; L. R. 1 Q. B. 277; Lunt v. London & C. R. Co., 12 Jur. (N. S.) 409; 35 L. J. (Q. B.) 105; 14 L. T. (N. S.) 225; 14 Week. Rep. 497; Dublin & C. R. Co. v. Slattery, 3 App. Cas. 1213, per Lord Blackburn.

<sup>83</sup> Lunt v. London & C. R. Co., L. R. 1 Q. B. 277; Sweeny v. Old Colony & C. R. Co., 10 Allen (Mass.) 368; s. c. 1 Thomp. Neg., 1st ed., 408. It has been held that the negligence of a gateman at a railroad crossing in allowing a *street car* to get almost, if not entirely, upon the track before giving any warning when an

engine was approaching, and then in giving contradictory signals as to stopping or going ahead,—may render the railroad company liable for an injury to a passenger in the street car in *jumping from the car* under a reasonable apprehension of danger, although there was no real danger, as the engine was under perfect control: Kleiber v. People's R. Co., 107 Mo. 240; s. c. 14 L. R. A. 613; 17 S. W. Rep. 946.

<sup>84</sup> This section is cited in §§ 1450, 1513, 1624.

<sup>85</sup> Vol. I, § 195; *post*, § 1624, where this section is cited; Quill v. New York & C. R. Co., 126 N. Y. 629; aff'g s. c. 32 N. Y. St. Rep. 612; 11 N. Y. Supp. 80; Bennett v. New York & C. R. Co., 133 N. Y. 563; aff'g s. c. 40 N. Y. St. Rep. 948; 16 N. Y. Supp. 765; Macon & C. R. Co. v. Davis, 27 Ga. 113; Breuninger v. Pennsylvania R. Co., 9 Pa. Super. Ct. 461; s. c. 16 Lanc. L. Rev. 164; 43 W. N. C. 523; Duncan v. Preferred Mut. Acci. Assn., 36 N. Y. St. Rep. 928; s. c. 13 N. Y. Supp. 620.



Whether he acts as a reasonable or prudent man might be expected to act under such circumstances, is a question which the law generally commits to the *decision of the jury*:—As where, upon seeing an approaching train almost upon him, he *whips up his horses*, although in so doing he commits an error of judgment;<sup>86</sup> or where he *jumps from his vehicle*, though he might have escaped if he had remained quiet;<sup>87</sup> or where, in the confusion caused by becoming suddenly aware of the approach of the train, he *runs in front of it*,<sup>88</sup> or where a passenger *jumped from a street car* under apprehension of a collision with a steam engine, although there was no real danger, as the engine was under control;<sup>89</sup> or where the occupants of a buggy, on discovering the reckless purpose of the driver to cross a railway track in front of an approaching train, *failed to jump* out and let him go it alone, there being no time for deliberation and a paralysis of fear;<sup>90</sup> or where the driver himself, under such circumstances, *fails to jump*.<sup>91</sup> The rule under consideration applies only in case the traveller gets into the situation of peril *without his own fault*. If he goes on to the track where the view is obstructed, without exercising ordinary care to discover whether a train is approaching, he is there by his own fault, and the rule under consideration does not help him out.<sup>92</sup>

<sup>86</sup> *Bond v. New York & C. R. Co.*, 69 Hun (N. Y.) 476; s. c. 52 N. Y. St. Rep. 637; 23 N. Y. Supp. 450.

<sup>87</sup> *Dyer v. Erie R. Co.*, 71 N. Y. 228; *International & C. R. Co. v. Neff* (Tex. Civ. App.), 26 S. W. Rep. 784 (no off. rep.). Compare *Spohn v. Missouri & C. R. Co.*, 101 Mo. 417; s. c. 14 S. W. Rep. 880 (where the passenger *jumped off a railway train* owing to the misconduct of the conductor).

<sup>88</sup> *Sullivan v. New York & C. R. Co.*, 154 Mass. 524; s. c. 28 N. E. Rep. 911. But not where he throws himself in front of the train in order to save his horse and wagon: *McManamee v. Missouri & C. R. Co.*, 135 Mo. 440; s. c. 37 S. W. Rep. 119; 5 Am. & Eng. Rail. Cas. (N. S.) 474.

<sup>89</sup> *Kleiber v. People's R. Co.*, 107 Mo. 240; s. c. 14 L. R. A. 613; 17 S. W. Rep. 946.

<sup>90</sup> *Alabama & C. R. Co. v. Davis*, 69 Miss. 444; s. c. 13 South. Rep. 693.

<sup>91</sup> *Hurley v. New York & C. R. Co.*, 90 Hun (N. Y.) 1; s. c. 35 N. Y. Supp. 351; 69 N. Y. St. Rep. 738.

<sup>92</sup> *Lierman v. Chicago & C. R. Co.*, 82 Wis. 286; s. c. 52 N. W. Rep. 91. Where a traveller negligently drove on the track and was then injured while endeavoring to signal and

stop an approaching train, it was held that he could not recover, by reason of his original negligence in getting into the situation of danger, although he used ordinary care in his endeavors to stop the train: *Balsler v. Chicago & C. R. Co. (Ohio)*, 9 Ohio S. & C. P. Dec. 523. Where the traveller had notice of the approach of the train, in time, by *turning his team around*, to avoid the accident, but failed to do so, he was adjudged guilty of contributory negligence, and could not recover: *Baltimore & C. R. Co. v. Musgrave* (Ind. App.), 55 N. E. Rep. 496. For a case where the driver was held guilty of contributory negligence in not stopping when he saw the train approaching, instead of whipping his horse forward, and where it was held error to instruct the jury that if the driver *used his best judgment* in trying to get over the track before the train struck him, rather than to turn his horse away from the track, it was for the jury to determine whether or not he was careless,—see *Getman v. Delaware & C. R. Co.*, 162 N. Y. 21; s. c. 56 N. E. Rep. 553; reversing s. c. 56 N. Y. Supp. 1108; 37 App. Div. 630.



§ 1617. **Care to be Exercised at Railway Crossings by Persons Non Sui Juris.**<sup>93</sup>—There are certain circumstances, peculiar to the situation and condition of the person injured, which may operate to excuse conduct which might fairly be regarded as negligence in others,—as, for example, his extreme youth. A child of tender years, or an old or infirm person, is expected to exercise no more than the degree of care due from those of his age and condition.<sup>94</sup> Chief Justice Hunt, in delivering the opinion in *O'Mara v. Hudson &c. Railroad Company*,<sup>95</sup> says: “The *old*, the *lame*, and *infirm* are entitled to the use of the street, and more care must be exercised towards them by engineers than towards those who have better powers of motion. The young are entitled to the same rights, and can not be expected to exercise as good foresight and vigilance as those of mature years.”

§ 1618. **Contributory Negligence of Children Killed or Injured at Railway Crossings.**—In dealing with this question we must first recur to the principle that the law expects of a child only the exercise of such care as may reasonably be expected of a child of his age, capacity, and experience, which is generally a question for a jury.<sup>96</sup> We may also get rid, as quickly as we can, of a few cases where judicial conceptions, sometimes harsh, have imputed contributory negligence as matter of law, in these cases, to the following persons:—To a boy thirteen years old riding a bicycle headlong into a train in plain sight, without taking any precaution, his mind being otherwise occupied;<sup>97</sup> where a boy *twelve years* of age, injured at a railway crossing, was deemed *sui juris*, in the absence of evidence that he was not qualified to understand the danger and appreciate the necessity for caution;<sup>98</sup> where a child *nine years* of age, familiar with the place and the danger, was killed while attempting to cross, when he must have seen

<sup>93</sup> This section is cited in §§ 1465, 1618.

<sup>94</sup> Vol. I, §§ 308, 336, *et seq.*; *Elkins v. Boston &c. R. Co.*, 115 Mass. 190; *Chicago &c. R. Co. v. Becker*, 84 Ill. 483; *Costello v. Syracuse &c. R. Co.*, 65 Barb. (N. Y.) 92; *Phila. &c. R. Co. v. Spearen*, 47 Pa. St. 300; *Boland v. Missouri &c. R. Co.*, 36 Mo. 484; *Isabel v. Hannibal &c. R. Co.*, 60 Mo. 475; s. c. 2 Cent. L. J. 590; *Chicago &c. R. Co. v. Murray*, 71 Ill. 601; *McGovern v. New York &c. R. Co.*, 67 N. Y. 417; *O'Mara v. Hudson &c. R. Co.*, 38 N. Y. 445; *Paducah &c. R. Co. v. Hoehl*, 12 Bush (Ky.) 41; *Thurber v. Harlem &c. R. Co.*, 60 N. Y. 326; *Warner v. Rail-*

*road Co.*, 6 Phila. 537; *Haas v. Chicago &c. R. Co.*, 41 Wis. 44.

<sup>95</sup> 38 N. Y. 445.

<sup>96</sup> Vol. I, §§ 308, 309; *ante*, § 1617; *Houston &c. R. Co. v. Boozer*, 70 Tex. 530; s. c. 8 S. W. Rep. 119; 8 Am. St. Rep. 616; *Chicago &c. R. Co. v. Body*, 85 Ill. App. 133 (girl six years old); *Spillane v. Missouri &c. R. Co.*, 111 Mo. 555; s. c. 20 S. W. Rep. 293; *Cleveland &c. R. Co. v. Heiman*, 16 Ohio C. C. 487.

<sup>97</sup> *Sewell v. New York &c. R. Co.*, 171 Mass. 302; s. c. 50 N. E. Rep. 541.

<sup>98</sup> *Friess v. New York &c. R. Co.*, 67 Hun (N. Y.) 205; s. c. 51 N. Y. St. Rep. 391; 22 N. Y. Supp. 104.



the train had he looked before making the attempt;<sup>99</sup> and even where contributory negligence was imputed, as matter of law, to a child *seven years* of age, who, in attempting to cross the track contrary to the efforts of the flagman, fell and was run over and killed.<sup>100</sup> But certainly ignorance of danger, or incapacity to appreciate it and to avoid it, due to youth and inexperience, are ingredients which are proper to be considered in determining the question of the contributory negligence of a child in case of its being injured on a street crossing:<sup>101</sup> and this means, in most cases, proper to be considered *by the jury*. And this leads us to the statement that, in most cases of injuries at railway crossings to children between the ages of six and fourteen years, the question of the contributory negligence of the child has been thought to be a question more fit to be submitted to the jury, under all the circumstances of the case, than to be decided by the trial judge, according to some hard-and-fast conception of law, or according to mere judicial conceit.<sup>102</sup>

<sup>99</sup> *Givens v. Kentucky &c. R. Co.*, 12 Ky. L. Rep. 950; s. c. 15 S. W. Rep. 1057 (no off. rep.).

<sup>100</sup> *Wendell v. New York &c. R. Co.*, 91 N. Y. 420.

<sup>101</sup> *Schmitz v. St. Louis &c. R. Co.*, 119 Mo. 256; s. c. 23 L. R. A. 250; 24 S. W. Rep. 472.

<sup>102</sup> It was so held in the following cases:—*Cooper v. Lake Shore &c. R. Co.*, 66 Mich. 261; s. c. 10 West. Rep. 184; 33 N. W. Rep. 306; *Finkelstein v. New York &c. R. Co.*, 41 Hun (N. Y.) 34; s. c. 2 N. Y. St. Rep. 680 (instruction as to the duty to look and listen, not applicable in the case of a child under nine); *Chicago &c. R. Co. v. Ohlsson*, 70 Ill. App. 487 (child six years old—flagman had signaled persons not to cross); *Powell v. New York &c. R. Co.*, 22 Hun (N. Y.) 56 (boy nine years old, curve in the track, avoiding one train, caught by another); *Lehman v. Eureka &c. Works*, 114 Mich. 260; s. c. 4 Det. L. N. 569; 72 N. W. Rep. 183 (boy nine years old attempted to pass through an opening three feet wide between cars standing on a crossing, no engine in sight); *Friess v. New York &c. R. Co.*, 67 Hun (N. Y.) 205; s. c. 51 N. Y. St. Rep. 391; 22 N. Y. Supp. 104; s. c. aff'd in 55 N. Y. St. Rep. 931 (boy twelve years old unfamiliar with a railway frog, caught in stepping on it); *Baker v. Flint &c. R. Co.*, 68 Mich. 90; s. c. 12 West. Rep. 485; 35 N. W. Rep.

836 (boy seven years old playing about a track, struck by passing train, which he could have avoided by looking and listening); *Johanson v. Boston &c. R. Co.*, 153 Mass. 57; s. c. 26 N. E. Rep. 426 (two children ten and eleven years old, respectively, killed at a crossing—view obstructed—flagman facing child, but not waving flag); *Henderson v. St. Paul &c. R. Co.*, 52 Minn. 479; s. c. 55 N. W. Rep. 53 (boy eleven years old sent on an errand, attempted to climb over the bumpers between two freight cars when the train was blocking the street); *Wilson v. Pennsylvania R. Co.*, 132 Pa. St. 27; s. c. 18 Atl. Rep. 1087 (ten-year-old boy sent upon the track to get his hat which had been blown off four hundred feet from a sharp curve, after looking and listening—evidence conflicting as to whether signals were given); *Finn v. Delaware &c. R. Co.*, 59 N. Y. Supp. 771 (child six years old struck by train approaching without warning on city street, having failed to look or listen); *Copley v. New Haven &c. R. Co.*, 136 Mass. 6 (girl sixteen years old ran upon track, killed at familiar crossing, in the night, track visible for nearly a mile, locomotive headlight burning, and whistle sounded at from three to six rods from the crossing); *Zwack v. New York &c. R. Co.*, 160 N. Y. 362; s. c. 54 N. E. Rep. 785; aff'g s. c. 40 N. Y. Supp. 821; 8 App. Div. 483



§ 1619. **Contributory Negligence of Cripples at Railway Crossings.**—It was well held a question for the jury to determine whether a woman who was crippled, but who attempted to cross the track of a cable street car line, was guilty of negligence, where there was evidence that the car, when she made the attempt, was around a curve out of sight, and that it came upon her and caught her in the space of one minute.<sup>103</sup> On the other hand, where a cripple, in the night-time, hastily left a safe path across a railroad in order to cross a highway and the railroad diagonally, and when he had got beyond the crossing planks, on the other side of the railway, stumbled among the rails and was injured,—it was held that he could not recover damages from the railroad company, even though it was the duty of the company to have extended the planks farther.<sup>104</sup>

§ 1620. **Contributory Negligence of Parents, Guardians, Custodians, etc.**<sup>105</sup>—Whatever may be the conclusion with regard to the child where the child is the plaintiff in the action, yet where the parents are suing for damages for the death or maiming of the child, *their* negligence in allowing the child to escape and get into danger will bar a recovery, unless the injury was recklessly, wantonly, or intentionally inflicted by the servants of the railway company,—as where parents permitted a child of tender years to play alone in the yard adjoining a railway track along which trains frequently passed, with the gate so unguarded that it could be opened by the child, with no one to attend it and keep it from going where it might choose, although the parents were at home and knew that a train would pass over soon, and the child got on the track and was killed.<sup>106</sup> But, as already seen,<sup>107</sup> the question whether parents, guardians, or custodians of children are negligent in allowing them to escape and get

(boy ten years old, who stopped and looked before going on the track, and waited for an engine to pass, and then immediately attempted to cross the track, and was struck by a locomotive, although it did not appear that he kept looking every instant of the time); *Chicago & C. R. Co. v. Body*, 85 Ill. App. 133 (girl six years old attempted to cross the track with other children, where the view was obstructed; bystanders, seeing train coming, attempted to warn them; one man, by holding out his arms across the way, succeeded in stopping all but the girl in question, who eluded him, ran upon the track and was killed,—

with the conclusion that, considering her tender years, her negligence did not bar a recovery).

<sup>103</sup> *Baltimore Traction Co. v. Wallace*, 77 Md. 435; s. c. 21 Wash. L. Rep. 313; 26 Atl. Rep. 518.

<sup>104</sup> *Delaware & C. R. Co. v. Cadow*, 120 Pa. St. 559; s. c. 12 Cent. Rep. 725; 14 Atl. Rep. 450; 21 W. N. C. 516. The propriety of this decision is doubtful: *Ante*, §§ 1512, 1513.

<sup>105</sup> On this subject, see Vol. I, § 321, *et seq.*

<sup>106</sup> *Alabama & C. R. Co. v. Dobbs*, 101 Ala. 219; s. c. 12 South. Rep. 770.

<sup>107</sup> Vol. I, § 324, *et seq.*



upon a railway track or into other places of danger, is generally a question for a jury.<sup>108</sup> It is not negligence as matter of law for a parent to send his sons of nine and thirteen years, with a gentle team upon an errand which requires them to cross a railroad track at an established crossing.<sup>109</sup> The contributory negligence of a nurse in conducting a child across a railway track whereby the child was killed, precluded a recovery of damages because of the death of the child, although the woman was not the plaintiff, where she stepped with the child upon the track, not knowing that a train was approaching, although she had sufficient time to cross, and was terrified by sudden outcries and commotion in the crowd behind her, and was confused by the directions which were shouted to her.<sup>110</sup>

§ 1621. **Contributory Negligence at Railway Crossings of One Riding with Another who is Driving.**—A great many decisions relating to injuries at railway crossings inflicted upon persons who are riding in vehicles driven by others, call up the question of *imputed negligence* already considered.<sup>111</sup> Dealing with the subject with reference to injuries at railway crossings to persons riding in vehicles, it may be said, at the outset, that if the driver was the agent or servant of the person sustaining the injury, then an application of the rule of *respondeat superior* imputes the negligence of the servant or agent to the master or principal, and there can be no recovery.<sup>112</sup> Outside of this relation, the cases speaking with reference to the question present three lines of doctrine: 1. That it is the duty of the person riding, if he is a mere companion or guest, to keep a lookout and not to leave that duty entirely to the driver, and to warn the driver when he discovers the approach of a train.<sup>113</sup> 2. That a person riding with

<sup>108</sup> *Meagher v. Cooperstown & C. R. Co.*, 75 Hun (N. Y.) 455; s. c. 57 N. Y. St. Rep. 679; 27 N. Y. Supp. 504.

<sup>109</sup> *Illinois & C. R. Co. v. Slater*, 129 Ill. 91; s. c. 6 L. R. A. 418; 21 N. E. Rep. 575; aff'g s. c. 28 Ill. App. 73.

<sup>110</sup> *Alabama & C. R. Co. v. Lowe*, 73 Miss. 206; s. c. 19 South. Rep. 96. In another case this exploded doctrine of imputed negligence resulted in the conclusion (two judges dissenting) that, where a mother hired a livery team and drove out with her child thirteen years of age, the team in charge of a driver furnished by the liveryman, and, on approaching a railway crossing, the flagman warned the driver not to cross, and the driver stopped; but started up his horses again, and in the collision which followed the

child was killed,—the negligence of the driver was imputable to the mother, and that her negligence was in turn imputable to the child: *Callahan v. Sharp*, 27 Hun (N. Y.) 85.

<sup>111</sup> Vol. I, § 497, *et seq.*

<sup>112</sup> *Louisville & C. R. Co. v. Stommel*, 126 Ind. 35; s. c. 25 N. E. Rep. 863.

<sup>113</sup> *Koehler v. Rochester & C. R. Co.*, 66 Hun (N. Y.) 566; *Griffith v. Baltimore & C. R. Co.*, 44 Fed. Rep. 574; *Dean v. Pennsylvania R. Co.*, 129 Pa. St. 514; s. c. 6 L. R. A. 143; *Aurelius v. Lake Erie & C. R. Co.*, 19 Ind. App. 584; s. c. 49 N. E. Rep. 857; *Slater v. Burlington & C. R. Co.*, 71 Iowa 709; s. c. 32 N. W. Rep. 264; *Miller v. Louisville & C. R. Co.*, 128 Ind. 97; s. c. 27 N. E. Rep. 339 (woman riding, familiar with cross-



a competent driver, over whom he has no control, is under no duty to maintain a lookout, but may commit that duty to the driver, without sustaining the imputation of contributory negligence,—a doctrine which is generally, though not always, confined to cases of *passengers* riding in conveyances, public or private.<sup>114</sup> 3. That the caution to be exercised by the person riding but not driving,—whether he is bound to keep a lookout and warn the driver or not,—is, under all the circumstances in evidence, to be *determined by the jury*.<sup>115</sup> The

ing, and nothing to prevent seeing or hearing the train); *Lake Shore &c. R. Co. v. Boyts*, 16 Ind. App. 640; s. c. 45 N. E. Rep. 812 (person riding as a guest, knowing the train has stopped at station near crossing, view unobstructed, failed to notify driver, injured by train backing over crossing); *Smith v. Maine &c. R. Co.*, 87 Me. 339; s. c. 32 Atl. Rep. 967 (plaintiff voluntarily assumed the duty of looking out and failed to discharge it); *Griffith v. Baltimore &c. R. Co.*, 44 Fed. Rep. 574; *Brickell v. New York &c. R. Co.*, 120 N. Y. 290; s. c. 42 Am. & Eng. Rail. Cas. 107; 30 N. Y. St. Rep. 932; 24 N. E. Rep. 449 (burden of establishing affirmatively freedom from contributory negligence not to be relaxed in favor of one who is being carried in vehicle owned by another at the time of an accident at a railway crossing); *Durkee v. Delaware &c. Canal Co.*, 88 Hun (N. Y.) 471; s. c. 34 N. Y. Supp. 978; 69 N. Y. St. Rep. 39 (one riding in his own carriage behind the horses of another, the latter driving, must look and listen on approaching a railway crossing, although driver looks and listens); *Dean v. Pennsylvania R. Co.*, 126 Pa. St. 514; s. c. 6 L. R. A. 143; 25 W. N. C. 9; 20 Pitts. L. J. (N. S.) 186; 41 Alb. L. J. 24; 18 Atl. Rep. 719; 47 Phila. Leg. Int. 143; 39 Am. & Eng. Rail. Cas. 697 (person riding, knowing that a train is about due, but who does not look, or listen, or warn driver, or ask to get out, is as much guilty of negligence as driver is).

<sup>114</sup> *O'Toole v. Pittsburgh &c. R. Co.*, 158 Pa. St. 99; s. c. 22 L. R. A. 606; 24 Pitts. L. J. (N. S.) 125; 33 W. N. C. 208; 48 Alb. L. J. 513; 27 Atl. Rep. 737 (passenger riding in *street car* under no duty to keep on the lookout, jump off, etc., especially if a cripple); *Little Rock &c. R. Co. v.*

*Harrell*, 58 Ark. 454; s. c. 25 S. W. Rep. 117 (failure of *street car driver* to keep a lookout not imputable to passenger, so as to prevent passenger from recovering damages, if street car run upon by railway train); *Metropolitan St. R. Co. v. Powell*, 89 Ga. 601; s. c. 16 S. E. Rep. 118 (woman riding in a wagon, who did not own the horse or wagon, had no agency in the driving, did not know of any incompetency in the driver, who was not her servant); *Philadelphia &c. R. Co. v. Hogeland*, 66 Md. 149 (A. riding in buggy and B. driving, and A. hurt at railway crossing—negligence of B. no defense); *Holzab v. New Orleans &c. R. Co.*, 38 La. An. 185; s. c. 58 Am. Rep. 177 (passenger in public conveyance having no control over driver); *East Tennessee &c. R. Co. v. Markens*, 88 Ga. 60; s. c. 14 L. R. A. 281; 13 S. E. Rep. 855 (female passenger in *public hack* under no duty to supervise driver at railway crossing, or look or listen, unless she has some reason to distrust his diligence); *Pyle v. Clark*, 75 Fed. Rep. 644; s. c. 5 Am. & Eng. Rail. Cas. (N. S.) 156 (passenger in conveyance, public or private, not bound to look and listen where he does not know of an approaching train, or that the driver fails to look or listen). See also *Wilson v. New York &c. R. Co.*, 18 R. I. 598, 605; *O'Toole v. Pittsburgh &c. R. Co.*, 158 Pa. St. 99; s. c. 22 L. R. A. 606.

<sup>115</sup> *Lewis v. Long Island R. Co.*, 30 App. Div. 410; 51 N. Y. Supp. 558; s. c. rev'd on other grounds, 162 N. Y. 52; s. c. 56 N. E. Rep. 548; *Wilson v. New York &c. R. Co.*, 18 R. I. 491; s. c. 29 Atl. Rep. 300 (injured person riding in a wagon in the night-time, driven by another, failed to request driver to stop, look, and listen, etc.); *Howe v. Minneapolis, &c. R. Co.*, 62 Minn. 71;



question is for the jury, where it is doubtful whether any watchfulness on the part of a woman riding as the invited guest of another, would have enabled her to interfere with the driver, without causing an accident as great as that which happened.<sup>116</sup> Outside of these are cases where the *husband* is driving and the *wife* riding, and the vehicle is struck by an approaching train, in which case the negligence of the husband is not imputed to the wife,<sup>117</sup> at least as matter of law.<sup>118</sup>

§ 1622. **Presumption that the Traveller Did Take the Proper Precautions on Approaching the Crossing.**<sup>119</sup>—Where the collision with the traveller results in his death, so that there is no direct evidence upon the question whether he did take the precautions required by the rule prevailing in the particular State, of looking, or looking and listening, or stopping, looking, and listening,—whether the want of this evidence will be supplied by the *presumption of right acting*,<sup>120</sup> the courts are divided. Those which cast the burden of negating the existence of contributory negligence upon the plaintiff, and which consequently proceed upon the presumption that such negligence exists until the contrary appears, seem generally to deny the operation of the presumption of right acting in such cases, so that, if the railroad company kills the unfortunate traveller, it kills also the evidence upon which alone his surviving family may recover damages for their loss. In those jurisdictions where the person killed or injured is presumed, in the absence of evidence to the contrary, to have been in the

s. c. 30 L. R. A. 684; 28 Chicago Leg. News 25; 2 Det. L. N. 537; 64 N. W. Rep. 102 (injured person riding in wagon driven by another at owner's invitation, and does not know that driver is incompetent, or not keeping a proper lookout); Miles v. Fonda & C. R. Co., 86 Hun (N. Y.) 508; s. c. 67 N. Y. St. Rep. 552; 33 N. Y. Supp. 729 (woman riding in a vehicle driven by another, looked, but did not see train by reason of being obliged to look backwards, etc.).

<sup>116</sup> McCaffrey v. Delaware & C. Canal Co., 137 N. Y. 568; aff'g s. c. 62 Hun (N. Y.) 618; 41 N. Y. St. Rep. 221; 16 N. Y. Supp. 495.

<sup>117</sup> Finley v. Chicago & C. R. Co., 71 Minn. 471; s. c. 74 N. W. Rep. 174.

<sup>118</sup> Lewin v. Lehigh Valley R. Co., 58 N. Y. Supp. 113; Vol. I, § 504. Contributory negligence on the part of a *wife*, in crossing a railroad track to a station for the purpose of

taking passage, will not defeat an action by her *husband* for the damages sustained by him, in view of the Iowa statute allowing her to sue and be sued alone, and abrogating the liability of a husband for the negligent acts of his wife: Honey v. Chicago & C. R. Co., 59 Fed. Rep. 423. Where the plaintiff was driving his own wagon, in which two other persons were riding with his consent, but there was no evidence of a *joint management or undertaking*, and the plaintiff was injured by collision with the defendant's railway train, it was held not error to refuse to instruct the jury on the theory of *imputed negligence*: Gulf & C. R. Co. v. Slater (Tex. Civ. App.), 56 S. W. Rep. 216.

<sup>119</sup> This section is cited in § 1649.

<sup>120</sup> As to this presumption in connection with the doctrine of contributory negligence, see Vol. I, §§ 396, 401, *et seq.*



exercise of ordinary care, and where the burden of alleging and proving contributory negligence as an affirmative defense rests upon the defendant,—then, in the absence of any direct evidence upon the question whether the person killed looked or listened before approaching the crossing, or stopped and looked and listened where that is the demand of the rule of the particular jurisdiction, it will be presumed that he did so. Where there is no direct evidence that the traveller *did not stop*, look, and listen before attempting to cross, it will be presumed that he did his duty in that regard and observed the proper precautions, in the view of the courts indicated in the marginal note.<sup>121</sup> On the other hand, the contrary will be the presumption, in the view of the courts indicated in the marginal note to this statement.<sup>122</sup> This presumption, whether indulged for or against the plaintiff, obtains only in the entire absence of evidence possessing sufficient probative force to warrant the submission of the question of contributory negligence to the jury. It does not prevail where there is direct or circumstantial evidence of sufficient weight, speaking upon the question.<sup>123</sup> In Virginia, where the rule obtains that the burden of alleging and proving contributory negligence is on the defendant, it is reasoned that a presumption, *though perhaps slight*, that a traveller killed at a crossing did his duty in approaching the crossing, arises, in the absence of evidence to the contrary, from the negligence of the company in approaching the crossing without giving any signals or

<sup>121</sup> McBride v. Northern &c. R. Co., 19 Ore. 64; s. c. 23 Pac. Rep. 814; 42 Am. & Eng. Rail. Cas. 146; Texas &c. R. Co. v. Gentry, 163 U. S. 353; s. c. 41 L. ed. 186; Chesapeake &c. R. Co. v. Steele, 54 U. S. App. 550; s. c. 84 Fed. Rep. 93; 29 C. C. A. 81; Chicago &c. R. Co. v. Hinds, 56 Kan. 758; s. c. 44 Pac. Rep. 993; Petty v. Hannibal &c. R. Co., 88 Mo. 306; Pennsylvania R. Co. v. Weber, 76 Pa. St. 157; s. c. 18 Am. Rep. 407; Schum v. Pennsylvania Co., 107 Pa. St. 8; s. c. 52 Am. Rep. 468; Dalton v. Chicago &c. R. Co., 104 Iowa 26; s. c. 73 N. W. Rep. 349; Weiss v. Pennsylvania R. Co., 79 Pa. St. 387; Lehigh Valley R. Co. v. Hall, 61 Pa. St. 361, 368; Atchison &c. R. Co. v. Hill, 57 Kan. 139; s. c. 45 Pac. Rep. 581; Kimball v. Friend, 95 Va. 125; s. c. 27 S. E. Rep. 901; 3 Va. Law Reg. 650; 8 Am. & Eng. Rail. Cas. (N. S.) 451; Washington &c. R. Co. v. Gladmon, 15 Wall. (U. S.) 401; s. c. 21 L. ed. 114; Southern R. Co. v. Bryant, 95 Va. 212; s. c. 28 S. E. Rep. 183; Huntress v. Boston &c. R.

Co., 66 N. H. 185; s. c. 34 Atl. Rep. 154; 49 Am. St. Rep. 600; Illinois &c. R. Co. v. Nowicki, 148 Ill. 29; s. c. 35 N. E. Rep. 358; aff'g 46 Ill. App. 566; Toledo &c. R. Co. v. Chisholm, 49 U. S. App. 700; s. c. 83 Fed. Rep. 652; 27 C. C. A. 663.

<sup>122</sup> Livermore v. Fitchburg R. Co., 163 Mass. 132; s. c. 39 N. E. Rep. 789; Moore v. Boston &c. R. Co., 159 Mass. 399; s. c. 34 N. E. Rep. 366; Walsh v. Boston &c. R. Co., 171 Mass. 52; s. c. 50 N. E. Rep. 453; Evansville Street R. Co. v. Gentry, 147 Ind. 408; s. c. 37 L. R. A. 378; 5 Am. & Eng. Rail. Cas. (N. S.) 500; 44 N. E. Rep. 311; Indiana &c. R. Co. v. Greene, 106 Ind. 279; s. c. 3 West. Rep. 883; Louisiana &c. R. Co. v. McDonald (Tex.), 52 S. W. Rep. 649; Von Atzinger v. New York &c. R. Co., 83 Hun (N. Y.) 120; s. c. 64 N. Y. St. Rep. 269; 31 N. Y. Supp. 632; Tully v. Fitchburg &c. R. Co., 134 Mass. 499.

<sup>123</sup> Mynning v. Detroit &c. R. Co., 64 Mich. 93; s. c. 7 West. Rep. 327.



warnings.<sup>124</sup> In such a case, if it is established that the company failed to give the statutory, customary, or proper signals or warnings, public policy requires that it should pay damages. On the other hand, in Indiana, while the contrary rule obtained, casting the burden of disproving contributory negligence upon the plaintiff, it was essential in the case of a person killed at a railway crossing, that *some evidence* of his conduct in approaching the crossing should appear; and, under this most unjust rule, it must either appear directly or circumstantially that the traveller was free from contributory fault, although the train approached the crossing at an unusual rate of speed, down grade, and without the sounding of the whistle or bell, as required by statute.<sup>125</sup> Under that rule, slight proof, at least, of the absence of contributory negligence on the part of the traveller, must be given in order to permit a recovery of damages, although, in killing him, the railway company may have succeeded in suppressing that "slight proof."<sup>126</sup> In the courts of the United States, where the just and sensible rule obtains that the burden of showing contributory negligence is on the defendant, the plaintiff, in an action for damages for the death of one killed at a railway crossing, is not under the burden of showing a lack of contributory negligence on the part of the deceased; but, after he has shown negligence on the part of the railway company adequate to account for the accident without any fault on the part of the deceased, he has established a *prima facie* right of recovery.<sup>127</sup> In a State jurisdiction where the contrary rule formerly prevailed, it was held, in the case of a man killed while trying to drive across a railway track, that, in the absence of any knowledge as to what was passing in his mind, he could not be found negligent, unless no sensible explanation of his conduct could reasonably be made.<sup>128</sup>

**1623. Circumstances which Speak upon the Question One Way or the Other.**—It is believed that in most cases there will be circumstances arising out of the physical facts surrounding the accident, which will speak upon the question of the contributory negligence of the person killed, one way or the other, with sufficient weight to turn the scales, in the absence of direct evidence. Suppose, for example, that a man is killed while crossing a railway track on foot, at a point where an approaching train might have been seen for a long distance; here

<sup>124</sup> Southern R. Co. v. Bryant, 95 Va. 212; s. c. 28 S. E. Rep. 183.

<sup>125</sup> Indiana &c. R. Co. v. Greene, 106 Ind. 279; s. c. 3 West. Rep. 883.

<sup>126</sup> Evansville Street R. Co. v. Gen-try, 147 Ind. 408; s. c. 37 L. R. A.

378; 5 Am. & Eng. Rail. Cas. (N. S.) 500; 44 N. E. Rep. 311.

<sup>127</sup> Toledo &c. R. Co. v. Chisholm, 49 U. S. App. 700; s. c. 83 Fed. Rep. 652; 27 C. C. A. 663.

<sup>128</sup> Staal v. Grand Rapids &c. R. Co., 57 Mich. 239.



the presumption is cogent that he did not exercise his faculties to the end of promoting his own safety, and in such a case it has been held proper to give the jury a peremptory instruction to that effect,<sup>129</sup> or to order a nonsuit.<sup>130</sup> So, where the deceased was run over while lying on the track at a place which was not a public crossing, and it was shown that he was an *epileptic*, and was possibly *intoxicated* at the time, and there was no explanation of his presence on the track consistent with due care on his part, it was held that an inference of contributory negligence arose as matter of law, and that it was not necessary to submit the question to the jury.<sup>131</sup> Under the railroad-ridden rule which casts the burden as to contributory negligence on the plaintiff, there can be no recovery in case of a man found killed at a railway crossing, where there is nothing to show that he looked or listened, or took any other precaution to ascertain whether a train was coming as he approached the crossing, or that he was in fact misled, although he "*may have been misled somewhat*" by the absence of the statutory signals, and by the open gates, and by the want of a light, and although his view of the approaching train may have been obscured by obstructions,<sup>132</sup>—a decision in favor of which not one word can be said. On the other hand, in a jurisdiction where the presumption obtains that the person killed or injured was in the exercise of due care, and where the burden of showing contributory negligence is on the defendant, it was held that the presumption that the traveler killed at a crossing was in the exercise of ordinary care was not overcome by evidence that he was killed while driving a two-wheel cart on a bright moonlight night, at a railroad crossing rendered obscure by weeds and willows, where the track was several feet above the grade of the highway, and that the train which ran upon him was coming rapidly down grade, and without giving any warning.<sup>133</sup> Coming back to the Massachusetts doctrine, already referred to, it has been held that in the case of a woman killed at a crossing where there were several tracks, there being no evidence from which it could be inferred that she made a fair use of her faculties and judgment in selecting an opportunity to cross in safety, and the evidence showing that she was first seen by the engineer erect and facing the locomotive between the rails on the track on which it was approaching her, which was the first track she had to cross,—it was held that there could be no recovery.

<sup>129</sup> Tully v. Fitchburg &c. R. Co., 134 Mass. 499.

<sup>130</sup> Von Atzinger v. New York &c. R. Co., 83 Hun (N. Y.) 120; s. c. 64 N. Y. St. Rep. 269; 31 N. Y. Supp. 632 (deceased familiar with the crossing).

<sup>131</sup> Louisiana &c. R. Co. v. McDonald (Tex.), 52 S. W. Rep. 649.

<sup>132</sup> Walsh v. Boston &c. R. Co., 171 Mass. 52, 56; s. c. 50 N. E. Rep. 453.

<sup>133</sup> Atchison &c. R. Co. v. Hill, 57 Kan. 139; s. c. 45 Pac. Rep. 581.



ery.<sup>134</sup> Under the Massachusetts doctrine, where not modified by statute, the jury are not warranted in presuming that the deceased exercised due care, and the fact that the sight and sound of an approaching train are cut off by an intervening hill, and that the train is late, does not take the place of evidence, but the railroad company enjoys the advantage of suppressing the evidence by killing the traveller.<sup>135</sup> Returning to the juster view of this question, another New England court has held that contributory negligence will not be presumed as matter of law, from the fact that a traveller drove upon a railway crossing at which there was no flagman, and where there were none of the warning signs required by statute, and was killed by a train running at the rate of thirty-five or forty miles an hour, although he had a clear view of the track for a mile or more in the direction from which he approached it, when he was but one hundred and ten feet from the track, and although the whistle was blown at a distance of eighty rods from the crossing, as required by law.<sup>136</sup> Continuing on the subject of the inferences to be derived from circumstances, it has been held that, where a woman was seen about to cross a railway track in a village, at a time when a train was approaching from one direction, and another train was backing towards her from the other direction, and she was soon after found dead, *outside the street limits* on grounds belonging to the company, having been run over by the backing train,—the fact that she was found outside the street limits did not of itself prove that she was guilty of contributory negligence.<sup>137</sup> It has been held that no inference that the traveller who was killed did not *listen*, before driving upon the railway track, could arise from the fact that he did not *stop* before reaching the crossing.<sup>138</sup> On the other hand, it has been held that it will be presumed that a traveller who *stopped and looked*, within less than fifty feet of the track, also *listened* for the approach of a train.<sup>139</sup> In another such case, the court regarded the conclusion that a driver twenty or thirty yards from the track voluntarily urged his mule upon the crossing ahead of an approaching engine not more than forty or fifty yards away, as *less probable* than the conclusion that the mule was frightened by the blowing of the whistle, and ran upon the cross-

<sup>134</sup> Moore v. Boston & C. R. Co., 159 Mass. 399; s. c. 34 N. E. Rep. 366.

<sup>135</sup> Livermore v. Fitchburg R. Co., 163 Mass. 132; s. c. 39 N. E. Rep. 789.

<sup>136</sup> Huntress v. Boston & C. R. Co., 66 N. H. 185; s. c. 34 Atl. Rep. 154; 49 Am. St. Rep. 600.

<sup>137</sup> Hassenyer v. Michigan & C. R. Co., 48 Mich. 205.

<sup>138</sup> Southern R. Co. v. Bryant, 95 Va. 212; s. c. 28 S. E. Rep. 183.

<sup>139</sup> McGill v. Pittsburgh & C. R. Co., 152 Pa. St. 331; s. c. 25 Atl. Rep. 540; 31 W. N. C. 355; 23 Pitts. L. J. (N. S.) 443. As to the duty of *stopping*, see *post*, § 1644; and as to the duty of *stopping, looking, and listening*, see *post*, § 1648.



ing in spite of the efforts of the driver to prevent it from so doing;<sup>140</sup> but it is plain that this would be a pure question for the jury. In a jurisdiction where the burden of disproving contributory negligence is on the plaintiff, it has been held that proof that a traveller approaching a railway track sat in his wagon facing the track during the passage of a train, is sufficient to justify a finding that he looked and listened for *another train* before crossing the track.<sup>141</sup> We conclude this discussion by saying that, in those jurisdictions where the rule obtains that the person killed or injured is presumed to have been in the exercise of due care, and where the burden of showing the contrary is on the defendant, the question whether the circumstances attending the death of a traveller killed at a railway crossing, are such as to warrant the presumption that the traveller, prompted by the instinct of self-preservation, exercised the care which the law demands of travellers in such cases,—there being no witness to the accident and no evidence speaking upon the question of the manner in which the deceased approached and went upon the track,—will be a *question of fact for the jury*.<sup>142</sup>

§ 1624. **When the Negligence of the Traveller is a Question for the Jury.**<sup>143</sup>—Without attempting to thresh out this question again,<sup>144</sup> it may be said that the question whether the traveller, killed or injured at a railway crossing, was guilty of contributory negligence, always goes to the jury where the *evidence is conflicting* as to the elemental or constitutive facts which determine that question.<sup>145</sup>—As, for example, when the question is whether a driver was negligent in hurrying to cross the track in front of a train;<sup>146</sup> or whether there were street noises which deafened the sound of the approaching car;<sup>147</sup> or whether the traveller attempted to cross in disregard of the flag-

<sup>140</sup> Central R. Co. v. Hollinshead, 81 Ga. 208; s. c. 7 S. E. Rep. 172.

<sup>141</sup> Stott v. New York & C. R. Co., 142 N. Y. 645; affg s. c. 66 Hun (N. Y.) 633; 50 N. Y. St. Rep. 500; 21 N. Y. Supp. 353.

<sup>142</sup> Dalton v. Chicago & C. R. Co., 104 Iowa 26; s. c. 73 N. W. Rep. 349.

<sup>143</sup> This section is cited in §§ 1450, 1513, 1616.

<sup>144</sup> See Vol. I, § 406, *et seq.*

<sup>145</sup> Wichita & C. R. Co. v. Davis, 37 Kan. 743; s. c. 16 Pac. Rep. 78; Chicago & C. R. Co. v. Hutchinson, 120 Ill. 587; s. c. 9 West. Rep. 547; 11 N. E. Rep. 855; Neiman v. Delaware & C. Canal Co., 149 Pa. St. 92; s. c. 24 Atl. Rep. 96. It has been

said that the question of the care to be exercised by one crossing a railway track "is exactly prescribed by law:" Lewis v. Puget Sound & C. R. Co., 4 Wash. 188; s. c. 29 Pac. Rep. 1061; Ohio & C. R. Co. v. Hill, 117 Ind. 56; s. c. 18 N. E. Rep. 461; quoting from Beach Contrib. Neg., § 63. But this is an aberration, since the *quantum* of care can not be measured in a cup, or weighed in scales; nor does the law undertake to do any such foolish thing.

<sup>146</sup> Tyler v. New York & C. R. Co., 137 Mass. 238.

<sup>147</sup> Little v. Grand Rapids St. R. Co., 78 Mich. 205; s. c. 41 N. W. Rep. 137.



man's signal, or whether the flagman signaled and told him to cross the first track;<sup>148</sup> or whether he looked and listened, or whether obstructions interfered with his view, or whether the train causing the injury was running at an unusual rate of speed;<sup>149</sup> or as to the speed of the train, the care exercised by the driver of the team, the distance of the train from the crossing when first seen by the driver, whether the bell was rung or the whistle sounded, and other questions calculated to determine the relative negligence of the parties.<sup>150</sup> It is a sound view that, where the evidence is conflicting as to whether the railway company gave the necessary or prescribed warning when its train approached the crossing, by sounding the steam whistle or ringing the bell, and there is positive testimony to the effect that the traveller looked and listened, the plaintiff ought not to be nonsuited.<sup>151</sup> The rule is said to be, in such cases, that the jury shall pass upon the question of the negligence of the plaintiff, unless such negligence is proved by evidence so conclusive that there can be no difference of opinion upon the mere statement of the facts.<sup>152</sup> It seems to be a sound conception and one which will conserve the public safety, but which in many cases would put a burden upon railway traffic, that, when it is made to appear that the statutory signals were not given by the train approaching the crossing, it is *for the jury to say*, under all the circumstances in evidence, whether the injury received by the traveller was *proximately caused* by the negligence of the defendant, or by the traveller's own conduct.<sup>153</sup> Expressions are found in judicial opinions from which the conclusion might be drawn that the question of the contributory negligence of the traveller in this relation will *generally* be a question of fact for the jury. For example, in some cases it is reasoned that except in cases "marked by gross and inexcusable negligence," whether a person, in attempting to cross a railroad track, exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercise under like circumstances, is a *question of fact for the jury*.<sup>154</sup> But this can not

<sup>148</sup> Germond v. Central &c. R. Co., 65 Vt. 126; s. c. 26 Atl. Rep. 401.

<sup>149</sup> Wesley v. Chicago &c. R. Co., 84 Iowa 441; s. c. 51 N. W. Rep. 163.

<sup>150</sup> Central R. Co. v. Moore, 24 N. J. L. 824; Keese v. New York &c. R. Co., 67 Barb. (N. Y.) 205; Kansas &c. R. Co. v. Twombly, 3 Colo. 125.

<sup>151</sup> Renwick v. New York &c. R. Co., 36 N. Y. 132; Wheelock v. Boston &c. R. Co., 105 Mass. 203; Craig v. New York &c. R. Co., 118 Mass. 431; Detroit &c. R. Co. v. Van Steinburg,

17 Mich. 99; Delaware &c. R. Co. v. Toffey, 38 N. J. L. 525; Phila. &c. R. Co. v. Hagan, 47 Pa. St. 244.

<sup>152</sup> Lake Shore &c. R. Co. v. Johnsen, 135 Ill. 641; s. c. 26 N. E. Rep. 510; aff'g 35 Ill. App. 430. See also Vol. I, § 428.

<sup>153</sup> Atlantic &c. R. Co. v. Reiger, 95 Va. 418; s. c. 28 S. E. Rep. 590.

<sup>154</sup> Parsons v. New York &c. R. Co., 113 N. Y. 355, 364; s. c. 21 N. E. Rep. 145; 3 L. R. A. 683; 22 N. Y. St. Rep. 697. See also Nosler v. Chicago &c. R. Co., 73 Iowa 268, 275;



be affirmed with any confidence. An examination of the cases, more than a thousand of them in number, cited in this chapter, will, it is believed, show that, in a majority of them, the traveller killed or injured at the railway crossing was held guilty of contributory negligence as matter of law. In the face of such a fact, we are to take the doctrine of the courts from their *judgments*, and not from their *dicta*. To this it may be added that, where the propriety of the conduct of the traveller under given circumstances, addresses itself to the ordinary experience of men, it can not, except within certain limits, be determined by any unbending rule of law, but addresses itself to the judgment and experience of a jury. This is peculiarly so in cases presenting a *complication of facts*, giving room for different inferences on the part of fair minded men of experience in such matters. For example, the question whether a traveller was negligent in driving across the railroad at all, under the circumstances; or in driving at a high rate of speed, in consequence of which *another person was run over and injured*,—was held a question for the jury, where there was proof that his horse was nervous and prancing, and that he apparently hastened across the track, and also that he started up in the face of steam and smoke so dense that he could not see any person who might chance to be in the way.<sup>155</sup> So, the question whether a traveller after he had driven partly upon the track and discovered a train approaching, should have *backed his team* or *turned them around*, instead of attempting to cross, is manifestly a question for a jury.<sup>156</sup> And so, generally, must be the question whether the traveller who has passed the gates, which are open, and got upon or near the track in a position of danger, is guilty of such conduct as imputes to him contributory negligence,<sup>157</sup>—on a principle already referred to.<sup>158</sup> So, it has been held a question for the jury whether the traveller approaching a railway track, after having looked and listened for a distance of several hundred feet, and checked his horses to a walk for that purpose, should, under all the circumstances, have taken any *additional precau-*

s. c. 34 N. W. Rep. 850. See also *Northrup v. New York & C. R. Co.*, 37 Hun (N. Y.) 295; *Hoye v. Chicago & C. R. Co.*, 67 Wis. 1; *Langhoff v. Milwaukee & C. R. Co.*, 19 Wis. 489; *Spencer v. Utica & C. R. Co.*, 5 Barb. (N. Y.) 337; *Thurber v. Harlem & C. R. Co.*, 60 N. Y. 326; *Dolan v. Delaware & C. R. Co.*, 71 N. Y. 285; *Bernhardt v. Rensselaer & C. R. Co.*, 32 Barb. (N. Y.) 165; *Wheelock v. Boston & C. R. Co.*, 105 Mass. 203.

<sup>155</sup> *Post v. United States & C. Co.*,

76 Mich. 574; s. c. 43 N. W. Rep. 636. The reader will note that this was a case where an *express wagon* ran over a pedestrian at a railway crossing.

<sup>156</sup> *Beanstrom v. Northern & C. R. Co.*, 46 Minn. 193; s. c. 48 N. W. Rep. 778.

<sup>157</sup> *Startz v. Pennsylvania & C. R. Co.*, 42 N. Y. St. Rep. 457; s. c. 16 N. Y. Supp. 810.

<sup>158</sup> Vol. I, § 195; *ante*, § 1616.



tions;<sup>159</sup> or whether he should have taken additional precautions after observing the absence of the usual signal of approaching trains made by the flagman.<sup>160</sup>

§ 1625. **Circumstances Taking the Question to the Jury.**—The contributory negligence of the traveller, killed or injured at a railway crossing, has been held a *question of fact for the jury* under the following circumstances:—Where the train was behind time, and a vehicle containing several persons was driving slowly, with a safe horse, and they stopped to look and listen at a low place where a train could be seen if near, and again at the top of a hill forty or fifty yards from the track, but, neither seeing or hearing any train, drove slowly down the hill, listening all the time without talking, but heard nothing until just as they got to the railroad cut, and the horse had his feet on the nearest rail,—a very improbable story, but presenting a question for the jury;<sup>161</sup> where the traveller was half way across the track before any warning was given, which was first sounded when the gates were shut, and came in the form of a shout from the gateman to “stop,” whereupon the deceased *whipped his horse*, the gateman shouting to him to “come on” and opening the gate in front of him;<sup>162</sup> where the evidence was conflicting as to whether the traveller attempted to cross in disregard of a signal from the flagman, and upon the question whether the flagman signaled to him and told him to cross the first track; and upon the question whether he did not attempt to stop until he had entered upon the space between the two tracks; and there was evidence from which it might be inferred that he understood the motion of the flagman to be a signal for him to hurry instead of to

<sup>159</sup> *Beanstrom v. Northern & C. R. Co.*, 46 Minn. 193; s. c. 48 N. W. Rep. 778.

<sup>160</sup> *Chicago & C. R. Co. v. Hutchinson*, 120 Ill. 587. Whether the railroad company exercised reasonable care in running its train past a trodden path, in whose use by the public it had acquiesced, has been held a question for the jury: *Larkin v. New York & C. R. Co.*, 46 N. Y. St. Rep. 659; s. c. 19 N. Y. Supp. 479. An illustration of the varying tendencies of courts either to decide such questions for themselves, or to permit juries to decide them, is found in a case in New Hampshire, where a train which was behind time drove over a railway crossing at a speed of from forty to fifty miles an hour, whereas the rules of the company permitted a

speed at that place of only fifteen miles an hour; where a traveller, familiar with the crossing, and driving a suitable team, approached the crossing carefully and prudently; where he looked for the coming of any train which might be approaching; where he must have seen the train, if he had looked, for a distance of about six hundred feet; where the train ran over and killed him; and it was held that it was for the jury to say whether he had exercised proper care and caution: *Davis v. Concord & C. Railroad (N. H.)*, 44 Atl. Rep. 388.

<sup>161</sup> *Baltimore & C. R. Co. v. Griffith*, 159 U. S. 603; s. c. 40 L. ed. 274; 16 Sup. Ct. Rep. 105.

<sup>162</sup> *Doyle v. Boston & C. R. Co.*, 145 Mass. 386; s. c. 5 N. Eng. Rep. 454; 14 N. E. Rep. 461.



stop;<sup>163</sup> where a foot-passenger, being familiar with the crossing, started to cross upon the raising of the gates, and when a team started to cross in the opposite direction, and there was a space of about three feet on which he could have safely stopped to look for the train which ran upon him, or from which he could have seen the gate as it began to fall,—it appearing that he kept his head down as if looking at the walk, which was rough and uneven;<sup>164</sup> where the injured traveller testified that he looked both ways before attempting to cross, and neither saw nor heard the approaching train, and the evidence showed that the night was dark and hazy, that an engine with a headlight burning stood near the crossing, that several switchlights were in the neighborhood, that a train had just passed making considerable noise, and that there were several lights on the rear of its caboose;<sup>165</sup> where a woman in crossing a railway of six tracks, upon a village street, was, when on the last track, struck and killed by a locomotive on which the bell was not rung, nor the whistle sounded;<sup>166</sup> where a traveller was killed in the night-time by the locomotive of a steam train on an avenue in a city, and there was no witness of the killing, and the evidence was conflicting as to whether the bell was rung or the whistle sounded, but the engineer testified that the locomotive was moving along a down grade, with no headlight, and was passing another train whose bell and whistle were sounding;<sup>167</sup> where it was shown that the traveller stopped one hundred feet from the track where he had a view of it, and that a further view from the road was cut off by a curve in the track, and several witnesses testified that the point where he stopped was the proper and customary place of observation resorted to by drivers coming in that direction, because the road ran down grade until at a point so near the track that horses could not be safely stopped there, and the plaintiff and his driver testified that they not only stopped at this point and waited until trains had passed, but drove on and slacked up nearer to the track to see and hear whether there was any other train coming;<sup>168</sup> where a woman on foot stopped when about two feet from the track and looked and listened, and the evidence showed that a train should have been seen at a distance of from one hundred and twenty to four hundred feet, and that the train which struck her

<sup>163</sup> *Germond v. Central &c. R. Co.*, 65 Vt. 126; s. c. 26 Atl. Rep. 401.

<sup>164</sup> *Oldenburg v. New York &c. R. Co.*, 124 N. Y. 414; s. c. 26 N. E. Rep. 1021; 36 N. Y. St. Rep. 402; aff'g 33 N. Y. St. Rep. 663; 11 N. Y. Supp. 689.

<sup>165</sup> *Beckwith v. New York &c. R. Co.*, 125 N. Y. 759; aff'g s. c. 54 Hun

446; s. c. 28 N. Y. St. Rep. 292; 7 N. Y. Supp. 719.

<sup>166</sup> *Sherry v. New York &c. R. Co.*, 104 N. Y. 652; s. c. 6 Cent. Rep. 357.

<sup>167</sup> *Smedis v. Brooklyn &c. R. Co.*, 88 N. Y. 13; aff'g s. c. 23 Hun (N. Y.) 279.

<sup>168</sup> *Whitman v. Pennsylvania R. Co.*, 156 Pa. St. 175; s. c. 32 W. N. C. 493; 27 Atl. Rep. 290.



was running at a high and dangerous rate of speed over a grade crossing of a populous borough, and that she walked eighteen feet after stopping and without looking up before she was struck;<sup>169</sup> where it appeared that a traveller approached a crossing behind a span of gentle horses attached to a light buggy, without curtains, driving slowly; that the street was obstructed by a box car standing more than one-half its length into the street, and extending near the travelled portion of the crossing; that, when his horses passed the end of the car, he checked them, and leaned forward to get a view unobstructed by the car; that, although he looked and listened, he could neither hear nor see an approaching train; that, when he passed the car, he again looked and saw the train approaching at the rate of forty-five or fifty miles an hour without giving the statutory signals; that he then tried to stop his team, which had come within ten feet of the track; that his team became frightened and he could not stop them, and that he immediately pulled upon one line to guide them from the track, when he was struck by the locomotive.<sup>170</sup>

#### § 1626. Other Circumstances Taking the Question to the Jury.—

The question of the contributory negligence of the traveller, killed or injured at a railway crossing, was also held a question for the jury under the following circumstances:—Where there was evidence that a building obscured the vision of the parties as they were approaching the track; that the driver and passengers on the vehicle looked and listened for approaching cars; that the driver brought the horse to a walk and slowly caused him to walk as they approached the crossing, and that they nevertheless neither saw nor heard anything to warn them of danger until it was too late to retreat;<sup>171</sup> where the traveller drove upon the tracks of *another company*, just ahead of an approaching train which he barely escaped, hurrying up in order to avoid it, and immediately passed upon the defendant's track, where he was exposed to its engine, and his attention was so engrossed by his situation on the former track that he did not think of the new danger, or look out for the engine on the track of the defendant, and the distance between the two tracks was so short that his team could not be stopped until it had gone upon the defendant's track;<sup>172</sup> where the traveller,

<sup>169</sup> *Arnold v. Philadelphia &c. R. Co.*, 161 Pa. St. 1; s. c. 34 W. N. C. 202; 28 Atl. Rep. 941.

<sup>170</sup> *Pittsburgh &c. R. Co. v. Burton*, 139 Ind. 357; s. c. 37 N. E. Rep. 150.

<sup>171</sup> *Bolinger v. St. Paul &c. R. Co.*, 36 Minn. 418; s. c. 31 N. W. Rep. 856.

<sup>172</sup> *Westaway v. Chicago &c. R. Co.*, 56 Minn. 28; s. c. 57 N. W. Rep. 222. As to getting caught between two engines or trains, proceeding in opposite directions, on different tracks, see *post*, §§ 1679, 1680; *ante*, §§ 1461, 1462.



who was driving his team with a heavily loaded sled towards the crossing, had his ears muffled, was familiar with the locality and stopped, looked, and listened before descending a steep hill, and tried to stop on hearing the signals a short distance from the track, but could not do so because of a steep declivity formed by snow thrown from the track upon the highway;<sup>173</sup> where the whistle was sounded and the bell rung, and the engine was going forty-five miles an hour, and the traveller was approaching the crossing at the rate of three and a half miles an hour, and the engine could be seen by one going in the same direction as the traveller, at a distance of twenty-six hundred feet when from one hundred to two hundred feet from the crossing, and at a distance of eight hundred feet when twenty feet from the crossing;<sup>174</sup> where it was the daily custom of the deceased, about the time when the accident occurred, to go to his place of business on foot over railway tracks which were laid upon the public street; that when he was killed he was pursuing the customary route; that the morning was dark and foggy; that there were a number of railroad tracks crossing the street on his right, and a number of footpaths between and across these tracks used by the public; that no warning was given by the bell, and that he was struck and killed immediately as he stepped upon one of the tracks;<sup>175</sup> where the traveller while driving across a railway track had watched an engine go by, and, while looking out for further dangers, was struck by the same engine backing down upon him without warning;<sup>176</sup> and under the circumstances of other cases referred to in the marginal note.<sup>177</sup>

<sup>173</sup> Siegel v. Milwaukee &c. R. Co., 79 Wis. 404; s. c. 48 N. W. Rep. 488.

<sup>174</sup> Hahn v. Chicago &c. R. Co., 78 Wis. 396; s. c. 47 N. W. Rep. 620.

<sup>175</sup> Keim v. Union R. &c. Co., 90 Mo. 314; s. c. 7 West. Rep. 144.

<sup>176</sup> Palmer v. Detroit &c. R. Co., 56 Mich. 1.

<sup>177</sup> Hendrickson v. Great Northern R. Co., 52 Minn. 340; s. c. 54 N. W. Rep. 189 (track visible for half a mile, but train may not have come in view); Salter v. Utica &c. R. Co., 88 N. Y. 42 (traveller driving at a slow trot on a sled with a heavy load of logs, and there being a complication of circumstances and measurements); Koenig v. Missouri &c. R. Co., 19 Mo. App. 327; s. c. 1 West. Rep. 453 (driver approaching crossing through a deep cut and looking and listening); Chicago &c. R. Co. v. Burton, 53 Ill. App. 69 (traveller attempting to cross in front of a

train known to be approaching—seemingly bad decision); Walter v. Baltimore &c. R. Co. (D.C.), 23 Wash. L. Rep. 226 (view obstructed, no signal of backing train, gates open, gate-man in his box, no lights); Conklin v. New York &c. R. Co., 43 N. Y. St. Rep. 414; s. c. 17 N. Y. Supp. 651 (woman run over by a hand-car running fifteen miles an hour, view of track somewhat obscured); Richardson v. New York &c. R. Co., 40 N. Y. St. Rep. 616; s. c. 15 N. Y. Supp. 868 (woman drove on track with train in plain sight from the time when she came within fifty-one feet of the track, but attention might have been distracted by supposed signal of flagman to come on, or sight of another traveller crossing from the other side in safety); Frazier v. Wabash R. Co., 75 Mo. App. 253; s. c. 1 Mo. App. Rep. 319 (traveller, leading horse hitched behind wagon, stopped, looked, and



§ 1627. **How in Case of the Contributory Negligence of the Traveller and the Gross, Reckless, Willful, or Wanton Negligence of the Railway Company.**<sup>178</sup>—From what has already preceded,<sup>179</sup> it must be concluded that, although the traveller is guilty of contributory negligence in approaching the railway crossing, yet this does not bar a recovery for damages for his injury or death, which is brought about by the gross, reckless, willful, or wanton negligence of the railway company; since in such case the question of contributory negligence does not arise at all, any more than it does in the case of a malicious trespass;<sup>180</sup> though in the absence of negligence of this grade, the contributory negligence of the traveller, clearly established, will bar a recovery.<sup>181</sup> As to what will be such negligence as renders contributory negligence immaterial, under this rule, the cases do not enlighten us, unless it be that it is such to run the traveller down after seeing his exposed position, and his inability or disinclination to get out of the way, when the catastrophe could have been easily avoided.<sup>182</sup> On the question what is not such negligence as renders the defense of con-

listened,—curve in track, trees obstructing view, no signal, unusual rate of speed,—horse was struck); *De Graw v. Erie R. Co.*, 63 N. Y. St. Rep. 296; s. c. 49 App. Div. 29 (plaintiff testified that he did not hear any signal nor see any headlight, but other witnesses testified positively that the warning signals were sounded and the headlight displayed,—conflict of evidence was to be resolved by the jury); *Shultz v. New York & C. R. Co.*, 69 Hun (N. Y.) 515; s. c. 53 N. Y. St. Rep. 149; 23 N. Y. Supp. 509 (gates open, but traveller did not sufficiently look and listen); *Smith v. New York & C. R. Co.*, 4 App. Div. (N. Y.) 493; s. c. 39 N. Y. Supp. 1119; rev'g s. c. 38 N. Y. Supp. 666 (speed of train thirty-five to fifty miles an hour, view for more than five hundred feet obstructed, evidence as to signals conflicting); *Loucks v. Chicago & C. R. Co.*, 31 Minn. 526 (hind end of wagon caught by train while crossing,—traveller could not turn when train first seen, whipped up and tried to clear the track); *Baltimore & C. R. Co. v. Stoltz*, 18 Ohio C. C. 93 (woman killed, horse trotting, side curtains on buggy, apron before her through which lines passed, rainy day, view obstructed, train running at unlawful speed). Question of negligence for jury in case of a person killed at a railway

crossing where action is brought on *policy of accident insurance*: *Duncan v. Preferred Mut. Acc. Assn.*, 36 N. Y. St. Rep. 928; s. c. 13 N. Y. Supp. 620. So, where the traveller was *driving one horse and leading another*, and was otherwise as careful as he could be from the situation of the crossing, the case was allowed to go to the jury: *Eagan v. Fitchburg R. Co.*, 101 Mass. 315. See also *Eaton v. Erie R. Co.*, 51 N. Y. 544.

<sup>178</sup> This section is cited in §§ 1637, 1666, 1695.

<sup>179</sup> Vol. I, §§ 21, 22, 265, 266, 276; *ante*, § 1606.

<sup>180</sup> Vol. I, § 168, *et seq.*

<sup>181</sup> *Freeman v. Duluth & C. R. Co.*, 74 Mich. 86; s. c. 3 L. R. A. 594; 41 N. W. Rep. 872 ("reckless negligence" necessary to acquit the plaintiff); *Richmond & C. R. Co. v. Howard*, 79 Ga. 44; s. c. 3 S. E. Rep. 426; *Atchison & C. R. Co. v. Townsend*, 39 Kan. 115; s. c. 17 Pac. Rep. 804; *McDonald v. International & C. R. Co.*, 86 Tex. 1; s. c. 22 S. W. Rep. 939; rev'g s. c. 21 S. W. Rep. 774, and 20 S. W. Rep. 847; *Tucker v. Duncan*, 4 Woods (U. S.) 652 (traveller can not recover without showing that the railway company was guilty of gross negligence or some willful act).

<sup>182</sup> *Ante*, § 1598.



tributary negligence immaterial under this rule, we find that it has been held that a railway company is not guilty of gross negligence because its engineer fails immediately to stop the train on discovering a team standing on a private crossing half a mile ahead, unless he *knows* that it is *fast and unable to move*.<sup>183</sup> Nor was a railway company chargeable with the willful or intentional killing of a traveller, where its train was running but thirty-five miles an hour, and its fireman saw the deceased while but one hundred and fifty feet distant, driving slowly toward the crossing, and efforts were made to stop the train as soon as a collision seemed probable, although the bell was neither rung nor the whistle sounded;<sup>184</sup> and the same conclusion was reached where the engineer made every effort to stop the train, on discovering that a team, *nearing the crossing*, was keeping on its way, instead of stopping, as it should have done.<sup>185</sup> It has even been held that the railway company is not liable, although the negligence of its servant was gross and reckless, for running over and killing a traveller at a street crossing who was familiar with the place, and with the manner of switching and backing cars there, where he recklessly *took his chances*, in attempting to cross in front of a moving train only one hundred feet distant, when he had a clear view of the track for one thousand feet, and when he had walked for thirty feet in plain view of the train, which he could have seen at a glance.<sup>186</sup> To run a train at a speed in violation of a municipal ordinance does not, of itself, amount to willful or wanton negligence,<sup>187</sup> since there may be circumstances which will excuse, or even justify it.<sup>188</sup>

§ 1628. When Traveller Guilty of "Gross and Willful Negligence" under Massachusetts Statute.—The legislature of Massachusetts, evidently dissatisfied with the great uniformity with which the Supreme Judicial Court of that State had decided questions of contributory

<sup>183</sup> Frost v. Milwaukee &c. R. Co., 96 Mich. 470; s. c. 56 N. W. Rep. 19. As to the right of the engineer to assume that the traveller will act prudently and take care of himself, see *ante*, § 1601.

<sup>184</sup> Cleveland &c. R. Co. v. Miller, 149 Ind. 490; s. c. 9 Am. & Eng. Rail. Cas. (N. S.) 684; 49 N. E. Rep. 445.

<sup>185</sup> Indiana &c. R. Co. v. Wheeler, 115 Ind. 253; s. c. 15 West. Rep. 133; 17 N. E. Rep. 563.

<sup>186</sup> Graf v. Chicago &c. R. Co., 94 Mich. 579; s. c. 54 N. W. Rep. 388.

<sup>187</sup> Chicago &c. R. Co. v. Argo, 82 Ill. App. 667.

<sup>188</sup> Nor was it willful negligence, under the theory prevailing in Kentucky, for a switchman on a railway train to quit his post long enough to get to the engine cab to *relight his lamp*, which had been blown out in a high wind,—especially where the injured traveller was notified of the approach of the train by the headlight of the engine: Smith v. Louisville &c. R. Co., 16 Ky. L. Rep. 887; s. c. 30 S. W. Rep. 209 (no off. rep.).



negligence in favor of the railroad companies, enacted a statute<sup>189</sup> making railroad companies liable for all damages for death or injuries to travellers at grade crossings, where the corporation neglected to give the statutory signals \* \* \* “unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful or unlawful act contributed to the injury.” Notwithstanding this statute, the habit of the Court which it was intended to cure, seems to “persist,” as the doctors say; for the court has held that one who attempts to cross a railway track in full view of a rapidly approaching train, without looking to see whether the danger is imminent, is guilty of such gross or willful negligence, within the meaning of the statute, as will defeat a recovery.<sup>190</sup> But where the railway company failed to give the statutory signals, and the traveller drove slowly toward the crossing, seated in an open carriage, behind a safe horse, and the safety gates were up, and he was not warned by the gate-keeper, and did not know that the train by which he was run over, and which had been running but a few days, had been put on,—the Court so far relaxed its severity as to hold that he was not guilty of such gross negligence, within the meaning of the statute, as prevented him from recovering damages.<sup>191</sup> In like manner, a woman was not guilty of such “gross or willful negligence,” within the meaning of the statute, as would defeat a recovery of damages for her death, which took place on a cold, dark night, by her being struck at a highway crossing by a railway train which failed to give the signals required by the statute, although she proceeded to cross the track without stopping and ascertaining the whereabouts of the train, which she knew was approaching, and although she was in good health and able to hear and see well, considering that she was seventy-one years old.<sup>192</sup>

§ 1629. **Liability of Railway Company for Failing to Use Care to Avoid Injuring Travellers Negligently Exposed on Highway Crossings.**—Finally, we are brought back to the “last clear chance” doctrine, or the doctrine discussed at much length in the preceding volume,<sup>193</sup> which is that, although a person comes upon the track negligently, yet if the servants of the railway company, *after they see*

<sup>189</sup> Pub. Stat. Mass., chap. 112, § 213.

<sup>190</sup> *Sullivan v. New York & C. R. Co.*, 154 Mass. 524; s. c. 28 N. E. Rep. 911.

<sup>191</sup> *Walsh v. Boston & C. R. Co.*, 171 Mass. 52; s. c. 50 N. E. Rep. 453.

<sup>192</sup> *Phelps v. New England R. Co.*, 172 Mass. 98; s. c. 51 N. E. Rep. 522.

<sup>193</sup> Vol. I, § 230, *et seq.*



his danger, can avoid injuring him, they are bound to do so.<sup>194</sup> And, according to the better view with reference to injuries to travellers at highway crossings,<sup>195</sup>—as distinguished from injuries to *trespassers* and *bare licensees* upon railway tracks at places where they have no legal right to be,—the servants of the railway company are bound to keep a vigilant lookout in front of advancing engines or trains, to the end of discovering persons exposed to danger on highway crossings; and the railway company will be liable for running over them if, by maintaining such a lookout and by using reasonable care and exertion to check or stop its train, it could avoid injury to them.

§ 1630. **Traveller not Bound to Make Inquiry as to Schedule of Trains.**—One railway company has had the presumption to challenge the right of a traveller to cross its tracks until, in addition to looking and listening, he had made inquiry as to the schedules of its trains, or the time when they were expected to pass; and, of course, got an answer to the effect that this was not contributory negligence as matter of law.<sup>196</sup>

§ 1631. **Injury to One Who is Travelling on Sunday.**<sup>197</sup>—The mere fact that the traveller who is injured at a railway crossing is travelling on Sunday in violation of a statute, does not, under modern and enlightened conceptions, prevent him from recovering damages for the injury.<sup>198</sup> It is an act which is not deemed a contributory cause of his injury in a juridical sense, but it is collateral to it,<sup>199</sup> and is left to be redressed or punished in a prosecution instituted by the State's officer for that purpose.<sup>200</sup>

§ 1632. **Weight of Evidence to Establish Contributory Negligence.**—It is plain that where contributory negligence is an *affirmative defense*, the fact that the person killed or injured was guilty of it is to be established by a *preponderance of evidence*, as in other civil actions.<sup>201</sup> This statement would not have been deemed necessary,

<sup>194</sup> State v. Manchester &c. Railroad, 52 N. H. 528.

<sup>195</sup> Ante, § 1592, et seq.

<sup>196</sup> South &c. Alabama R. Co. v. Thompson, 62 Ala. 494, 500.

<sup>197</sup> This section is cited in § 1469.

<sup>198</sup> Boyden v. Fitchburg &c. R. Co., 70 Vt. 125; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 523; 39 Atl. Rep. 771; Van Auker v. Chicago &c. R. Co., 96 Mich. 307; s. c. 55 N. W. Rep. 971.

<sup>199</sup> Vol. I, § 249.

<sup>200</sup> Riding home from a railway station in a peaceable and quiet manner on Sunday evening has been held not to be such a violation of a statute against labor, sport, games, etc., on that day, as will defeat a right to recover damages for injuries received from a train at a railway crossing: Van Auker v. Chicago &c. R. Co., 96 Mich. 307; s. c. 55 N. W. Rep. 971.

<sup>201</sup> Vol. I, § 413.



but for the fact that the writer has come across a decision to the effect that where a traveller, passing over a railway crossing of a public highway, is injured by the railway company, proof that he was guilty of contributory negligence must be *clear* and *convincing*, in order to absolve the company from liability.<sup>202</sup>

§ 1633. **Instructions Submitting Question of Contributory Negligence of Traveller to Jury.**—Where the evidence is not so conclusive as to warrant the court in finding, as a conclusion of law, that the plaintiff has been so negligent in attempting to cross, instructions based upon the evidence may be given, to the effect that if he might have seen or heard the approaching train, and failed to do so by his own want of care and attention, he is precluded from recovering.<sup>203</sup> In a jurisdiction where the independence of juries is, under the mandate of the Constitution of the State, upheld, it has been held that a request for an instruction to the effect that if the jury believe from the evidence that the imprudence of the plaintiff in driving over the railroad, under the circumstances, contributed to her injury, they should find the defendant not guilty, is improper, because it intimates to the jury that the plaintiff was imprudent, and it is for them to decide that question.<sup>204</sup>

## ARTICLE II. DUTY OF TRAVELLER TO STOP, LOOK, AND LISTEN.

### SECTION

- 1637. Duty of traveller to look.
- 1638. Duty to look both ways.
- 1639. Duty to look twice, and to keep on looking.
- 1640. Doctrine that the failure to look is not negligence as matter of law.
- 1641. Duty to listen.
- 1642. Duty to look and listen.
- 1643. Illustrations of contributory negligence in failing to look and listen.
- 1644. Duty of traveller to stop and stop again.

### SECTION

- 1645. No absolute duty to stop before entering upon a railway crossing.
- 1646. Duty to alight, go forward, look and listen.
- 1647. Duty to stop and listen.
- 1648. Duty of traveller to stop, look and listen.
- 1649. Doctrine that failure to stop, look and listen is evidence of negligence, and not negligence *per se*.
- 1650. Doctrine that failure to look and listen is not negligence as matter of law.

<sup>202</sup> *Kaminitsky v. Northeastern R. Co.*, 25 South Car. 53. This holding seems to have been made in deference to an absurd and unjust statute.

<sup>203</sup> *Haines v. Illinois &c. R. Co.*, 41 Iowa 227; *Baltimore &c. R. Co. v.*

*State*, 29 Md. 252; *Baltimore &c. R. Co. v. Whittaker*, 24 Ohio St. 642; *Marietta &c. R. Co. v. Picksley*, 24 Ohio St. 654.

<sup>204</sup> *Illinois &c. R. Co. v. Griffin*, 184 Ill. 9; s. c. 56 N. E. Rep. 337; *aff'd* s. c. 84 Ill. App. 152.



## SECTION

1651. Circumstances tending to excuse the failure of the traveller to look or listen.
1652. Circumstances which furnish no excuse for not looking.
1653. Doctrine that it is not contributory negligence as matter of law not to look and listen.
1654. Not necessary to take unavailing or useless precautions.
1655. Traveller looking without seeing where view is unobstructed.
1656. Place, point or distance from the track at which the traveller ought to stop, look and listen.

## SECTION

1657. Further of the place, point, distance at which the traveller must look, etc.
1658. Contributory negligence of persons of defective sight or hearing.
1659. Contributory negligence of travellers who voluntarily disable themselves from seeing or hearing.
1660. Further of the negligence of voluntarily disabled persons.
1661. Cases of this kind which have gone to the jury.

§ 1637. **Duty of Traveller to Look.**<sup>205</sup>—On approaching a railway crossing at grade, the traveller is bound to make a fair use of his faculties to the end of ascertaining whether a train is approaching in dangerous proximity. And first, *it is his duty to look*; and if, by looking, he might have discovered<sup>206</sup> the approach of the train in time, by the exercise of ordinary or reasonable care, to avoid coming into collision with it, or otherwise being injured in consequence of it, there can be no recovery of damages because of his injury or death;<sup>207</sup> al-

<sup>205</sup> This section is cited in §§ 1507, 1666, 1695.

<sup>206</sup> *Post*, § 1655.

<sup>207</sup> *Cones v. Cincinnati &c. R. Co.*, 114 Ind. 328; s. c. 14 West. Rep. 101; 16 N. E. Rep. 638; *Allyn v. Boston &c. R. Co.*, 105 Mass. 77 (traveller had no previous knowledge of the existence of the railroad crossing, and failed to learn in time to avoid the collision, merely because he did not look,—his ignorance held no excuse); *Freeman v. Duluth &c. R. Co.*, 74 Mich. 86; s. c. 3 L. R. A. 594; 41 N. W. Rep. 872; *Hayden v. Missouri &c. R. Co.*, 124 Mo. 566; s. c. 28 S. W. Rep. 74; *Walters v. Chicago &c. R. Co.* (Wis.), 80 N. W. Rep. 451 (plaintiff failed to look and discover an approaching train by which his horses were frightened); *Delaware &c. R. Co. v. Hefferan*, 57 N. J. L. 149; s. c. 30 Atl. Rep. 578; *Sprow v. Boston &c. R. Co.*, 163 Mass. 330; s. c. 39 N. E. Rep. 1024; *Schlimgen v. Chicago &c. R. Co.*, 90 Wis. 186; s. c. 62 N. W. Rep. 1045;

*Scaggs v. Delaware &c. Canal Co.*, 145 N. Y. 201; s. c. 64 N. Y. St. Rep. 594; 39 N. E. Rep. 716; *Schofield v. Chicago &c. R. Co.*, 114 U. S. 615; *Campbell v. Union R. Co.*, 9 Misc. 484; s. c. 61 N. Y. St. Rep. 89; 30 N. Y. Supp. 246; *Steinhofel v. Chicago &c. R. Co.*, 92 Wis. 123; s. c. 65 N. W. Rep. 852; *Rainey v. New York &c. R. Co.*, 68 Hun (N. Y.) 495; s. c. 52 N. Y. St. Rep. 677; 23 N. Y. Supp. 80; *Grand Trunk R. Co. v. Baird*, 94 Fed. Rep. 946 (foreman of track repairs attempted to cross track in a freight yard without looking, although he knew that engines were constantly moving there, heard no signals, and there were other circumstances); *Theobald v. Chicago &c. R. Co.*, 75 Ill. App. 208; *Marks v. Petersburg &c. R. Co.*, 88 Va. 1; s. c. 15 Va. L. J. 501; 13 S. E. Rep. 299; *Tucker v. New York &c. R. Co.*, 124 N. Y. 308; s. c. 36 N. Y. St. Rep. 272; 26 N. E. Rep. 916; rev'g 33 N. Y. St. Rep. 863; 11 N. Y. Supp. 692; *Sullivan v. Old Colony R. Co.*, 153



though the train may have been approaching at a dangerous or unlawful rate of *speed*,<sup>208</sup> and without giving the statutory, customary, or

- Mass. 118; s. c. 26 N. E. Rep. 240; Nash v. New York & C. R. Co., 125 N. Y. 715, *mem.*; s. c. 34 N. Y. St. Rep. 788; 26 N. E. Rep. 266; rev'g 51 Hun (N. Y.) 594; 22 N. Y. St. Rep. 106; 4 N. Y. Supp. 525; Nixon v. Chicago & C. R. Co., 84 Iowa 331; s. c. 51 N. W. Rep. 157; Tierney v. Chicago & C. R. Co., 84 Iowa 641; s. c. 51 N. W. Rep. 175; Olson v. Chicago & C. R. Co., 81 Wis. 41; s. c. 50 N. W. Rep. 512; *aff'd* and explained 81 Wis. 47; 50 N. W. Rep. 1096; Grostick v. Detroit & C. R. Co., 90 Mich. 594; s. c. 49 Am. & Eng. Rail. Cas. 332; 51 N. W. Rep. 667; Lewis v. Puget Sound & C. R. Co., 4 Wash. 188; s. c. 29 Pac. Rep. 1061; Elliott v. Chicago & C. R. Co., 150 U. S. 245; s. c. 37 L. ed. 1068; 14 Sup. Ct. Rep. 85; Tyler v. Old Colony R. Co., 157 Mass. 336; s. c. 32 N. E. Rep. 227; Hansen v. Chicago & C. R. Co., 83 Wis. 631; s. c. 53 N. W. Rep. 909; Pennsylvania R. Co. v. Leary, 56 N. J. L. 705; s. c. 29 Atl. Rep. 678; Louisville & C. R. Co. v. Richards, 100 Ala. 365; s. c. 13 South. Rep. 944; Wabash & C. R. Co. v. Hicks, 13 Ill. App. 407; Galveston & C. R. Co. v. Bracken, 59 Tex. 71; Cullen v. Delaware & C. Canal Co., 113 N. Y. 667; s. c. 23 N. Y. St. Rep. 719; 21 N. E. Rep. 716; Bannister v. Lake Shore & C. R. Co., 113 Mich. 530; s. c. 4 Det. L. N. 385; 71 N. W. Rep. 861; Vreeland v. Cincinnati & C. R. Co., 109 Mich. 585; s. c. 3 Det. L. N. 246; 67 N. W. Rep. 905; Vogg v. Missouri & C. R. Co., 138 Mo. 172; s. c. 36 S. W. Rep. 646; Martin v. Little Rock & C. R. Co., 62 Ark. 156; s. c. 34 S. W. Rep. 545; Pyle v. Clark, 75 Fed. Rep. 644; s. c. 5 Am. & Eng. Rail. Cas. (N. S.) 156; Shires v. Fonda & C. R. Co., 80 Hun (N. Y.) 92; s. c. 62 N. Y. St. Rep. 4; 30 N. Y. Supp. 175; Whalen v. New York & C. R. Co., 58 Hun (N. Y.) 431; s. c. 35 N. Y. St. Rep. 556; 12 N. Y. Supp. 527; Smith v. New York & C. R. Co., 44 N. Y. St. Rep. 55; s. c. 17 N. Y. Supp. 400; Henavie v. New York & C. R. Co., 10 App. Div. 64; s. c. 41 N. Y. Supp. 935; Stopp v. Fitchburg R. Co., 80 Hun (N. Y.) 178; s. c. 61 N. Y. St. Rep. 629; 29 N. Y. Supp. 1008; Johnson v. Illinois & C. R. Co., 61 Ill. App. 522; Roach v. St. Joseph & C. R. Co., 55 Kan. 654; s. c. 41 Pac. Rep. 964; Jones v. Barnard, 63 Mo. App. 501; s. c. 2 Mo. App. Rep. 820; Collins v. New York & C. R. Co., 154 N. Y. 740; *aff'g* s. c. 92 Hun (N. Y.) 563; s. c. 36 N. Y. Supp. 942; 72 N. Y. St. Rep. 225; Missouri & C. R. Co. v. Warren (Tex. Civ. App.), 2 Am. Neg. Rep. 246; s. c. 39 S. W. Rep. 652; *aff'd* in 90 Tex. 560; 40 S. W. Rep. 6; Gulf & C. R. Co. v. Hamilton, 17 Tex. Civ. App. 76; s. c. 42 S. W. Rep. 358; Woodward v. New York & C. R. Co., 106 N. Y. 369; s. c. 9 Cent. Rep. 293; 13 N. E. Rep. 424; Young v. New York & C. R. Co., 107 N. Y. 500; s. c. 9 Cent. Rep. 879; 14 N. E. Rep. 434; Moebus v. Herrmann, 108 N. Y. 349; s. c. 11 Cent. Rep. 90; 15 N. E. Rep. 415; Hamilton v. Delaware & C. R. Co., 50 N. J. L. 263; s. c. 11 Cent. Rep. 562; 13 Atl. Rep. 29; Mynning v. Detroit & C. R. Co., 64 Mich. 93; s. c. 7 West. Rep. 327; Magner v. Truesdale, 53 Minn. 436; s. c. 55 N. W. Rep. 607; Berzevizy v. Delaware & C. R. Co., 19 App. Div. 309; s. c. 46 N. Y. Supp. 27; Wilber v. New York & C. R. Co., 17 App. Div. 623; s. c. 45 N. Y. Supp. 761 (flagman signaled him to stop); Lamb v. New York & C. R. Co., 18 App. Div. 579; s. c. 46 N. Y. Supp. 404; St. Louis & C. R. Co. v. Tippett, 56 Ark. 457; s. c. 20 S. W. Rep. 161; Illinois & C. R. Co. v. James, 67 Ill. App. 649; Huggart v. Missouri & C. R. Co., 134 Mo. 673; s. c. 38 S. W. Rep. 220; Groesbeck v. Chicago & C. R. Co., 93 Wis. 505; s. c. 67 N. W. Rep. 1120; 5 Am. & Eng. Rail. Cas. (N. S.) 177; Comer v. Shaw, 98 Ga. 543; s. c. 25 S. E. Rep. 733; Hartman v. Harris, 182 Pa. St. 172; s. c. 37 Atl. Rep. 942; Braudy v. Detroit & C. R. Co., 107 Mich. 100; s. c. 2 Det. L. N. 607; 64 N. W. Rep. 1056; Cantrell v. Erie R. Co. (N. J. L.), 43 Atl. Rep. 881; Baltimore & C. R. Co. v. Stoltz, 18 Ohio C. C. 93; Illinois & C. R. Co. v. Batson, 81 Ill. App. 142; Fowler v. New York & C. R. Co., 147 N. Y. 717; *aff'g* s. c. 74 Hun 141; 56 N. Y. St. Rep. 307; 26 N. Y. Supp. 218.
- <sup>208</sup> Cones v. Cincinnati & C. R. Co., 114 Ind. 328; s. c. 14 West. Rep. 101; 16 N. E. Rep. 638; Freeman v. Duluth & C. R. Co., 74 Mich. 86; s. c. 3 L. R. A. 594; 41 N. W. Rep. 872;



proper *signals*;<sup>209</sup> or without having a *flagman* at the crossing, as required by statute or ordinance;<sup>210</sup> or although, having a *flagman*, he is *negligent* in the performance of his duties;<sup>211</sup> or although, it being night, the train had no light in front;<sup>212</sup> or although the railway company is guilty of culpable negligence in any other respect,<sup>213</sup> unless the same is of such a character as to amount to that *willfulness* or *wantonness* which renders the contributory negligence of the person injured immaterial.<sup>214</sup>

§ 1638. **Duty to Look Both Ways.**<sup>215</sup>—As the traveller can never know, to a certainty, from which direction to expect the approach of a train, the rule under consideration obviously requires him, on approaching the crossing, to *look both ways*. If he looks but one way, and, in consequence of failing to look the other way, is run over by a train coming from the other direction, the law ascribes contributory negligence to him precisely as though he had not looked at all;<sup>216</sup> and this, as in other cases,<sup>217</sup> although the statutory or other signals were

Schofield v. Chicago &c. R. Co., 114 U. S. 615; Theobald v. Chicago &c. R. Co., 75 Ill. App. 208; Powell v. Missouri &c. R. Co., 76 Mo. 80; Neier v. Missouri &c. R. Co., 12 Mo. App. 35; s. c. 4 West. Rep. 597; Smith v. Wabash R. Co., 141 Ind. 92; s. c. 40 N. E. Rep. 270; Carney v. Chicago &c. R. Co., 46 Minn. 220; s. c. 48 N. W. Rep. 912; Sala v. Chicago &c. R. Co., 85 Iowa 678; s. c. 52 N. W. Rep. 664.

<sup>209</sup> Neier v. Missouri &c. R. Co., 12 Mo. App. 35; s. c. 4 West. Rep. 597; State v. Cumberland &c. R. Co., 87 Md. 183; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 511; 39 Atl. Rep. 610; Merkeley v. Chesapeake &c. R. Co., 43 W. Va. 11; s. c. 26 S. E. Rep. 349; Miller v. Terre Haute &c. R. Co., 144 Ind. 323; s. c. 43 N. E. Rep. 257; New York &c. R. Co. v. Swartout, 3 Ohio Dec. 636; Western &c. R. Co. v. Kehoe, 83 Md. 434; s. c. 28 Chicago Leg. News 423; 35 Atl. Rep. 90; Judson v. Great Northern R. Co., 63 Minn. 248; s. c. 65 N. W. Rep. 447; Johnson v. Chesapeake &c. R. Co., 91 Va. 171; s. c. 21 S. E. Rep. 238; Schofield v. Chicago &c. R. Co., 2 McCrary (U. S.) 268; s. c. aff'd in 114 U. S. 615; Giberson v. Bangor &c. R. Co., 89 Me. 337; s. c. 36 Atl. Rep. 400; Mayers v. Southern R. Co., 119 N. C. 758; s. c. 26 S. E. Rep. 148; Mesic v. Atlantic &c. R. Co., 120 N. C. 489; s. c. 26 S. E. Rep. 633; Thornton v. Cleveland &c. R. Co.,

131 Ind. 492; s. c. 31 N. E. Rep. 185; Gulf &c. R. Co. v. Hamilton, 17 Tex. Civ. App. 76; s. c. 42 S. W. Rep. 358; Hinken v. Iowa &c. R. Co., 97 Iowa 603; s. c. 66 N. W. Rep. 882.

<sup>210</sup> Smith v. Wabash R. Co., 141 Ind. 92; s. c. 40 N. E. Rep. 270; Sala v. Chicago &c. R. Co., 85 Iowa 678; s. c. 52 N. W. Rep. 664.

<sup>211</sup> Berry v. Pennsylvania R. Co., 48 N. J. L. 141; s. c. 5 Cent. Rep. 111.

<sup>212</sup> Meyers v. Southern R. Co., 119 N. C. 758; s. c. 26 S. E. Rep. 148.

<sup>213</sup> Hansen v. Chicago &c. R. Co., 83 Wis. 631; s. c. 53 N. W. Rep. 909; Galveston &c. R. Co. v. Bracken, 59 Tex. 71; Bellefontaine R. Co. v. Hunter, 33 Ind. 335, 364; Moore v. Central R. Co., 24 N. J. L. 268; Runyon v. Central R. Co., 25 N. J. L. 557.

<sup>214</sup> Vol. I, §§ 21, 22, 206, 207, 208, 265, 266, 276; *ante*, §§ 1606, 1627; Louisville &c. R. Co. v. Richards, 100 Ala. 365; s. c. 13 South. Rep. 944.

<sup>215</sup> This section is cited in § 1640.

<sup>216</sup> Young v. New York &c. R. Co., 107 N. Y. 500; s. c. 9 Cent. Rep. 879; 14 N. E. Rep. 434; Nixon v. Chicago &c. R. Co., 84 Iowa 331; s. c. 51 N. W. Rep. 157; Thornton v. Cleveland &c. R. Co., 131 Ind. 492; s. c. 31 N. E. Rep. 185; Shires v. Fonda &c. R. Co., 80 Hun (N. Y.) 92; s. c. 62 N. Y. St. Rep. 4; 30 N. Y. Supp. 175; Ormsbee v. Boston &c. R. Co., 14 R. I. 102; s. c. 51 Am. Rep. 354.

<sup>217</sup> *Ante*, §§ 1605, 1606.



not given, or the railway company may have been otherwise negligent.<sup>218</sup>

§ 1639. **Duty to Look Twice, and to Keep On Looking.**<sup>219</sup>—The fact that a traveller looks up and down the track when approaching it at a considerable distance from the crossing, will not always be enough. In many cases it may become his duty, in the exercise of ordinary care and caution for his own safety, to *look again* before driving upon the track,<sup>220</sup> or even to *look frequently*,<sup>221</sup> and the books disclose various circumstances where the failure of the traveller to look a second time is not held to be negligence *per se*, but presents a *question for the jury* merely.<sup>222</sup> A motorman of an electric car attempting to run his car across a steam railway track, at a rate not exceeding two miles an hour, without looking for the approach of a train, the electric car leaving a point thirty or forty feet from the crossing, at which point the motorman could see along the railway track for a distance of about five hundred and seventy-six feet, is guilty of contributory negligence, precluding recovery for injuries received by a collision at the crossing.<sup>223</sup> The same was held where a pedestrian, after stopping when thirty-five or forty feet from the railway track, and looking in the direction of an approaching train, with an unobstructed view of sixteen hundred feet, without seeing it, attempted to cross it without again looking in the direction of the train;<sup>224</sup> where a driver, after stopping, looking, and listening for a train, when thirty-five feet from the crossing, drove on a walk upon the crossing without again looking in the direction from which a train was approaching, which train he

<sup>218</sup> Thornton v. Cleveland & C. R. Co., 131 Ind. 492; s. c. 31 N. E. Rep. 185; Ormsbee v. Boston & C. R. Co., 14 R. I. 102; s. c. 51 Am. Rep. 354. It has been held that the duty to look both ways does not as a matter of law apply to the case of a person about to cross a city street. The degree of caution which he must exercise is affected by the situation and circumstances: Moebus v. Herrmann, 108 N. Y. 349; s. c. 15 N. E. Rep. 415; 11 Cent. Rep. 90.

<sup>219</sup> This section is cited in §§ 1656, 1657.

<sup>220</sup> Smith v. New York & C. R. Co., 44 N. Y. St. Rep. 55; s. c. 17 N. Y. Supp. 400; Stopp v. Fitchburg R. Co., 80 Hun (N. Y.) 178; s. c. 61 N. Y. St. Rep. 629; 29 N. Y. Supp. 1008; Illinois & C. R. Co. v. James, 67 Ill. App. 649; Hartman v. Harris, 182 Pa. St. 172; s. c. 37 Atl. Rep. 942;

Cantrell v. Erie R. Co. (N. J. L.), 43 Atl. Rep. 881.

<sup>221</sup> Washington & C. R. Co. v. Lacey, 94 Va. 460; s. c. 26 S. E. Rep. 834.

<sup>222</sup> Gulf & C. R. Co. v. Hamilton, 17 Tex. Civ. App. 76; s. c. 42 S. W. Rep. 358; Baltimore & C. R. Co. v. Wetmore, 65 Ill. App. 292; Haupt v. New York & C. R. Co., 20 Misc. (N. Y.) 291; s. c. 45 N. Y. Supp. 666; rev'g s. c. 18 Misc. 594; 42 N. Y. Supp. 477; Missouri & C. R. Co. v. Cox (Tex. Civ. App.), 27 S. W. Rep. 1050 (no off. rep.); Stevens v. Missouri & C. R. Co., 67 Mo. App. 356 (duty of looking and listening not absolute where one is injured by making a "flying switch").

<sup>223</sup> Vreeland v. Cincinnati & C. R. Co., 109 Mich. 585; s. c. 3 Det. L. N. 246; 67 N. W. Rep. 905.

<sup>224</sup> Cantrell v. Erie R. Co. (N. J. L.), 43 Atl. Rep. 881.



would have seen if he had again looked;<sup>225</sup> where a traveller in a buggy, after stopping and looking at a point two hundred and forty-six feet from the crossing, where a partial view of the track could be had, did not continue to look frequently, until he had got so near the track that he could not prevent an accident, although his view was obstructed from the point where he stopped until near the track, but not so much so as to prevent him from seeing the train in time if he had continued to look.<sup>226</sup> On the contrary, it has been held that one driving at a slow trot, who looks for a train when sixty feet from the railroad track, is not, as matter of law, guilty of contributory negligence in not subsequently looking in the same direction before reaching the track, *where he listens* for a train and hears nothing.<sup>227</sup>

§ 1640. **Doctrine that the Failure to Look is not Negligence as Matter of Law.**<sup>228</sup>—Decisions are occasionally met with which challenge the doctrine that there is an unbending rule of law making it negligence under all circumstances for a traveller approaching a railway crossing *not to look* for approaching trains,<sup>229</sup> but which hold it, in many cases, to be a question of fact for a jury.<sup>230</sup> We have seen that the general rule acted upon by the courts requires him to *look both ways*,<sup>231</sup> but it is said that he is not required *constantly* to look up and then down the track,<sup>232</sup> and clearly he can not very well look

<sup>225</sup> *Hartman v. Harris*, 182 Pa. St. 172; s. c. 37 Atl. Rep. 942.

<sup>226</sup> *Washington & C. R. Co. v. Lacey*, 94 Va. 460; s. c. 26 S. E. Rep. 834.

<sup>227</sup> *Moore v. Chicago R. Co.*, 102 Iowa 595; s. c. 71 N. W. Rep. 569. In another case, a person about to cross a railroad crossing, with a single track and infrequent trains, when he was about one hundred yards from the crossing, saw a train with the rear towards him, going, apparently, in an opposite direction. He did not keep his eyes fixed upon the train, as his attention was distracted by the actions of persons near the station gesticulating to him, which signals he did not understand. In an action for damages resulting from a collision with this train, the court held that there was no legal obligation upon the plaintiff to keep his eye fixed on the train up to the moment of crossing the track, but that, under all the circumstances, the question whether he was in the exercise of due care was one of fact for the jury: *Bonnell v. Delaware & C. R. Co.*, 39 N. J. L. 189.

<sup>228</sup> This section is cited in § 1642.

<sup>229</sup> *Texas & C. R. Co. v. Chapman*, 57 Tex. 75; *Cahill v. Cincinnati & C. R. Co.*, 92 Ky. 345; s. c. 13 Ky. L. Rep. 714; 18 S. W. Rep. 2; 49 Am. & Eng. Rail. Cas. 390; *Chicago & C. R. Co. v. Halsey*, 31 Ill. App. 601; *Haupt v. New York & C. R. Co.*, 20 Misc. (N. Y.) 291; s. c. 45 N. Y. Supp. 666; rev'g s. c. 18 Misc. 594; 42 N. Y. Supp. 477; *Piper v. Chicago & C. R. Co.*, 77 Wis. 247; s. c. 46 N. W. Rep. 165; *Dahlstrom v. St. Louis & C. R. Co.*, 108 Mo. 525; s. c. 18 S. W. Rep. 919 (traveller attempting to cross railway track in city street without looking).

<sup>230</sup> *Plummer v. Eastern R. Co.*, 73 Me. 591. Compare *Cranston v. New York & C. R. Co.*, 103 N. Y. 614; reversing s. c. 39 Hun 308; *Manley v. New York & C. R. Co.*, 18 App. Div. (N. Y.) 420; s. c. 45 N. Y. Supp. 1108; reversing s. c. 18 Misc. (N. Y.) 502; 42 N. Y. Supp. 1076.

<sup>231</sup> *Ante*, § 1638.

<sup>232</sup> *Gratiot v. Missouri & C. R. Co.*, 116 Mo. 450; s. c. 16 S. W. Rep. 384.



both ways at the same time. Another decision makes the concession that, while the traveller is bound to make efforts to see the train, he is not bound, as matter of law, to succeed in seeing it,<sup>233</sup> which may mean that he is not bound, like an X-ray, to look through a stone wall, a clay embankment, a mass of weeds, or a train standing upon a side track. The meaning of these cases, at most, is that there may be exceptional circumstances where the law will excuse the traveller in failing to look,—as where his view is obstructed by a long train of cars standing on a side track;<sup>234</sup> as where he could not have seen had he looked, his view being obstructed by lumber piles and cars standing on a side track;<sup>235</sup> as where, by reason of an obstruction of the view, looking would be unavailing;<sup>236</sup> or where there may be evidence sufficient to satisfy a man of ordinary carefulness that no train is approaching, without his taking the precaution of looking;<sup>237</sup> or where he is prevented from looking by being preoccupied with something which demands his entire attention, such as the *fright* or excitement of his horses.<sup>238</sup> And this brings us to the inquiry to what extent the traveller is bound to use his sense of hearing.

§ 1641. **Duty to Listen.**<sup>239</sup>—If one of the senses of the traveller can not be made available, his obligation to use the other becomes stronger, and he should employ it with greater vigilance.<sup>240</sup> Where the law requires, as it should, and generally does, listening as well as looking for approaching trains, the fact that the vision of the traveller is obscured is no excuse for his failure to listen, but renders it the more obligatory.<sup>241</sup> It has been often held that evidence tending to show a connection between the failure to ring the bell upon the engine and the injury received by the traveller, is irrelevant and unnecessary, where it appears that the traveller crossed the track without listening, at a point where trains were frequently passing.<sup>242</sup> In short, the traveller is bound to *listen where he can not see*, and to *stop where he can not listen without stopping*;<sup>243</sup> and if he approaches

<sup>233</sup> Greany v. Long Island R. Co., 101 N. Y. 419; s. c. 2 Cent. Rep. 452.

<sup>234</sup> Chicago &c. R. Co. v. Hedges, 105 Ind. 398; s. c. 3 West. Rep. 898.

<sup>235</sup> Pennsylvania R. Co. v. Marshall, 119 Ill. 399; s. c. 7 West. Rep. 445.

<sup>236</sup> Post, §§ 1651, 1654.

<sup>237</sup> Cahill v. Cincinnati &c. R. Co., 92 Ky. 345; s. c. 13 Ky. L. Rep. 714; 18 S. W. Rep. 2; 49 Am. & Eng. Rail. Cas. 390.

<sup>238</sup> Piper v. Chicago &c. R. Co., 77 Wis. 247; s. c. 46 N. W. Rep. 165.

<sup>239</sup> This section is cited in § 1652.

<sup>240</sup> Louisville &c. R. Co. v. Stommel, 126 Ind. 35; s. c. 25 N. E. Rep. 863.

<sup>241</sup> Pennsylvania R. Co. v. Monney, 126 Pa. St. 244; s. c. 46 Phila. Leg. Int. 334; 24 W. N. C. 40; 17 Atl. Rep. 590; Atchison &c. R. Co. v. Townsend, 39 Kan. 115; s. c. 17 Pac. Rep. 804.

<sup>242</sup> Kelly v. Chicago &c. R. Co., 88 Mo. 534; s. c. 4 West. Rep. 577.

<sup>243</sup> Kelly v. Chicago &c. R. Co., 88 Mo. 534.



a railway track on a dark night, knowing that trains frequently pass, he will be guilty of contributory negligence if he does not listen before attempting to pass.<sup>244</sup>

§ 1642. **Duty to Look and Listen.**<sup>245</sup>—The duty of a traveller on approaching a railway crossing, of making a reasonable use of his faculties to discover whether a train is approaching, implies not only a duty to look in both directions, but *also to listen* for the sound of approaching trains, at a safe distance from the track.<sup>246</sup> Where a traveller, knowing that he is approaching a railway crossing, and with an unobstructed view of the track in both directions, and there being nothing to prevent his hearing an approaching train, advances to the point of intersection, without either looking or listening, his reckless conduct will generally impute contributory negligence to him as matter of law, so as to preclude a recovery of damages in case of his injury or death.<sup>247</sup> The rule applies to *pedestrians* as well as to

<sup>244</sup> Little Rock &c. R. Co. v. Bléwitt, 65 Ark. 235; s. c. 45 S. W. Rep. 548. But in a jurisdiction where the burden of disproving contributory negligence rests on the plaintiff, and in a case where the traveller was killed, it has been held that want of due care on his part is not necessarily shown by the absence of affirmative proof that he listened for the train, when it appeared that a person standing by at the same time heard no sound of a train approaching, until the whistle was sounded upon the trainmen discovering the traveller on the track: Hanks v. Boston &c. R. Co., 147 Mass. 495; s. c. 7 N. Eng. Rep. 139; 18 N. E. Rep. 218.

<sup>245</sup> This section is cited in §§ 1507, 1582.

<sup>246</sup> Brown v. Milwaukee &c. R. Co., 22 Minn. 165; Ernst v. Hudson &c. R. Co., 39 N. Y. 61; Stackus v. New York &c. R. Co., 7 Hun (N. Y.) 559; Chicago &c. R. Co. v. Kusel, 63 Ill. 180, note; Wilcox v. Rome &c. R. Co., 39 N. Y. 358; Chicago &c. R. Co. v. McKean, 40 Ill. 218; Chicago &c. R. Co. v. Still, 19 Ill. 499, 508; Railroad Co. v. Houston, 95 U. S. 697; s. c. 6 Cent. L. J. 132; 5 Reporter 164; St. Louis &c. R. Co. v. Manly, 58 Ill. 300; Linfield v. Old Colony &c. R. Co., 10 Cush. (Mass.) 562; Chicago &c. R. Co. v. Hatch, 79 Ill. 137.

<sup>247</sup> Chicago &c. R. Co. v. Damerell, 81 Ill. 450; s. c. 3 Cent. L. J. 768;

Rockford &c. R. Co. v. Byam, 80 Ill. 528; Bellefontaine &c. R. Co. v. Hunter, 33 Ind. 335; Allyn v. Boston &c. R. Co., 105 Mass. 77; Morse v. Erie &c. R. Co., 65 Barb. (N. Y.) 490; Haring v. New York &c. R. Co., 13 Barb. (N. Y.) 9; Mitchell v. New York &c. R. Co., 2 Hun (N. Y.) 535; s. c. 5 N. Y. S. C. (T. & C.) 1; Benton v. Central Railroad, 42 Iowa 192; New Orleans &c. R. Co. v. Mitchell, 52 Miss. 808; Gorton v. Erie &c. R. Co., 45 N. Y. 660; Reynolds v. New York &c. R. Co., 58 N. Y. 248; s. c. 2 N. Y. S. C. (T. & C.) 644; Cleveland &c. R. Co. v. Elliott, 28 Ohio St. 340; Railroad Co. v. Houston, 95 U. S. 697; s. c. 6 Cent. L. J. 132; Lake Shore &c. R. Co. v. Sunderland, 2 Bradw. (Ill.) 307; Fletcher v. Atlantic &c. R. Co., 64 Mo. 484; Leduke v. St. Louis &c. R. Co., 4 Mo. App. 485; Den Blaker v. New Jersey &c. R. Co., 30 N. J. Eq. 240; s. c. 7 Reporter 626; Cordell v. New York &c. R. Co., 75 N. Y. 330; s. c. 19 Alb. L. J. 134; North Pennsylvania R. Co. v. Heileman, 49 Pa. St. 60; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Philadelphia &c. R. Co. v. Peebles, 67 Fed. Rep. 591; Griffin v. Chicago &c. R. Co., 68 Iowa 638; Schaefer v. Chicago &c. R. Co., 62 Iowa 624; Crawford v. Chicago &c. R. Co. (Iowa), 80 N. W. Rep. 519; Pence v. Chicago &c. R. Co., 63 Iowa 746; Johnson v. Chicago &c. R. Co., 91 Iowa 248; s. c. 59 N. W. Rep. 66; Baltimore &c. R. Co. v. Walborn, 127 Ind. 142; s. c. 26



persons who approach the crossing driving *vehicles*.<sup>248</sup> It also applies to travellers who know that *no regular train* is due at the particular time; since it is the privilege of the railroad company to run special

- N. E. Rep. 207; *Duncan v. Missouri &c. R. Co.*, 46 Mo. App. 198; *Herlish v. Louisville &c. R. Co.*, 44 La. An. 280; s. c. 10 South. Rep. 628; *Studley v. St. Paul &c. R. Co.*, 48 Minn. 249; s. c. 51 N. W. Rep. 115; *Easley v. Missouri &c. R. Co.*, 113 Mo. 236; s. c. 20 S. W. Rep. 1073; *Pennsylvania R. Co. v. Rathgeb*, 32 Ohio St. 66; *Holmes v. South &c. R. Co.*, 97 Cal. 161; s. c. 31 Pac. Rep. 834; *Griffith v. Baltimore &c. R. Co.*, 44 Fed. Rep. 574; *Chicago &c. R. Co. v. Florens*, 32 Ill. App. 365; *Haetsch v. Chicago &c. R. Co.*, 87 Wis. 304; s. c. 58 N. W. Rep. 393; *Aiken v. Pennsylvania R. Co.*, 130 Pa. St. 380; s. c. 47 Phila. Leg. Int. 84; 41 Am. & Eng. Rail. Cas. 571; 20 Pitts. L. J. (N. S.) 182; 25 W. N. C. 13; 18 Atl. Rep. 619; *Lesan v. Maine &c. R. Co.*, 77 Me. 85; *State v. Maine &c. R. Co.*, 77 Me. 538; *Stoltz v. Baltimore &c. R. Co.* (C. P.), 7 Ohio Dec. 435; *Chicago &c. R. Co. v. Patrick*, 71 Ill. App. 632; *Ayers v. Norfolk &c. R. Co.* (Va.), 27 S. E. Rep. 582; *Lenz v. Whitcomb*, 96 Wis. 310; s. c. 71 N. W. Rep. 377; *Martin v. Pennsylvania R. Co.*, 176 Pa. St. 444; s. c. 39 W. N. C. 36; 35 Atl. Rep. 183; *Lane v. Missouri &c. R. Co.*, 132 Mo. 4; s. c. 33 S. W. Rep. 645; dissenting opinion by *Barclay, J.*, *Id.*, 1128; *Sullivan v. New York &c. R. Co.*, 175 Pa. St. 361; s. c. 34 Atl. Rep. 798; 39 W. N. C. 63; *Bates v. New York &c. R. Co.*, 84 Hun (N. Y.) 287; s. c. 65 N. Y. St. Rep. 496; 32 N. Y. Supp. 337; *Belch v. New York &c. R. Co.*, 90 Hun (N. Y.) 477; s. c. 36 N. Y. Supp. 56; 71 N. Y. St. Rep. 225; *Fowler v. New York &c. R. Co.*, 147 N. Y. 717; aff'g s. c. 74 Hun (N. Y.) 141; 56 N. Y. St. Rep. 307; 26 N. Y. Supp. 218; *Coppuck v. Philadelphia &c. R. Co.*, 191 Pa. St. 172; s. c. 43 Atl. Rep. 70; *Wichita &c. R. Co. v. Davis*, 37 Kan. 743; s. c. 16 Pac. Rep. 78; *Rheiner v. Chicago &c. R. Co.*, 36 Minn. 170; s. c. 30 N. W. Rep. 548; *Matta v. Chicago &c. R. Co.*, 69 Mich. 109; s. c. 13 West. Rep. 717; 37 N. W. Rep. 54; *McCrory v. Chicago &c. R. Co.*, 31 Fed. Rep. 531; *Dunning v. Bond*, 38 Fed. Rep. 813; *Chicago &c. R. Co. v. Hedges*, 118 Ind. 5; s. c. 20 N. E. Rep. 530; *Bloomfield v. Burlington &c. R. Co.*, 74 Iowa 607; s. c. 38 N. W. Rep. 431; *Thompson v. New York &c. R. Co.*, 110 N. Y. 636; s. c. 13 Cent. Rep. 240; 16 N. Y. St. Rep. 869; 17 N. E. Rep. 690; *Marland v. Pittsburg &c. R. Co.*, 123 Pa. St. 487; s. c. 46 Phila. Leg. Int. 211; 19 Pitts. L. J. (N. S.) 328; 23 W. N. C. 93; 16 Atl. Rep. 623; *State v. Boston &c. R. Co.*, 80 Me. 430; s. c. 6 N. Eng. Rep. 777; 38 Alb. L. J. 269; 15 Atl. Rep. 36; *Weyl v. Chicago &c. R. Co.*, 40 Minn. 350; s. c. 42 N. W. Rep. 24; *Harris v. Minneapolis &c. R. Co.*, 37 Minn. 47; s. c. 33 N. W. Rep. 121; *New York &c. R. Co. v. Kellam*, 83 Va. 851; s. c. 3 S. E. Rep. 703; *Norfolk &c. R. Co. v. Burge*, 84 Va. 63; s. c. 4 S. E. Rep. 21; *Nash v. Richmond &c. R. Co.*, 82 Va. 55; *Glascock v. Central &c. R. Co.*, 73 Cal. 137; s. c. 14 Pac. Rep. 418; *Rupard v. Chesapeake &c. R. Co.*, 88 Ky. 280; s. c. 10 Ky. L. Rep. 1023; 11 S. W. Rep. 70; *Brown v. Texas &c. R. Co.*, 42 La. An. 350; s. c. 7 South. Rep. 682; *Union R. Co. v. State*, 72 Md. 153; s. c. 42 Am. & Eng. Rail. Cas. 172; 19 Atl. Rep. 449; *Allen v. Maine &c. R. Co.*, 82 Me. 111; s. c. 19 Atl. Rep. 105; *Kohler v. Pennsylvania R. Co.*, 135 Pa. St. 346; s. c. 20 Pitts. L. J. (N. S.) 459; 47 Phila. Leg. Int. 344; 26 W. N. C. 176; 19 Atl. Rep. 1049; *Butler v. Gettysburg &c. R. Co.*, 126 Pa. St. 160; s. c. 19 Atl. Rep. 37; *McBride v. Northern &c. R. Co.*, 19 Or. 64; s. c. 23 Pac. Rep. 814; 42 Am. & Eng. Rail. Cas. 146; *Donnelly v. Boston &c. R. Co.*, 151 Mass. 210; s. c. 42 Am. & Eng. Rail. Cas. 182; 24 N. E. Rep. 38; *Taylor v. Missouri &c. R. Co.*, 86 Mo. 457; s. c. 3 West. Rep. 270; *Pennsylvania R. Co. v. Coon*, 111 Pa. St. 430; s. c. 2 Cent. Rep. 323; *Chase v. Maine &c. R. Co.*, 78 Me. 346; s. c. 2 N. E. Rep. 872; *Meserole v. Brooklyn &c. R. Co.*, 57 Hun (N. Y.) 591; s. c. 32 N. Y. St. Rep. 708; 10 N. Y. Supp. 813; *Judson v. Great Northern R. Co.*, 63 Minn. 248; s. c. 65 N. W. Rep. 447.
- <sup>248</sup> *Aiken v. Pennsylvania R. Co.*, 130 Pa. St. 380; s. c. 47 Phila. Leg. Int. 84; 41 Am. & Eng. Rail. Cas. 571; 20 Pitts. L. J. (N. S.) 182; 25 W. N. C. 13; 18 Atl. Rep. 619.



trains, and it is the duty of the traveller to look and listen for them.<sup>249</sup> But it does not apply to an *employe* of the railway company whose duty requires him to go upon the track, in the same sense in which it applies to an ordinary traveller; but the men who are driving the train are under a duty to look out for such employes and to give them suitable warnings.<sup>250</sup> It has been said that this is not a rule of evidence, but one of *absolute and unbending law*;<sup>251</sup> but this proposition can not be affirmed as a rule of American law, especially in view of the fact that many courts hold that the failure of the traveller to look and listen on approaching a railway crossing is not negligence *per se*, but merely evidence of negligence, to go to the jury.<sup>252</sup>

§ 1643. **Illustrations of Contributory Negligence in Failing to Look and Listen.**—A., approaching a railroad crossing in the daytime, fails to *look both ways* for approaching trains, although the view is unobstructed, but goes upon the track and is run over by a train which is approaching at a negligent or unlawful rate of speed, or without giving signals, or although there is no sign-board at the crossing. This is contributory negligence in A., and he can not recover damages from the railroad company, notwithstanding the fact that it has been guilty of negligence or of a violation of the law.<sup>253</sup>

Omaha &c. R. Co. v. Talbot, 48 Neb. 627; s. c. 67 N. W. Rep. 599; Chicago &c. R. Co. v. Hedges, 105 Ind. 398; Hixson v. St. Louis &c. R. Co., 80 Mo. 335; Chicago &c. R. Co. v. Gertsen, 15 Ill. App. 614; Clark v. Missouri &c. R. Co., 35 Kan. 350; Conklin v. Erie &c. R. Co., 63 N. J. L. 338; s. c. 43 Atl. Rep. 666; Hunter v. Montana &c. R. Co. (Mont.), 57 Pac. Rep. 140; Kane v. New York &c. R. Co., 132 N. Y. 160; s. c. 43 N. Y. St. Rep. 494; 30 N. E. Rep. 256.

<sup>249</sup> Brown v. Texas &c. R. Co., 42 La. An. 350; s. c. 7 South. Rep. 682; Aiken v. Pennsylvania R. Co., 130 Pa. 380; s. c. 47 Phila. Leg. Int. 84; 41 Am. & Eng. Rail. Cas. 571; 20 Pitts. L. J. (N. S.) 182; 25 W. N. C. 13; 18 Atl. Rep. 619; Terre Haute &c. R. Co. v. Voelker, 129 Ill. 540; s. c. 39 Am. & Eng. Rail. Cas. 615; 22 N. E. Rep. 20; Tucker v. Chicago &c. R. Co. (Mich.), 80 N. W. Rep. 984.

<sup>250</sup> McMarshall v. Chicago &c. R. Co., 80 Iowa 757; s. c. 45 N. W. Rep. 1065.

<sup>251</sup> Aiken v. Pennsylvania R. Co., 130 Pa. St. 380; s. c. 47 Phila. Leg. Int. 84; 41 Am. & Eng. Rail. Cas. 571;

20 Pitts. L. J. (N. S.) 182; 25 W. N. C. 13; 18 Atl. Rep. 619; Terre Haute &c. R. Co. v. Voelker, 129 Ill. 540; s. c. 39 Am. & Eng. Rail. Cas. 615; 22 N. E. Rep. 20.

<sup>252</sup> *Ante*, § 1640; *post*, §§ 1649, 1650, 1651, 1653.

<sup>253</sup> St. Louis &c. R. Co. v. Mathias, 50 Ind. 65, 81 (Buskirk, C. J., dissenting); Indianapolis &c. R. Co. v. Stout, 53 Ind. 143, 148; Cleveland &c. R. Co. v. Crawford, 24 Ohio St. 631; s. c. 2 Am. L. T. (N. S.) 211; North Pennsylvania R. Co. v. Heileman, 49 Pa. St. 60; s. c. 1 Thomp. Neg., 1st ed., 401; Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329; Butterfield v. Western R. Corp., 10 Allen (Mass.) 532; Wilds v. Hudson River R. Co., 24 N. Y. 430; Stackus v. New York &c. R. Co., 7 Hun (N. Y.) 559; Pittsburgh &c. R. Co. v. Dunn, 56 Pa. St. 280; Hanover R. Co. v. Coyle, 55 Pa. St. 396; Pennsylvania R. Co. v. Beale, 73 Pa. St. 505; Railroad Co. v. Houston, 95 U. S. 697; s. c. 1 Thomp. Neg. (1st ed.), p. 444; Schultz v. Pennsylvania R. Co., 5 Reporter 376; St. Louis &c. R. Co. v. Manly, 58 Ill. 300. See *contra*, Spencer v. Illinois &c. R. Co., 29 Iowa



A. drives his four-horse team along a road running parallel with and near to a railroad track. As he approaches the crossing, the air is *so filled with dust that he can not see* the railroad, and his wagon makes some noise. Nevertheless, he attempts to cross without stopping to listen for an approaching train, and his horses are killed by the engine. This is contributory negligence in A., and he can not recover damages from the railroad company.<sup>254</sup> On the other hand, where there was evidence tending to show that the plaintiff was injured while passing at night through an *opening between the defendant's cars*, at a crossing, by the cars being driven together without signal; that for twenty years the company had separated the cars at such crossing and had brought them together only upon giving signals, and had constructed a sidewalk at such crossing; that other persons had gone through the opening just before plaintiff attempted to do so; and that he had stopped and listened before going through and heard nothing,—the jury were warranted in finding that the plaintiff was free from contributory negligence and that the defendant was guilty of negligence.<sup>255</sup> An *instruction* that it was the duty of a person crossing “to make such use of his eyes and ears as would enable him to avoid danger, provided the managers of the railroad train were doing their duty,” was held erroneous, as it was his duty to use all his faculties, whether they were doing their duty or not.<sup>256</sup> Where the train was being run through the city at double the rate of *speed* permitted by the ordinance, and with the *brakemen collected on the engine* where their services could not be rendered available to control the train, the negligence was not considered so great as to excuse the negligence of one who undertook to cross the track without looking in both directions.<sup>257</sup> And where the crossing was undertaken upon the supposition that the train had passed at the usual hour, when, in fact, it was *behind time*, this circumstance was held insufficient to excuse the traveller from looking.<sup>258</sup> So, where undisputed testimony showed that the plaintiff lived near the railway, and *knew the time* of the train, and with that knowledge drove upon the crossing when it was due, his negligence was so manifest that he should have been nonsuited.<sup>259</sup> In one case, even where the view of the track was not en-

66. Compare *Payne v. Chicago & N. Co.*, 39 Iowa 523; *Pennsylvania R. Co. v. Ackerman*, 74 Pa. St. 265; *Morris & C. R. Co. v. Haslan*, 33 N. J. L. 147.

<sup>254</sup> *Flemming v. Western Pac. R. Co.*, 49 Cal. 253.

<sup>255</sup> *Gurley v. Missouri & C. R. Co.*, 122 Mo. 141; s. c. 26 S. W. Rep. 953.

<sup>256</sup> *Toledo & C. R. Co. v. Shuckman*, 50 Ind. 42. See *ante*, § 1605, *et seq.*

<sup>257</sup> *St. Louis & C. R. Co. v. Mathias*, 50 Ind. 65.

<sup>258</sup> *Toledo & C. R. Co. v. Jones*, 76 Ill. 311.

<sup>259</sup> *Brooks v. Buffalo & C. R. Co.*, 1 Abb. App. Dec. (N. Y.) 211; s. c. 25 Barb. (N. Y.) 600; *Dascomb v. Buffalo & C. R. Co.*, 27 Barb. (N. Y.) 221; *Reynolds v. New York & C. R. Co.*, 58 N. Y. 248; reversing s. c. 2 N. Y. S. C. (T. & C.) 644.



tirely unobstructed, the highway approached the track on a declivity, the train was *behind time*, and running at an *unusual rate of speed*, and the evidence was conflicting as to whether the bell was rung or the whistle blown, a nonsuit was ordered, for the reason that, notwithstanding the obstruction, the plaintiff, by the exercise of ordinary diligence, could have seen the coming train.<sup>260</sup> Where the plaintiff's servant, in charge of his team, approached the crossing, with an unobstructed view for a long distance, though there was no sign at the crossing as required by statute, and the servant swore that he kept a constant lookout for the train, and did not see it, he was so flatly contradicted by the circumstances that the court found no difficulty in arriving at the conclusion, as matter of law, that the collision was caused by the negligence of the plaintiff, and not by that of the defendant.<sup>261</sup>

§ 1644. *Duty of Traveller to Stop and Stop Again.*<sup>262</sup>—Many of the cases go so far as to hold that it is the duty of the traveller, if *driving a vehicle*, to come to a full stop before attempting to cross,<sup>263</sup> and cases are met with which even hold that it may be his duty under particular circumstances to *stop again* before driving upon the track.<sup>264</sup> Others connect the duty of stopping with the duty of *looking*, and hold that it is his duty to stop and look.<sup>265</sup> But whether it

<sup>260</sup> *Brendell v. Buffalo &c. R. Co.*, 27 Barb. (N. Y.) 534, note. See also *Chicago &c. R. Co. v. Notzki*, 66 Ill. 455.

<sup>261</sup> *Payne v. Chicago &c. R. Co.*, 39 Iowa 523; s. c. 44 Iowa 236, where, upon a new trial, the court instructed that it was only necessary to show the defendant's neglect or refusal to comply with the statute in order to render it liable. This was in pursuance of § 1288 of the Iowa Code, which added to the statute providing that a company shall be liable for all injuries occurring by failure or refusal to erect a sign at a crossing, these words: "And in order for the injured party to recover, it shall be only necessary for him to prove such neglect or refusal." But this amendment of the statute, having gone into effect subsequently to the collision for which the damages were claimed, and it not appearing essential to a fair construction of the statute that it should have a retroactive operation, the law as it stood at the time of the accident was held to apply, and the instruction held erroneous. As to

*looking without seeing*, see *post*, § 1655.

<sup>262</sup> This section is cited in §§ 1623, 1670.

<sup>263</sup> *Wilds v. Hudson &c. R. Co.*, 29 N. Y. 315, 328; *Shultz v. Pennsylvania R. Co.*, 5 Reporter 376; *Pennsylvania R. Co. v. Bentley*, 66 Pa. St. 30. *Contra*, *Leavenworth &c. R. Co. v. Rice*, 10 Kan. 426, 438; *Lit-taur v. Narragansett &c. R. Co.*, 61 Fed. Rep. 591; *Mynning v. Detroit &c. R. Co.*, 64 Mich. 93; s. c. 7 West. Rep. 324.

<sup>264</sup> *Cincinnati &c. R. Co. v. Grames*, 136 Ind. 39; s. c. 34 N. E. Rep. 714; *Baker v. Pennsylvania R. Co.*, 15 Lanc. L. Rev. (Pa.) 35; *Grand Trunk R. Co. v. Cobleigh*, 73 Fed. Rep. 784; s. c. 24 C. A. 342; 51 U. S. App. 15; rev'g 75 Fed. Rep. 247; s. c. 5 Am. & Eng. Rail. Cas. (N. S.) 445; *Merkle v. New York &c. R. Co.*, 49 N. J. L. 473; s. c. 8 Cent. Rep. 346; 9 Atl. Rep. 680; *Mann v. Philadelphia &c. R. Co. (Pa.)*, 1 Dauph. Co. Rep. 51.

<sup>265</sup> *Seamans v. Delaware &c. R. Co.*, 174 Pa. St. 421; s. c. 34 Atl. Rep. 568; *Chicago &c. R. Co. v. Reith*, 65 Ill. App. 461.



will be incumbent upon him to stop a second time will manifestly, under most circumstances, present a question for the jury, and can not be answered by any rule of law.<sup>266</sup> But a moment's reflection will convince one that the duty of stopping should be connected with the duty of listening, rather than with the duty of looking, since the noise of his vehicle may be such as to prevent his hearing the approaching train, unless he takes this precaution.<sup>267</sup> Others seem to proceed upon the somewhat extreme view that he is bound to stop because the act of stopping will have a tendency to arouse his faculties, and to change his attention from the subject which may be occupying it, and to fix it upon the danger confronting him. But in a case where the view of the track is unobstructed for a long distance in both directions, there would be no more sense in requiring him to stop on approaching the crossing, in order to alarm or rouse his own faculties, than there would be in requiring him to prick himself with a pin. Where, however, the view is obstructed, so that he is unable to ascertain by looking whether or not a train is approaching, and where he is driving a vehicle which is making considerable noise, the exercise of ordinary or reasonable care will require him to stop in order that he may the better listen;<sup>268</sup> and in such a case it has been held that it is his absolute duty to stop;<sup>269</sup> and this is especially so where the traveller knows that a train is due about that time.<sup>270</sup> It should be added that where the severe rule prevails making it contributory negligence, as matter of law, for the traveller to fail to stop, as well as to look and listen, the fact that the railway company was culpably negligent in not exhibiting a light at night, or in not giving the statutory signals, is deemed immaterial.<sup>271</sup>

**§ 1645. No Absolute Duty to Stop before Entering upon a Railway Crossing.**—Except in Pennsylvania, and possibly one or two other jurisdictions, no such judicial legislation has been attempted as to lay down the hard-and-fast rule that the traveller approaching a railway crossing is bound under all circumstances, *to stop* as well as to look

<sup>266</sup> Newhard v. Pennsylvania R. Co., 153 Pa. St. 417; s. c. 19 L. R. A. 563; 32 W. N. C. 54; 26 Atl. Rep. 105. Where a traveller stopped, looked at his watch, and found that no regular train was due, and listened before proceeding to cross, his view of the track on both sides being obstructed, it was held that he was not guilty of contributory negligence: McWilliams v. Philadelphia & c. R. Co. (Pa.), 22 W. N. C. 372; s. c. 15 Atl. Rep. 654.

<sup>267</sup> Littaur v. Narragansett & c. R. Co., 61 Fed. Rep. 591.

<sup>268</sup> Atchison & c. R. Co. v. Powers, 58 Kan. 544; s. c. 50 Pac. Rep. 452; Shufelt v. Flint & c. R. Co., 96 Mich. 327; s. c. 55 N. W. Rep. 1013 (did not stop or look).

<sup>269</sup> Abbott v. Dwinell, 74 Wis. 514; s. c. 43 N. W. Rep. 496.

<sup>270</sup> Seefeld v. Chicago & c. R. Co., 70 Wis. 216; s. c. 35 N. W. Rep. 278.

<sup>271</sup> Mynning v. Detroit & c. R. Co., 64 Mich. 93; s. c. 7 West. Rep. 324.



and listen for approaching trains; but the courts generally agree that whether he ought to stop, in the exercise of ordinary care and caution, is a question for a jury, depending upon the circumstances of each particular case.<sup>272</sup> On the other hand, a court denying the obligation to stop for the purpose of listening, reasons that where the view of the traveller is *obstructed by the act of the railroad company*, he has a right to presume that the usual signals of an approaching train will be given.<sup>273</sup> It has been held that when a traveller on a country highway comes to a railroad crossing with which he is familiar, knowing that a train is about due at that point and liable to pass at any time, it becomes his duty, as an act of ordinary prudence, to look and listen for its approach; and if his sense of sight is unavailing because of obstructions to the view, and his sense of hearing unavailing because of preventing noises, it becomes his duty, as a further act of ordinary prudence, to stop, in order to better enable him to look and listen before entering upon the crossing; and in such case, if by stopping he can see or hear the approaching train, but fails to do so, his negligence

<sup>272</sup> *Manley v. Delaware &c. Canal Co.*, 69 Vt. 101; s. c. 37 Atl. Rep. 279; *Cook v. Missouri &c. R. Co.*, 19 Mo. App. 329; s. c. 1 West. Rep. 451; *Faber v. St. Paul &c. R. Co.*, 29 Minn. 465; *Kenney v. Hannibal &c. R. Co.*, 105 Mo. 270; s. c. 15 S. W. Rep. 983; *aff'd on rehearing* 16 S. W. Rep. 837; *Michalke v. Galveston &c. R. Co.* (Tex. Civ. App.), 27 S. W. Rep. 164 (no off. rep.); *Lewis v. Long Island R. Co.*, 162 N. Y. 52; s. c. 56 N. E. Rep. 548; reversing s. c. 53 N. Y. Supp. 1107; 32 App. Div. 627; *Judson v. Central &c. R. Co.*, 158 N. Y. 597; s. c. 6 Am. Neg. Rep. 167; 53 N. E. Rep. 514; *rev'g* s. c. 91 Hun (N. Y.) 1; 36 N. Y. Supp. 83; *Hixson v. St. Louis &c. R. Co.*, 80 Mo. 335; *Duffy v. Chicago &c. R. Co.*, 32 Wis. 269; *Bunting v. Central &c. R. Co.*, 14 Nev. 351; *Leavenworth &c. R. Co. v. Rice*, 10 Kan. 426; *Spencer v. Illinois &c. R. Co.*, 29 Iowa 55; *Houston &c. R. Co. v. Wilson*, 60 Tex. 142; *Alexander v. Richmond &c. R. Co.*, 112 N. C. 720; *Wright v. Cincinnati &c. R. Co.*, 94 Ky. 114; *Beanstrom v. Northern &c. R. Co.*, 46 Minn. 193; *Continental &c. Co. v. Stead*, 95 U. S. 161; s. c. 24 L. ed. 403; *Chicago &c. R. Co. v. Hinds*, 56 Kan. 758; s. c. 44 Pac. Rep. 993; *Neudorffer v. Brooklyn Heights R. Co.*, 9 App. Div. 66; s. c. 41 N. Y. Supp. 50; *Russell v. Atchison &c. R. Co.*, 70 Mo. App. 88; *Mayers v. St. Louis &c. R. Co.*, 71 Mo.

App. 140; *Louisville &c. R. Co. v. Rush*, 127 Ind. 545; s. c. 26 N. E. Rep. 1010; *Chicago &c. R. Co. v. Williams*, 56 Kan. 333; s. c. 43 Pac. Rep. 246; *Cincinnati &c. R. Co. v. Farra*, 66 Fed. Rep. 496; s. c. 13 C. A. 602; *Atchison &c. R. Co. v. Hague*, 54 Kan. 284; s. c. 60 Am. & Eng. Rail. Cas. 617; 38 Pac. Rep. 257; *Masterson v. Chicago &c. R. Co.*, 58 Mo. App. 572; *Abbott v. Dwinnell*, 74 Wis. 514; s. c. 43 N. W. Rep. 496; *Chicago City R. Co. v. Robinson*, 27 Ill. App. 26; s. c. *aff'd* 127 Ill. 9; 4 L. R. A. 126; 18 N. E. Rep. 772; *Chicago &c. R. Co. v. Lane*, 130 Ill. 116; s. c. 22 N. E. Rep. 513; *aff'g* 30 Ill. App. 437; *Masterson v. Chicago &c. R. Co.*, 49 Mo. App. 6; *Powell v. New York &c. R. Co.*, 109 N. Y. 613; s. c. 11 Cent. Rep. 909; 16 N. E. Rep. 339; *Terre Haute &c. R. Co. v. Barr*, 31 Ill. App. 57; *Terre Haute &c. R. Co. v. Voelker*, 31 Ill. App. 314; *Ladouceur v. Northern &c. R. Co.*, 4 Wash. 38; s. c. 29 Pac. Rep. 942; *Pratt v. Chicago &c. R. Co.*, 98 Iowa 563; s. c. 67 N. W. Rep. 402; *Lapsley v. Union &c. R. Co.*, 50 Fed. Rep. 172; s. c. *aff'd* 51 Fed. Rep. 174; *Garland v. Chicago &c. R. Co.*, 8 Ill. App. 571; *Illinois &c. R. Co. v. Mizell*, 100 Ky. 235; s. c. 18 Ky. L. Rep. 738; 38 S. W. Rep. 5; 6 Am. & Eng. Rail. Cas. (N. S.) 337.

<sup>273</sup> *Bunting v. Central &c. R. Co.*, 14 Nev. 351.



in such respect should be declared as a matter of law, and not left to the determination of the jury as a question of fact.<sup>274</sup> The same court has held, in an action for injuries received at a railway crossing of a highway, that a finding that a railway company was negligent in not signaling; that, if the plaintiff had stopped as he approached the track, he could have avoided the injury; that, if he had looked when within fifteen feet of the crossing, he could have seen the train, and at a distance of twenty-five feet he could have seen one hundred feet of the track,—shows such negligence on the part of plaintiff as bars recovery.<sup>275</sup> Another court has well reasoned that to authorize the court to hold it negligence, as matter of law, for one to fail to stop before attempting to cross a railroad track, there must have been such an evident necessity, under the circumstances, that he should stop, that the minds of reasonable men would not differ in regard to it.<sup>276</sup> Other courts have stated the doctrine that it is not negligence *per se* for the traveller approaching a railway crossing not to stop, by adding such *qualifications* as those stated in the margin.<sup>277</sup>

<sup>274</sup> Atchison &c. R. Co. v. Willey, 60 Kan. 819; s. c. 58 Pac. Rep. 472.

<sup>275</sup> Walker v. Mercer, 61 Kan. 736; s. c. 60 Pac. Rep. 735; rev'g Mercer v. Walker, 9 Kan. App. 882; s. c. 58 Pac. Rep. 27.

<sup>276</sup> St. Louis &c. R. Co. v. Knowles, 6 Kan. App. 790; s. c. 51 Pac. Rep. 230.

<sup>277</sup> Unless the view of the track is so obstructed, or other circumstances are such that an ordinarily prudent man would stop: Lapsley v. Union &c. R. Co., 50 Fed. Rep. 172; s. c. aff'd 51 Fed. Rep. 172. Where the traveller's team is running, and he has all he can do to stop it, and the train is approaching at an unusual rate of speed, and without giving any signals: Pratt v. Chicago &c. R. Co., 98 Iowa 563; s. c. 67 N. W. Rep. 402. Where the conditions were such that the train could not be heard until it whistled for the crossing, and it was running at a high rate of speed, and did not sound the whistle until close to the crossing: Ladouceur v. Northern &c. R. Co., 4 Wash. 38; s. c. 29 Pac. Rep. 942. Where the vehicle of the traveller was making no noise, which prevented him from hearing all that he could have heard had he come to a full stop: Masterson v. Chicago &c. R. Co., 49 Mo. App. 6. Although the wagon of the traveller is old and makes considerable noise,

and the driver knows that there are obstructions which to some extent interfere with his view of an approaching train, and that the train is due about that time,—no absolute duty to stop: Chicago &c. R. Co. v. Lane, 130 Ill. 116; s. c. 22 N. E. Rep. 513; aff'g 30 Ill. App. 437. Where the view is unobstructed and nothing impedes the hearing of the approaching traveller: Masterson v. Chicago &c. R. Co., 58 Mo. App. 572. Where the traveller drives a load of barrels down a hill through a cut, at a trot, and the railroad crossing is about seventy-five feet beyond the foot of the hill: Atchison &c. R. Co. v. Hague, 54 Kan. 284; s. c. 60 Am. & Eng. Rail. Cas. 617; 38 Pac. Rep. 257. Where a woman with two small children drove toward the track where the view was obstructed by an undergrowth and weeds for a distance of four hundred feet until near the crossing, and she knew that no regular train was due at that hour: Cincinnati &c. R. Co. v. Farra, 66 Fed. Rep. 496; s. c. 13 C. C. A. 602. Where a child started to cross a track at a railway crossing when the train nearest to it backed off the crossing, and no train was in view, and it was run over by a train backing on another track which was hidden by the first train, of the approach of which no proper signal



§ 1646. *Duty to Alight, Go Forward, Look and Listen.*<sup>278</sup>—The suggestions of ordinary caution and prudence may require the traveller, *under peculiar circumstances*, to get out of his vehicle and approach the track and look up and down it in both directions before attempting to cross it.<sup>279</sup> But plainly, there can be no rule of law establishing such a duty for all cases; but whether the circumstances are of that peculiar character which requires the traveller so to act, will be a *question of fact for the jury*.<sup>280</sup> A court which imposes, as matter of law, the obligation to *stop*, as well as to look and listen, has held that it is not obligatory for a driver approaching a railroad crossing to alight and go upon the track to look for an approaching train, unless he can get a view of the track in no other way.<sup>281</sup> Another court has well reasoned that it is generally sufficient for the

was given: *Louisville &c. R. Co. v. Rush*, 127 Ind. 545; s. c. 26 N. E. Rep. 1010. Where, although the view was somewhat obstructed, there were no conditions rendering it difficult to hear an approaching train, and the driver relied upon the giving of the statutory signals: *Russell v. Atchison &c. R. Co.*, 70 Mo. App. 88. Where the view of the track was so obstructed by weeds negligently permitted to grow on the highway, as to prevent the traveller from hearing an approaching train until nearly on the track, in the absence of evidence that he could not have heard the whistle without stopping, if it had been sounded at a considerable distance from the crossing: *Chicago &c. R. Co. v. Hinds*, 56 Kan. 758; s. c. 44 Pac. Rep. 993. Where the traveller *stopped twice* to listen for a train at distances of ninety and one hundred and twenty feet from the track, and being unable to see the track until within a few feet of it, he looked in one direction without stopping, and, on looking in the other after his team was on the crossing, found a train immediately upon him, and whipped his horses in his attempt to escape: *Kenney v. Hannibal &c. R. Co.*, 105 Mo. 270; s. c. 15 S. W. Rep. 983; s. c. *aff'd* on rehearing 16 S. W. Rep. 837. Where the only available place to see or hear an approaching train was forty or fifty feet from the track, and the traveller looked and listened there, but perceived no train and proceeded upon the track: *Cook v. Missouri*

*&c. R. Co.*, 19 Mo. App. 329; s. c. 1 West. Rep. 451.

<sup>278</sup> This section is cited in § 1654.

<sup>279</sup> *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504.

<sup>280</sup> *Powell v. New York &c. R. Co.*, 109 N. Y. 613; s. c. 11 Cent. Rep. 909; 16 N. E. Rep. 339; *Kelsey v. Staten Island Rapid Transit R. Co.*, 78 Hun (N. Y.) 208; s. c. 60 N. Y. St. Rep. 180; 28 N. Y. Supp. 974; *Alexander v. Richmond &c. R. Co.*, 112 N. C. 720; s. c. 16 S. E. Rep. 896; *Pittsburgh &c. R. Co. v. Wright*, 80 Ind. 236; *Georgia &c. R. Co. v. Lee*, 92 Ala. 262; s. c. 9 South. Rep. 230; *Huckshold v. St. Louis &c. R. Co.*, 90 Mo. 548; s. c. 7 West. Rep. 764; *Guggenheim v. Lake Shore &c. R. Co.*, 66 Mich. 150; s. c. 9 West. Rep. 903; 33 N. W. Rep. 161.

<sup>281</sup> *Ellis v. Lake Shore &c. R. Co.*, 138 Pa. St. 506; s. c. 21 Pitts. L. J. (N. S.) 361; 27 W. N. C. 145; 21 Atl. Rep. 140. Where the view of the driver, as he approached the crossing, was obstructed by cars standing on a side track which were parallel with the highway, and he stopped and listened before turning at a sharp angle upon the crossing around the end of a standing car, it was held that he was not guilty of contributory negligence as matter of law because he did not leave his team and go in advance sufficiently near the track to see along its course, but that whether he was negligent in not doing so was a *question for the jury*: *Georgia &c. R. Co. v. Lee*, 92 Ala. 262; s. c. 9 South. Rep. 230.



driver to *check up slowly*, and to look and to listen for the purpose of ascertaining whether a train is approaching, without alighting and going forward for that purpose.<sup>282</sup>

§ 1647. **Duty to Stop and Listen.**<sup>283</sup>—Most of the decisions which emphasize the duty of the traveller to stop, connect it with the duty of listening, since the object of stopping is to enable him the better to listen. Decisions are therefore not wanting which hold that, where the view of the track is obstructed so that a driver approaching the crossing can not see an approaching train, it will be his duty to stop and listen,—a failure of which duty will impute contributory negligence to him, and prevent a recovery of damages in case of a collision, provided the catastrophe might have been prevented had he observed this precaution.<sup>284</sup> But it is plain that there can be no absolute rule of law on the question of the duty of the traveller to stop and listen, which will be applicable to all cases. Whether this is a reasonable precaution, depends upon the circumstances of each case.<sup>285</sup> It can not therefore be said as an unbending rule of law, that it is contributory negligence for a traveller to attempt to drive across a railroad track on a public highway without first stopping and listening;<sup>286</sup> but it will in many, perhaps in most cases, be a *question of fact for the jury*.<sup>287</sup> One court has well reasoned that, while it is not always the duty of the traveller to stop before crossing the track, yet where the crossing is at a point where trains frequently pass, *if he can not see up and down the track*, it is his duty *to listen* before attempting to cross.<sup>288</sup>

<sup>282</sup> *Alexander v. Richmond & C. R. Co.*, 112 N. C. 720; s. c. 16 S. E. Rep. 896.

<sup>283</sup> This section is cited in § 1582.  
<sup>284</sup> *Jensen v. Michigan & C. R. Co.*, 102 Mich. 176; s. c. 60 N. W. Rep. 57; *Lake Shore & C. R. Co. v. Geiger*, 8 Ohio C. C. 41; *Henze v. St. Louis & C. R. Co.*, 71 Mo. 636; *Towers v. Lake Erie & C. R. Co.*, 18 Ind. App. 684; s. c. 48 N. E. Rep. 1046; *Chase v. Maine & C. R. Co.*, 78 Me. 346; s. c. 2 N. E. Rep. 875; *Judson v. Central Vermont R. Co.*, 91 Hun (N. Y.) 1; s. c. 71 N. Y. St. Rep. 420; 35 N. Y. Supp. 83; *Osborn v. Detroit & C. R. Co.*, 115 Mich. 102; s. c. 4 Det. L. N. 786; 72 N. W. Rep. 1114; *McCanna v. New England R. Co.*, 20 R. I. 439; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 485; 39 Atl. Rep. 891; *Haetsch v. Chicago & C. R. Co.*, 87 Wis. 304; s. c. 58 N. W. Rep. 393.

<sup>285</sup> *Shaber v. St. Paul & C. R. Co.*, 28 Minn. 103.

<sup>286</sup> *Cincinnati & C. R. Co. v. Wright*, 34 S. W. Rep. 526 (no off. rep.); *Cleveland & C. R. Co. v. Monaghan*, 41 Ill. App. 498; *aff'd* on other grounds in 140 Ill. 474; *Hoggatt v. Evansville & C. R. Co.*, 3 Ind. App. 437; s. c. 29 N. E. Rep. 941; *Cincinnati & C. R. Co. v. Grames*, 8 Ind. App. 112; s. c. 34 N. E. Rep. 613; *St. Louis & C. R. Co. v. Barker*, 77 Fed. Rep. 810; s. c. 23 C. C. A. 475; 40 U. S. App. 739.

<sup>287</sup> *Abbott v. Dwinnell*, 74 Wis. 514; s. c. 43 N. W. Rep. 496; *Gulf & C. R. Co. v. Anderson*, 76 Tex. 244; s. c. 13 S. W. Rep. 196; 42 Am. & Eng. Rail. Cas. 160; *Eilert v. Green Bay & C. R. Co.*, 48 Wis. 606. Compare *Kellogg v. New York & C. R. Co.*, 79 N. Y. 72.

<sup>288</sup> *Kelly v. Chicago & C. R. Co.*, 88 Mo. 534; s. c. 4 West. Rep. 577.



§ 1648. **Duty of Traveller to Stop, Look and Listen.**<sup>289</sup>—Some courts go further and maintain the rule that it is the duty of the traveller on approaching a railway grade crossing, to stop, look and listen for coming trains, and that if he fails to take this precaution he can not recover damages in case of an injury which might have been averted had he taken it, no matter how negligent the railway company may have been. Briefly stated, the doctrine of these courts is that the failure of the traveller to stop, look and listen, is not evidence of negligence merely, but *negligence per se*.<sup>290</sup> This rule of stopping, looking and listening, like other rules imposing precautions upon travellers, is of such a character that, if disregarded by the traveller, no damages can be recovered for his death or injury, although the railway company may have been negligent in a manner which contributed directly thereto,—as in failing to have a watchman at the crossing, or to give a signal of the approaching train.<sup>291</sup> The rule does not apply to travellers *on foot*, so as to make it negligence as matter of law for a pedestrian approaching a crossing to fail to stop, look and listen.<sup>292</sup> One court has mitigated the severity of the doctrine by holding that a driver who attempts to cross a railway track without bringing his team to a walk, in order to look and listen, is

<sup>289</sup> This section is cited in §§ 1441, 1507, 1530, 1623.

<sup>290</sup> *Ritzman v. Philadelphia &c. R. Co.*, 187 Pa. St. 337; s. c. 40 Atl. Rep. 975; *Robertson v. Pennsylvania R. Co.*, 180 Pa. St. 43; s. c. 36 Atl. Rep. 403; 40 W. N. C. 53; *Lehigh Valley R. Co. v. Greiner*, 113 Pa. St. 600; s. c. 4 Cent. Rep. 901; *Spradley v. Alabama &c. R. Co.*, 110 Ala. 687; s. c. 20 South. Rep. 1022; *Decker v. Lehigh Valley R. Co.*, 181 Pa. St. 465; s. c. 37 Atl. Rep. 570; *Hess v. Williamsport &c. R. Co.*, 181 Pa. St. 492; s. c. 41 W. N. C. 311; 37 Atl. Rep. 568; *Gleim v. Harris*, 181 Pa. St. 387; s. c. 37 Atl. Rep. 515; *Betts v. Lehigh Valley R. Co. (Pa.)*, 43 Atl. Rep. 362; *Hunter v. Montana &c. R. Co.*, 57 Pac. Rep. 140; *Reading &c. R. Co. v. Ritchie*, 102 Pa. St. 425; *Chicago &c. R. Co. v. Palmer (Kan.)*, 60 Pac. Rep. 736 (crossing dangerous, view obstructed, traveller drove upon it at a rate of speed of six or eight miles an hour without stopping to look or listen,—no recovery); *Ash v. Wilmington &c. R. Co.*, 148 Pa. St. 133; s. c. 30 W. N. C. 49; 23 Atl. Rep. 898; *Georgia &c. R. Co. v. Lee*, 92 Ala. 262; s. c. 9 South. Rep. 230; *Connerton v. Delaware &c.*

*Canal Co.*, 169 Pa. St. 339; s. c. 26 Pitts. L. J. (N. S.) 77; 32 Atl. Rep. 416; *Whitman v. Pennsylvania R. Co.*, 156 Pa. St. 175; s. c. 32 W. N. C. 493; 27 Atl. Rep. 290; *State v. Cumberland &c. R. Co.*, 87 Md. 183; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 511; 39 Atl. Rep. 610; *Keppleman v. Philadelphia &c. R. Co.*, 190 Pa. St. 333; s. c. 42 Atl. Rep. 697; *Cincinnati &c. R. Co. v. Duncan*, 143 Ind. 524; s. c. 42 N. E. Rep. 37; *Union &c. R. Co. v. Adams*, 33 Kan. 427; *Schneider v. Chicago &c. R. Co.*, 99 Wis. 378; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 81; 75 N. W. Rep. 169 (distinguishing *Piper v. Chicago &c. R. Co.*, 77 Wis. 247; *Langhoff v. Milwaukee &c. R. Co.*, 23 Wis. 43; *Chase v. Maine &c. R. Co.*, 167 Mass. 383); *Hoover v. Pennsylvania R. Co.*, 8 Lanc. L. Rev. (Pa.) 337.

<sup>291</sup> *Connerton v. Delaware &c. Canal Co.*, 169 Pa. St. 339; s. c. 26 Pitts. L. J. (N. S.) 77; 32 Atl. Rep. 416; *Hoover v. Pennsylvania R. Co.*, 8 Lanc. L. Rev. (Pa.) 337; *ante*, §§ 1605, 1606.

<sup>292</sup> *Zimmerman v. Hannibal &c. R. Co.*, 71 Mo. 476.



guilty of negligence which will prevent a recovery of damages in case of his injury, unless the negligence of the railroad company is *gross*.<sup>293</sup> Another court has held, with reference to the facts of a particular case, that it is negligence *per se* for a person to cross a railway track without first looking and listening for a coming train; that if his view is obstructed he must listen carefully; and that when *riding with bells* attached to his team, he must *stop*.<sup>294</sup> Under the doctrine which obliges the traveller to stop, look and listen, if the evidence is *conflicting* as to whether he did so, the question of contributory negligence, of course, must go to the jury;<sup>295</sup> but, necessarily, under binding instructions as to the law. It has been held by the court which seems to have invented this rule, and which enforces it as an unbending rule of law, that one who approaches a railroad crossing where *buildings obscure the track on either side*, leaves his horse with the driver about twenty feet from the track, walks to the track, looks up and down, listens, and as the track is visible only a few hundred feet, sees and hears nothing, walks quickly back to his team, drives upon the track, and is injured by a train, has fulfilled his duty to *stop, look, and listen*; and the court should so instruct the jury.<sup>296</sup> Another court has held that a foot-traveller crossing a railroad track, by a foot path near a highway crossing, who *stops* at the track to *look and listen* for an approaching train, but can not perceive one or hear signals of one, but is struck by a train approaching suddenly and without warning, and who is otherwise in the exercise of due care,—is not chargeable with negligence contributing to the collision.<sup>297</sup>

§ 1649. **Doctrine that Failure to Stop, Look and Listen is Evidence of Negligence, and not Negligence per se.**<sup>298</sup>—The prevailing doctrine undoubtedly is that the failure of a driver of a vehicle on approaching a railway grade crossing to stop, look and listen, is not under all circumstances negligence as matter of law, but is generally no more than *prima facie evidence of negligence* to be considered *by the jury*.<sup>299</sup>

<sup>293</sup> Thomas v. Chicago &c. R. Co., 86 Mich. 496; s. c. 49 N. W. Rep. 547. The learned reader will note, here and elsewhere, that the doctrine of the Supreme Court of Michigan places *gross* negligence in the same category in which other courts place *willful or wanton* negligence or misconduct: *Ante*, § 1488.

<sup>294</sup> Chase v. Maine Central R. Co., 78 Me. 346.

<sup>295</sup> Ely v. Pittsburgh &c. R. Co., 158 Pa. St. 233; s. c. 24 Pitts. L. J. (N. S.) 270; 27 Atl. Rep. 970.

<sup>296</sup> Lehigh Valley R. Co. v. Brandtmaier, 113 Pa. St. 610; s. c. 5 Cent. Rep. 144.

<sup>297</sup> Baltimore &c. R. Co. v. Owings, 65 Md. 502; s. c. 3 Cent. Rep. 847.

<sup>298</sup> This section is cited in § 1642.

<sup>299</sup> St. Louis &c. R. Co. v. Amos, 54 Ark. 159; s. c. 15 S. W. Rep. 362; Ramsey v. Louisville &c. R. Co., 89 Ky. 99; s. c. 20 S. W. Rep. 162; Olsen v. Oregon &c. R. Co., 9 Utah 129; s. c. 33 Pac. Rep. 623; Reed v. Chicago &c. R. Co., 74 Iowa 188; s. c. 37 N. W. Rep. 149; Northern &c. R.



§ 1650. **Doctrine that Failure to Look and Listen is not Negligence as Matter of Law.**<sup>300</sup>—Cases are found which hold that the failure of the traveller on approaching a railway crossing to look and listen, is not negligence as matter of law, under all circumstances;<sup>301</sup> but that, whether it is negligence in him to fail to look and listen where the view is obstructed, or where there are complicated circumstances calculated to deceive and throw him off his guard, presents a *question for the jury*.<sup>302</sup> Where, for example, immediately after the passing of a train, the plaintiff, following the team of a person ahead, attempted to cross the track and was struck by a train *running wild*, which made *no signals*, and was *completely hid* from the highway by *obstructions* left by the defendant, the usual interval between trains not being less than a mile,—he was deemed not guilty of negligence in failing to stop, look and listen.<sup>303</sup> And so in the following cases:—Where the traveller, after waiting twelve seconds for the train to pass, went upon the track and was struck by *another train*, following it at a

Co. v. Holmes, 3 Wash. Terr. 543; s. c. 18 Pac. Rep. 76; Dalwigh v. International &c. R. Co. (Tex. Civ. App.), 42 S. W. Rep. 1009 (no off. rep.); Cincinnati &c. R. Co. v. Murphy, 17 Ohio C. C. 223; Klotz v. Winona &c. R. Co., 68 Minn. 341; s. c. 71 N. W. Rep. 257. The rule that persons about to cross a railway track must stop, look, and listen, does not obtain in Ontario: Hollinger v. Canadian &c. R. Co., 21 Ont. 705. That the question is one for the jury will appear from a holding that it is error to charge that a person, in approaching a railroad track, is not bound to stop, look, and listen before attempting to cross; it being for the jury to say whether he ought to: Gulf &c. R. Co. v. Daniels (Tex. Civ. App.), 24 S. W. Rep. 337 (no off. rep.). Where, before going on the track, the plaintiff stopped at the only available place to hear and see an approaching train, although forty or fifty yards from the track, and looked and listened, but did not see or hear the train, and then drove on,—he was not deemed guilty of contributory negligence: Cook v. Missouri &c. R. Co., 19 Mo. App. 329; s. c. 1 West. Rep. 451. Even the Supreme Court of Pennsylvania, which is the chief proponent of this rule of “stop, look, and listen,” has held that it does not apply to a passenger who is injured while attempting to alight from a train at her point of

destination, but that, under the circumstances, the question of her negligence was properly submitted to *the jury*: Pennsylvania R. Co. v. White, 88 Pa. St. 327. Another court has held that where there is no direct evidence that a traveller did not stop, look, and listen before entering upon a railroad crossing, it will be presumed that he did his duty in that regard and observed the proper precautions: McBride v. Northern R. Co., 19 Ore. 64; s. c. 42 Am. & Eng. Rail. Cas. 146; 23 Pac. Rep. 814. But it is to be observed that while it may be so presumed in a jurisdiction where the burden of proof with respect to contributory negligence is on the defendant, it will not be so presumed in those jurisdictions which follow the peculiar rule of putting the burden of negating contributory negligence upon the plaintiff: Vol. I, §§ 396, 401; *ante*, § 1622.

<sup>300</sup> This section is cited in § 1642.

<sup>301</sup> Chicago &c. R. Co. v. Hansen, 166 Ill. 623; s. c. 2 Chic. L. J. Wkly. 261; 46 N. E. Rep. 1071; aff'g s. c. 2 Chic. L. J. Wkly. 114.

<sup>302</sup> Winey v. Chicago &c. R. Co., 92 Iowa 622; s. c. 61 N. W. Rep. 218; Davis v. Concord &c. Railroad (N. H.), 44 Atl. Rep. 388; Galveston &c. R. Co. v. Harris (Tex. Civ. App.), 53 S. W. Rep. 599.

<sup>303</sup> Funston v. Chicago &c. R. Co., 61 Iowa 452.



distance of three hundred feet, and at the rate of fifteen or twenty miles an hour;<sup>304</sup> where the *obstructions* were such that the traveller could not see the approaching train, and he drove upon the track looking to the front, not knowing that a train was approaching;<sup>305</sup> where the traveller attempted to cross within a minute and a half after the passage of a work train, without looking to see whether *another train* was following it, and was caught by the second train;<sup>306</sup> where a person, driving a four-mule team with a load across a railway having four tracks, failed to look in the direction of a coming train at the moment when he emerged from behind a box car, which *obstructed his view*, when he had stopped to look along the track at the last place at which he could obtain a view before reaching the box car;<sup>307</sup> where a woman, driving a team, failed to look by reason of keeping her attention upon her horses, where there was a person in the carriage with her *who was looking* for approaching trains;<sup>308</sup> where a traveller, driving along a road parallel with the railway track, who was familiar with the crossing, did not look for an approaching train until he turned to cross the track at a point thirty-six feet from it, his *horses*, though ordinarily gentle, having become *frightened* and unmanageable from escaping steam;<sup>309</sup> where a *flagman*, stationed at a railway crossing, failed to look and listen before stepping upon the track of another company close to the track of his own employer, while flagging back a person in danger of a train on the road of his employer.<sup>310</sup> Nor is the rule which requires the traveller at crossings to look and listen applicable to men employed in railway yards, whose duties make it necessary for them to go frequently upon the track.<sup>311</sup>

§ 1651. **Circumstances Tending to Excuse the Failure of the Traveller to Look or Listen.**<sup>312</sup>—This brings us to the consideration of the question what circumstances will so far excuse the failure of the traveller to look or listen for approaching trains on nearing a railway crossing as to relieve him from the imputation of contributory negligence, or to *commit the question to a jury*. The traveller was not deemed negligent as matter of law:—Where, on driving toward the

<sup>304</sup> *Grand Rapids &c. R. Co. v. Cox*, 8 Ind. App. 29; s. c. 35 N. E. Rep. 183.

<sup>305</sup> *Norfolk &c. R. Co. v. Burge*, 84 Va. 63; s. c. 4 S. E. Rep. 21.

<sup>306</sup> *McGhee v. White*, 66 Fed. Rep. 502; s. c. 13 C. C. A. 608.

<sup>307</sup> *Heath v. Stewart*, 90 Wis. 418; s. c. 63 N. W. Rep. 1051.

<sup>308</sup> *Sauerborn v. New York &c. R. Co.*, 141 N. Y. 553; aff'g s. c. 52 N.

Y. St. Rep. 784; 69 Hun (N. Y.) 429; 23 N. Y. Supp. 478.

<sup>309</sup> *Lynch v. Northern &c. R. Co.*, 69 Fed. Rep. 86; s. c. 16 C. C. A. 151; 29 U. S. App. 664.

<sup>310</sup> *Chicago &c. R. Co. v. Woolridge*, 72 Ill. App. 551; citing *Plummer v. Eastern R. Co.*, 73 Me. 591.

<sup>311</sup> *Jordan v. Chicago &c. R. Co.*, 58 Minn. 8; s. c. 59 N. W. Rep. 633.

<sup>312</sup> This section is cited in §§ 1640, 1642.



crossing he looked twice up and down the track before attempting to cross, and, when about four feet from the track, was about to look again, when his attention was momentarily arrested by seeing a person in front of him on the track, at which time he heard the train, but could not then stop his horses, which were killed;<sup>313</sup> where he attempted to cross the track immediately *behind* a moving train without looking to see whether there was a *detached car following*, his attention having been diverted by the fireman, and he not knowing that cars were run into the switch at that crossing in that manner;<sup>314</sup> where the traveller was seated in a covered wagon, making it inconvenient for him to look to the right and left, and the electric bells maintained at the crossing were not ringing, and he stopped and looked at a distance of one hundred feet from the crossing, at which point no train was in sight, but failed to look again, although by so doing he might have seen the approaching train;<sup>315</sup> where the traveller could not, in any event, by looking or listening, have seen or heard the train until his horses were within four feet of the rail on the crossing;<sup>316</sup> where there were two main tracks and a side track, and, while a north-bound train was passing on the main track farthest from the traveller, he stepped upon the other main track and was struck by an approaching south-bound train.<sup>317</sup>

§ 1652. **Circumstances which Furnish no Excuse for not Looking.**—It is a sound general statement of the law to say that a traveller approaching a railway crossing of the highway is bound to look for coming trains before attempting to cross; that neglect to do so is negligence, unless obstructions prevent a view of the track, or unless some act of the company has put him off his guard and induced him to believe that he can pass in safety without using the precaution of looking.<sup>318</sup> If there is nothing to prevent the traveller from seeing the approaching train, and if he heedlessly steps upon the track immediately in front of it, the fact that he could not hear the approaching cars because of the noise, will be no excuse for his failure to use his

<sup>313</sup> Thompson v. New York &c. R. Co., 110 N. Y. 636; s. c. 13 Cent. Rep. 240; 16 N. Y. St. Rep. 869; 17 N. E. Rep. 690.

<sup>314</sup> Bowen v. New York &c. R. Co., 89 Hun (N. Y.) 594; s. c. 35 N. Y. Supp. 540; 70 N. Y. St. Rep. 144.

<sup>315</sup> Hicks v. New York &c. R. Co., 164 Mass. 424; s. c. 41 N. E. Rep. 721; 49 Am. St. Rep. 471.

<sup>316</sup> Winstanley v. Chicago &c. R.

Co., 72 Wis. 375; s. c. 39 N. W. Rep. 856.

<sup>317</sup> Chicago &c. R. Co. v. Pearson, 184 Ill. 386; s. c. 56 N. E. Rep. 633; aff'g 82 Ill. App. 605. For other cases where travellers were caught between trains, see *post*, §§ 1679, 1680. For similar *street railway* accidents, see *ante*, §§ 1461, 1462.

<sup>318</sup> Abbott v. Chicago &c. R. Co., 30 Minn. 482.



eyes;<sup>319</sup> but the fact that his *hearing* is obstructed, furnishes an additional reason why he should *look*.<sup>320</sup> The fact that his attention is diverted by the passage of another train on another track is no excuse for not looking in the direction of the train which runs upon him.<sup>321</sup> Nor will his failure to look and listen be excused by the fact that he could not safely stop after passing cars on the side track, which obstructed his view; since in such a case he ought to cross at some other place, or approach the track at a point where he can make the necessary observations.<sup>322</sup> If he approaches the crossing between hours when regular trains are due, he is not justified in assuming that no train will pass, and his negligence in failing to look and listen will not be excused, even where he is struck by a *special train*.<sup>323</sup>

§ 1653. **Doctrine that it is not Contributory Negligence as Matter of Law not to Look and Listen.**<sup>324</sup>—From what has preceded, it may be concluded that there can be *no unbending rule of law* making it obligatory under all circumstances upon a traveller approaching a railway crossing to look and listen for coming trains;<sup>325</sup> but that, in many cases, such failure will be excused, or it will be *submitted* to the determination of a *jury* upon the question whether it amounted to a want of ordinary care.<sup>326</sup> The better opinion is that such failure is *prima facie* evidence of negligence; in other words, that if the approaching train might have been seen if the traveller had looked, or heard if he had listened, his failure to look and listen makes him pre-

<sup>319</sup> Sabine &c. R. Co. v. Dean, 76 Tex. 73; s. c. 13 S. W. Rep. 45.

<sup>320</sup> *Ante*, § 1641.

<sup>321</sup> Woodward v. New York &c. R. Co., 106 N. Y. 369; s. c. 9 Cent. Rep. 293; 13 N. E. Rep. 424; *post*, §§ 1679, 1680; and as to street railroads, *ante*, § 1461.

<sup>322</sup> Owens v. Pennsylvania R. Co., 41 Fed. Rep. 187.

<sup>323</sup> Vincent v. Morgan's &c. Co., 48 La. An. 933; s. c. 20 South. Rep. 207.

<sup>324</sup> This section is cited in §§ 1642, 1658.

<sup>325</sup> Central Texas &c. R. Co. v. Bush, 12 Tex. Civ. App. 291; s. c. 3 Am. & Eng. Rail. Cas. (N. S.) 264; 34 S. W. Rep. 133; Laverenz v. Chicago &c. R. Co., 56 Iowa 689; Galveston &c. R. Co. v. Huebner (Tex. Civ. App.), 42 S. W. Rep. 1021 (no off. rep.); Ayers v. Norfolk &c. R. Co. (Va.), 27 S. E. Rep. 582; Lake Shore &c. R. Co. v. Foster, 74 Ill. App. 387; Ward v. Chicago &c. R. Co., 85 Wis. 601; s. c. 55

N. W. Rep. 771; Hendrickson v. Great Northern R. Co., 49 Minn. 245; s. c. 16 L. R. A. 261; 51 N. W. Rep. 1044; Toledo &c. R. Co. v. Cline, 135 Ill. 41; s. c. 45 Am. & Eng. Rail. Cas. 150; 25 N. E. Rep. 846; rev'g on other grounds s. c. 31 Ill. App. 563; St. Louis &c. R. Co. v. Faitz, 23 Ill. App. 498; Terre Haute &c. R. Co. v. Voelker, 129 Ill. 540; s. c. 22 N. E. Rep. 20; 39 Am. & Eng. Rail. Cas. 615; Chicago &c. R. Co. v. Wilson, 133 Ill. 55; s. c. 24 N. E. Rep. 555; 42 Am. & Eng. Rail. Cas. 153; Winchell v. Abbott, 77 Wis. 371; s. c. 46 N. W. Rep. 665.

<sup>326</sup> Eskridge v. Cincinnati &c. R. Co., 89 Ky. 367; s. c. 12 S. W. Rep. 580; 11 Ky. L. Rep. 557; 42 Am. & Eng. Rail. Cas. 176; Terre Haute &c. R. Co. v. Voelker, 129 Ill. 540; s. c. 22 N. E. Rep. 20; 39 Am. & Eng. Rail. Cas. 615; Chicago &c. R. Co. v. Wilson, 133 Ill. 55; s. c. 24 N. E. Rep. 555; 42 Am. & Eng. Rail. Cas. 153; Lake Shore &c. R. Co. v. Foster, 74 Ill. App. 387.



sumptively guilty of negligence, so that if this presumption is not repelled, no recovery of damages can be had.<sup>327</sup> We are more concerned with discovering under what circumstances the failure of the traveller to look and listen on approaching a crossing has been condoned. Confessedly, he is bound to look and listen unless there are peculiar facts excusing him from the performance of the duty.<sup>328</sup> It has been held that the general rule that persons approaching a railway crossing must look and listen for trains, stopping under some circumstances, to the end of discovering whether any engine or train is approaching before attempting to cross, does not apply where the crossing is in a large city, and where the pedestrian is ignorant of the existence of the crossing, the night being dark, and there being no watchman at the place nor any signal, nor anything to indicate the existence of a railway crossing to one not familiar with the locality.<sup>329</sup> Where the traveller was fatally injured by being thrown from his horse, which became *frightened* by an approaching train, the question whether the failure of the traveller to look and listen for trains before attempting to cross, was held to be a question for the jury.<sup>330</sup> It has been held that the traveller approaching a crossing is not bound to abandon the duty of watching his team, but that he has a right to presume that he will be warned by the proper signals, if a train is approaching.<sup>331</sup> Another court has reasoned that the traveller is not guilty of contributory negligence as matter of law by reason of failing to look and listen, where his vigilance has been allayed by the failure of those driving an approaching train to sound the whistle or ring the bell.<sup>332</sup> Another court has relaxed the rule of looking and listening to the extent of holding that the duty of a traveller before crossing a railroad, to look both ways and listen, depends upon the condition that he may reasonably expect the coming of a train at any time, and at all times, and that his attention is not reasonably arrested or diverted.<sup>333</sup> Another court has decided in a case where a woman was killed at a railway crossing, that a recovery is not necessarily impossible, where there is uncontradicted evidence that she looked both ways before stepping

<sup>327</sup> Chase v. Maine &c. R. Co., 78 Me. 346; s. c. 2 N. E. Rep. 875.

<sup>328</sup> Ayers v. Norfolk &c. R. Co. (Va.), 27 S. E. Rep. 582 (no off. rep.).

<sup>329</sup> Winchell v. Abbott, 77 Wis. 371; s. c. 46 N. W. Rep. 665.

<sup>330</sup> Eskridge v. Cincinnati &c. R. Co., 89 Ky. 367; s. c. 12 S. W. Rep. 580; 11 Ky. L. Rep. 557; 42 Am. & Eng. Rail. Cas. 176.

<sup>331</sup> St. Louis &c. R. Co. v. Faitz, 23 Ill. App. 498. As to the traveller's *right to presume* that a signal will be given, see *ante*, §§ 1448, 1612, *et seq.*

<sup>332</sup> Hendrickson v. Great Northern R. Co., 49 Minn. 245; s. c. 16 L. R. A. 261; 51 N. W. Rep. 1044.

<sup>333</sup> Ward v. Chicago &c. R. Co., 85 Wis. 601, 604; s. c. 55 N. W. Rep. 771.



upon the track, although there is evidence that an approaching train might and should have been discovered by one on the lookout for it.<sup>334</sup>

**§ 1654. Not Necessary to Take Unavailing or Useless Precautions.**<sup>335</sup>—Contributory negligence will not be imputed to the traveller injured at a railway crossing, from the fact that he failed to take unavailing or useless precautions.<sup>336</sup> For example, he will not be chargeable with contributory negligence, for failing to stop and listen, if the approaching train could not have been seen had he stopped, nor heard because it made so little noise, had he listened.<sup>337</sup> Where the evidence is conflicting as to whether it would have been available for him to look and listen, the court should not instruct the jury in binding terms that he was guilty of contributory negligence in going upon the track without looking and listening.<sup>338</sup> Where the train came from a direction where it could not have been seen in time, it was not incumbent on the person crossing to look in that direction.<sup>339</sup> Where there was noise sufficiently loud to drown the rumbling sound of a train in motion, the fact that the injured party did not listen, where there was neither sound of bell nor whistle to give warning of the approaching train, was not negligence.<sup>340</sup> Although it may, under certain circumstances, be the duty of one about to cross a railway track with horses and wagon, to stop, get out of his vehicle, and look up and down the track,<sup>341</sup> still, when it appears that want of care on the part of the managers of the train would have rendered this course fruitless for the purpose of averting the collision, his failure to do so can not be said to contribute to the injury.<sup>342</sup>

**§ 1655. Traveller Looking without Seeing where View is Unobstructed.**<sup>343</sup>—This brings us to the question whether the law will tolerate the absurdity or fraud of allowing the traveller to prove that

<sup>334</sup> Seeley v. New York &c. R. Co., 8 App. Div. 402; s. c. 40 N. Y. Supp. 866.

<sup>335</sup> This section is cited in § 1640.

<sup>336</sup> Davis v. New York &c. R. Co., 47 N. Y. 400; Hackford v. New York &c. R. Co., 6 Lans. (N. Y.) 381; Leonard v. New York &c. R. Co., 10 Jones & Sp. (N. Y.) 225.

<sup>337</sup> Donohue v. St. Louis &c. R. Co., 91 Mo. 357.

<sup>338</sup> Hinkle v. Richmond &c. R. Co., 109 N. C. 472; s. c. 11 Rail. & Corp. L. J. 81; 13 S. E. Rep. 884; 26 Am. St. Rep. 581.

<sup>339</sup> McGuire v. Hudson &c. R. Co., 2 Daly (N. Y.) 76; Chicago &c. R. Co. v. Lee, 87 Ill. 454.

<sup>340</sup> Davis v. New York &c. R. Co., 47 N. Y. 400; Leonard v. New York &c. R. Co., 10 Jones & Sp. (N. Y.) 225.

<sup>341</sup> *Ante*, § 1646.

<sup>342</sup> Pennsylvania R. Co. v. Ackerman, 74 Pa. St. 265; McGuire v. Hudson &c. R. Co., 2 Daly (N. Y.) 76. See also Cleveland &c. R. Co. v. Crawford, 24 Ohio St. 361; Davis v. New York &c. R. Co., 47 N. Y. 400; Weber v. New York &c. R. Co., 58 N. Y. 451; s. c. 67 N. Y. 587; Duffy v. Chicago &c. R. Co., 32 Wis. 269.

<sup>343</sup> This section is cited in §§ 1637, 1643.



he looked but did not see the train, where the view was unobstructed, and where, if he had looked, he must have seen it. The law will tolerate no such nonsense. If the position of the traveller, with respect to the approaching train, was such that he must have seen it if he had looked, or heard it if he had listened, the law will conclusively presume that he neither looked nor listened, or else that, having perceived it coming, he thrust himself in front of it and took his chances of getting across ahead of it.<sup>344</sup> Under such circumstances the presumption, in case of the traveller being killed, that he did his legal duty of stopping, looking and listening, or of looking and listening, has been regarded as completely overcome by the affirmative proof that he was struck the moment he set his foot upon the track.<sup>345</sup>

§ 1656. **Place, Point or Distance from the Track at which the Traveller Ought to Stop, Look and Listen.**—Many decisions deal with the question whether, although the traveller stopped, looked and listened, that being the rule of the jurisdiction, or looked and listened where the rule of the jurisdiction did not require him to stop,—he stopped, looked and listened, or stopped and listened, *at the right place*, that is to say, at the most available point for seeing or hearing the train. It is perfectly plain that if the traveller looks at a place from which he can not see, or listens at a place from which he can not hear, and there are other places from which he can see or hear, or both see and hear, and he does not avail himself of those places, to the end of ascertaining whether or not a train is approaching,—he has not discharged the duty of exercising ordinary or reasonable care, which the law puts upon him. But as the traveller can not, under all circumstances, be supposed to know the most available place for him to select to stop, look and listen, or to look and listen, and ought not to be held to be an *insurer* of the correctness of his decision, while the

<sup>344</sup> Cleveland &c. R. Co. v. Miller, 149 Ind. 490; s. c. 9 Am. & Eng. Rail. Cas. (N. S.) 684; 49 N. E. Rep. 445; Chicago &c. R. Co. v. Kirby, 86 Ill. App. 57; Burke v. New York &c. R. Co., 73 Hun (N. Y.) 32; s. c. 57 N. Y. St. Rep. 7; 25 N. Y. Supp. 1009; Newhard v. Pennsylvania R. Co., 153 Pa. St. 417; s. c. 26 Atl. Rep. 105; 19 L. R. A. 563; 32 W. N. C. 54; Myers v. Baltimore &c. R. Co., 150 Pa. St. 386; s. c. 24 Atl. Rep. 747; 30 W. N. C. 492; Haetsch v. Chicago &c. R. Co., 87 Wis. 304; s. c. 58 N. W. Rep. 393; Lane v. Missouri &c. R. Co., 132 Mo. 4; s. c. 33 S. W. Rep. 645, 1128; Indiana &c. R. Co. v. Hammock, 113 Ind. 1; s. c. 12 West.

Rep. 297; 14 N. E. Rep. 737; Wilcox v. Rome &c. R. Co., 39 N. Y. 358; Glascock v. Central &c. R. Co., 73 Cal. 137; s. c. 14 Pac. Rep. 518; Miller v. Truesdale, 56 Minn. 274; s. c. 57 N. W. Rep. 661; Bruenninger v. Pennsylvania R. Co. (Pa.), 15 Lanc. L. Rev. 6; Tucker v. Chicago &c. R. Co. (Mich.), 80 N. W. Rep. 984. *Contra*, that it is a *question for a jury*, see Weiss v. Pennsylvania R. Co., 79 Pa. St. 387; Pennsylvania R. Co. v. Weber, 76 Pa. St. 157.

<sup>345</sup> Pennsylvania R. Co. v. Mooney, 126 Pa. St. 244; s. c. 24 W. N. C. 40; 17 Atl. Rep. 590.



railroad company is allowed to select its speed at will and to drive its train upon the crossing without giving the statutory signals,—the question can not ordinarily be decided as an unbending rule of law, but must be treated as a question *in pais* to be submitted to the jury.<sup>346</sup> On the other hand, a class of decisions is found which endeavor to put this question in a straight jacket, by defining and limiting, as matter of law, the places at which the traveller is to exercise the duty of stopping, looking and listening.<sup>347</sup> For example, he is to stop, look and listen *immediately before crossing* the railway track;<sup>348</sup> he must look and listen before he gets so near the crossing that he can not check his horses in case of their becoming *frightened*;<sup>349</sup> and if he drives too near at a time when he knows that a train is due, in consequence of which his horse takes fright at the train, and runs on the track in front of it, when he might have seen the train fifty or sixty rods from the crossing, if he had looked,—there will be no recovery of damages.<sup>350</sup> Marking out the duty of the traveller by the lines and measurements of engineering, it has been held not enough that he looked when he was within 250 feet of the track, but that he was negligent because he did not *look again*, when, if he had done so when within one hundred feet of the track, he must have seen the approaching train.<sup>351</sup> So, where a woman driving a horse, stopped to look and listen at a point 293 feet from the crossing, from which point an approaching *hand-car* could not be seen, she was guilty of negligence in not stopping again to look and listen at a point fifty-five feet from the crossing, where the track could be seen for several hundred feet,

<sup>346</sup> *Ellis v. Lake Shore &c. R. Co.*, 138 Pa. St. 506; s. c. 21 Atl. Rep. 140; 21 Pitts. L. J. (N. S.) 361; 48 Phila. Leg. Int. 336; 27 W. N. C. 145; *Lehigh &c. Coal Co. v. Lear* (Pa.), 9 Atl. Rep. 267 (no off. rep.); *Pennsylvania &c. R. Co. v. Huff* (Pa.), 8 Atl. Rep. 789 (no off. rep.); *Austin v. Long Island R. Co.*, 140 N. Y. 639; aff'g s. c. 69 Hun. (N. Y.) 67; s. c. 52 N. Y. St. Rep. 746; 23 N. Y. Supp. 193; *Link v. Philadelphia &c. R. Co.*, 165 Pa. St. 75; s. c. 36 W. N. C. 21, 24; 30 Atl. Rep. 820, 822.

<sup>347</sup> To look and listen upon the sidewalk at a point distant *eleven feet* from the track of a railroad in a street, and failing both to *look and listen again* before crossing the track, is not, under this rule, a compliance with the duty of the traveller: *Lennon v. New York &c. R. Co.*, 65 Hun. (N. Y.) 578; s. c. 48 N. Y. St. Rep. 806; 20 N. Y. Supp. 557.

A subordinate court in Pennsylvania has held that the question whether a person was guilty of negligence in failing to *stop, look, and listen at the best place* for observation in approaching a railroad crossing, is one of law for the court, where the facts are undisputed, simple, and proved by evidence involved in no uncertainty: *Mann v. Philadelphia &c. R. Co.*, 1 Dauph. Co. Rep. 51.

<sup>348</sup> *Lehigh Valley R. Co. v. Brandtmaier*, 113 Pa. St. 610, 618; s. c. 5 Cent. Rep. 144.

<sup>349</sup> *Rhoades v. Chicago &c. R. Co.*, 58 Mich. 263.

<sup>350</sup> *Allen v. New York &c. R. Co.*, 92 Hun. (N. Y.) 589; s. c. 36 N. Y. Supp. 624; 71 N. Y. St. Rep. 791.

<sup>351</sup> *Mann v. Belt &c. R. Co.*, 128 Ind. 138; s. c. 26 N. E. Rep. 819. As to the duty of *looking again*, see *ante*, § 1639.



and which was the usual place for travellers, familiar with the crossing, as she was, to stop for the purpose of looking and listening; and hence she could not recover damages for her injuries caused by her horse taking fright at the *hand-car*.<sup>352</sup>

§ 1657. **Further of the Place, Point, or Distance at which the Traveller must Look, etc.**—It is not enough to satisfy the exactions of decisions of this class that the traveller stops and looks and listens *once*, but he must stop and look and listen *again*; and, according to some of the judicial conceptions, must keep on looking and listening.<sup>353</sup> A traveller (or his personal representative) failed to recover damages:—Where, after halting for an instant thirty or forty feet from the track, he drove directly upon the track without again stopping or looking in the direction from which he knew a train was due, although his view in that direction was obstructed until he was near the crossing;<sup>354</sup> where, knowing that the crossing was dangerous and that a train was due, he made but one stop, and that at a distance of seventy-five yards from the track, in a place from which the track could not be seen, and then carelessly drove upon the track without stopping again;<sup>355</sup> where he stopped at a place where he could not possibly see an approaching train, or stopped nearer at a point where he could see a train more than a third of a mile away, and then proceeded upon the track and was struck by a train;<sup>356</sup> where he approached the crossing without stopping to look or listen, except at a point twenty rods away, where his view was obstructed, and did not discover the train until he was so near the crossing that he could not stop;<sup>357</sup> where she stopped sixty feet from the track without seeing or hearing the approaching train, when if she had stopped twenty-five

<sup>352</sup> *Plummer v. New York &c. R. Co.*, 168 Pa. St. 62; s. c. 31 Atl. Rep. 887.

<sup>353</sup> *Ante*, § 1639. Upon the question how far from the crossing the traveller may stop, look and listen, without being guilty of negligence in not stopping and looking and listening again, the reader may amuse his leisure in reading the following cases:—*Missouri &c. R. Co. v. Cox* (Tex. Civ. App.), 27 S. W. Rep. 1050 (no off. rep.); *Renwick v. New York &c. R. Co.*, 36 N. Y. 132; *Rodrian v. New York &c. R. Co.*, 125 N. Y. 526. When traveller *negligent* in this regard,—see *Plummer v. New York &c. R. Co.*, 168 Pa. St. 62; *Reeves v. Dubuque &c. R. Co.*, 92 Iowa 32; *Fowler v. New York &c. R. Co.*, 74 Hun (N. Y.) 141; *Cincin-*

*nati &c. R. Co. v. Grames*, 136 Ind. 39; *Shufelt v. Flint &c. R. Co.*, 96 Mich. 327; *Stopp v. Fitchburg R. Co.*, 80 Hun (N. Y.) 178; *Jobe v. Memphis &c. R. Co.*, 71 Miss. 734; *Highland Ave. & Belt R. Co. v. Mad-dox*, 100 Ala. 618; *Drake v. Chicago &c. R. Co.*, 51 Mo. App. 562; *Beyel v. Newport News &c. R. Co.*, 34 W. Va. 538.

<sup>354</sup> *Jobe v. Memphis &c. R. Co.*, 71 Miss. 734; s. c. 15 South. Rep. 129. <sup>355</sup> *Beyel v. Newport News &c. R. Co.*, 34 W. Va. 538; s. c. 12 S. E. Rep. 532; 45 Am. & Eng. Rail. Cas. 188.

<sup>356</sup> *Urias v. Pennsylvania R. Co.*, 152 Pa. St. 326; s. c. 31 W. N. C. 353; 23 Pitts. L. J. (N. S.) 273; 25 Atl. Rep. 566.

<sup>357</sup> *Reeves v. Dubuque &c. R. Co.*, 92 Iowa 32; s. c. 60 N. W. Rep. 243.



feet from the track she might have seen it.<sup>358</sup> But it is more consonant with common sense to leave the question to the determination of the jury,—not whether he stopped to look and listen at the best possible place for that purpose, but whether he exercised reasonable care in selecting the place.<sup>359</sup>

§ 1658. **Contributory Negligence of Persons of Defective Sight or Hearing.**—If a traveller approaching the railway crossing suffers from a defect of sight or hearing, this circumstance imposes upon him the duty of using *greater care and caution* than is expected of travellers in the full possession of those faculties,<sup>360</sup> and if either of these senses is impaired, or for any reason can not be used to advantage, he ought to be correspondingly more vigilant in the use of the other.<sup>361</sup> Thus, a deaf person whose vision is unimpaired, is under a greater obligation than one in the full possession of all his senses, to *look* for an approaching train under such circumstances; and his failure to do so may be such contributory negligence as will bar a recovery of damages, if he is killed or injured.<sup>362</sup> So, a *blind man*, alone and unattended,

<sup>358</sup> *Aurelius v. Lake Erie &c. R. Co.*, 19 Ind. App. 584; s. c. 49 N. E. Rep. 857.

<sup>359</sup> One court has condemned an instruction to the effect that the traveller was not guilty of negligence in failing to *select the best possible place* to look and listen, if he exercised ordinary care in selecting the place: *Moberly v. Kansas City &c. R. Co.*, 98 Mo. 183; s. c. 11 S. W. Rep. 569. Another court well held that a traveller is not guilty of contributory negligence, as matter of law, in failing to exercise the duty of looking at the precise place and time where and when looking would be of the most advantage, especially where he relies upon the presumption that a *flagman* stationed at the crossing will warn him of the approach of trains: *Wilber v. New York &c. R. Co.*, 8 App. Div. 138; s. c. 40 N. Y. Supp. 471. Another court has ruled that a traveller approaching a railway crossing is not bound to keep his eyes constantly upon the track for trains at all points leading to the crossing, whether the view of the track is obstructed or not: *Winey v. Chicago &c. R. Co.*, 92 Iowa 622; s. c. 61 N. W. Rep. 218. Another court has untangled this question with reference to the facts of the case in judgment, by holding that one who stops

her horse to look and listen for an approaching train at a point 175 feet from the crossing, is not, as a matter of law, guilty of contributory negligence preventing a recovery for her death, where that is the usual and customary place for stopping, and there is no other place, except one so close to the track as to be dangerous if the horse should become frightened: *Cookson v. Pittsburgh &c. R. Co.*, 179 Pa. St. 184; s. c. 40 W. N. C. 101; 27 Pitts. L. J. (N. S.) 394; 36 Atl. Rep. 194.

<sup>360</sup> Vol. I, § 336; *ante*, § 1465; *Marks v. Petersburg R. Co.*, 88 Va. 1; s. c. 15 Va. L. J. 501; 13 S. E. Rep. 299; *Lake Shore &c. R. Co. v. Miller*, 25 Mich. 274; *International &c. R. Co. v. Garcia*, 75 Tex. 589; *Candee v. Kansas City &c. R. Co.*, 130 Mo. 142; s. c. 31 S. W. Rep. 1029.

<sup>361</sup> *Chicago &c. R. Co. v. Pounds*, 82 Fed. Rep. 217; s. c. 49 U. S. App. 476; 27 C. C. A. 112.

<sup>362</sup> *Tyler v. Sites*, 88 Va. 470; s. c. 15 Va. L. J. 793; 13 S. E. Rep. 978; *Cleveland &c. R. Co. v. Terry*, 8 Ohio St. 570; *Morris &c. R. Co. v. Haslan*, 33 N. J. L. 147; *Central R. Co. v. Feller*, 84 Pa. St. 226. But see *New Jersey &c. Transp. Co. v. West*, 32 N. J. L. 91. See also *International &c. R. Co. v. Garcia*, 75 Tex. 583; s. c. 13 S. W. Rep. 223; 42 Am. & Eng. Rail. Cas. 115.



is guilty of gross negligence in attempting to cross a network of railroad tracks at a highway crossing, knowing that a great number of cars and engines are constantly moving over the tracks in different directions and in close proximity to each other, and that the signals and noises made by the different engines will necessarily mislead one wholly dependent upon the sense of hearing.<sup>363</sup> Partial blindness, it has been held, demands the exercise of more than ordinary care on the part of the traveller suffering from this deprivation;<sup>364</sup> but the loss of *one* eye does not relieve him from the imputation of negligence, if he goes upon the track without seeing an approaching train which he could have seen by making a diligent use of the other eye.<sup>365</sup> It must follow from the foregoing that if a *deaf person* drives upon a railway track at a crossing, without looking (or stopping to look where that is the rule of the jurisdiction) for an approaching train, which he might see by looking carefully, and is struck by it and injured,—he can not recover damages from the railway company, although he sees that another vehicle one hundred feet or so in front of him has safely crossed.<sup>366</sup> Where a deaf person driving toward a railway crossing was in plain view of an approaching train for more than two hundred yards before reaching the track, and could see it by making the slightest exertion, and looked at a point about fifty feet from the crossing, and did not see the train by reason of a cloud of dust, and failed to look again before venturing upon the crossing, but came into such close proximity therewith as to render his situation dangerous, it was held that he was guilty of contributory negligence as matter of law.<sup>367</sup> We have seen that the employés of a railway company, driving a train toward one whom they see exposed upon the track or near it, may rightfully presume, within reasonable limits, especially if they give him warning signals, that he will take the usual and proper measures for promoting his own safety,—in other words, that he will *get out of the way* if he reasonably can.<sup>368</sup> This presumption applies in case of a *deaf person* so exposing himself, where the trainmen have no knowledge of his infirmity; so that if, by reason of his infirmity and without negligence on the part of the trainmen, he is killed or injured, damages can not be recovered from the company.<sup>369</sup>

<sup>363</sup> Florida &c. R. Co. v. Williams, 37 Fla. 406; s. c. 20 So. Rep. 558.

<sup>364</sup> Marks v. Petersburg R. Co., 88 Va. 1; s. c. 15 Va. L. J. 501; 13 S. E. Rep. 299.

<sup>365</sup> Fusili v. Missouri &c. R. Co., 45 Mo. App. 535.

<sup>366</sup> Phillips v. Detroit &c. R. Co., 111 Mich. 274; s. c. 3 Det. L. N. 678; 6 Am. & Eng. Rail. Cas. (N. S.) 319; 69 N. W. Rep. 496.

<sup>367</sup> Chicago &c. R. Co. v. Pounds, 82 Fed. Rep. 217; s. c. 49 U. S. App. 476; 27 C. C. A. 112.

<sup>368</sup> Vol. I, § 191; *ante*, §§ 1448, 1612, 1653, *et seq.*

<sup>369</sup> Johnson v. Louisville &c. R. Co., 91 Ky. 651; s. c. 25 S. W. Rep. 754. For example, where one walking near a railway track was hailed by persons approaching him on a *hand-car* from behind, and he failed to



§ 1659. **Contributory Negligence of Travellers who Voluntarily Disable themselves from Seeing or Hearing.**<sup>370</sup>—The legal status of an injured traveller who, in approaching a railway crossing, voluntarily disables himself from seeing or hearing an approaching train, is, of course, substantially the same as though, without being so disabled, he had failed, through negligence or inattention, to exercise those faculties.<sup>371</sup> Where the traveller was so *wrapped up*, to protect himself from the cold, that he could not hear distinctly, he was held under obligation to exercise special vigilance to overcome the temporary disability.<sup>372</sup> Similarly, a person approaching a crossing in a covered wagon, having an *umbrella hoisted* inside as an additional protection from rain which was falling at the time, was not in the exercise of reasonable care when looking only straight ahead.<sup>373</sup> This doctrine has been applied where the traveller attempted to cross with her *head bundled up*, when she could not have failed to see the train if she had turned her head in its direction,<sup>374</sup> where a person driving upon a crossing with a load of logs on a cold day, had his *ears muffled up*, and the circumstances were such that he might have seen the

hear their call on account of deafness, but, having reached the street crossing and received no warning from the flagman stationed there to give warning of approaching trains, who did not know of the deafness of the traveller, the traveller turned suddenly upon the track and was run upon by the hand-car,—it was held that the company was not liable by reason of the failure of the flagman to warn him: *Piskorowski v. Detroit & C. R. Co.* (Mich.), 80 N. W. Rep. 241. For an example of an *instruction* which denied or ignored this principle,—see *International & C. R. Co. v. Garcia*, 75 Tex. 583; s. c. 13 S. W. Rep. 223; 42 Am. & Eng. Rail. Cas. 115. In an action to recover damages for the death of an old and very deaf man, killed by a train at a highway crossing, the defendant having given *evidence* to the effect that boys about the crossing interfered with the deceased and told him that a train was coming, and endeavored to restrain him from going upon the tracks,—it was held that the plaintiff might show that, at the same hour and place, five days previous to the accident, the boys had annoyed him and he had attempted to cane them,—the theory being that this evidence tended to prove that the warning to the de-

ceased, given by the boys at the time of the accident, was ineffectual because misunderstood by the old man: *Tyler v. Concord & C. Railroad* (N. H.), 44 Atl. Rep. 524.

<sup>370</sup> This section is cited in § 1446.

<sup>371</sup> *Reynolds v. Great Northern R. Co.*, 69 Fed. Rep. 808; s. c. 16 C. C. A. 435; 32 U. S. App. 577; 29 L. R. A. 695; *Gunn v. Wisconsin & C. R. Co.*, 70 Wis. 203; s. c. 35 N. W. Rep. 281; *Norfolk & C. R. Co. v. Stone*, 88 Va. 310; s. c. 15 Va. L. J. 621; 13 S. E. Rep. 432; *Koehler v. Rochester & C. R. Co.*, 66 Hun (N. Y.) 566; s. c. 50 N. Y. St. Rep. 619; 21 N. Y. Supp. 844; *Salter v. Utica & C. R. Co.*, 75 N. Y. 273; rev'g s. c. 13 Hun (N. Y.) 187; *Brady v. Toledo & C. R. Co.*, 81 Mich. 616; s. c. 45 N. W. Rep. 1110; *Bremiller v. Buffalo & C. R. Co.*, 90 Hun (N. Y.) 226; s. c. '35 N. Y. Supp. 561.

<sup>372</sup> *Illinois & C. R. Co. v. Ebert*, 74 Ill. 399; *Butterfield v. Western R. Co.*, 10 Allen (Mass.) 532; *Stevens v. Oswego & C. R. Co.*, 18 N. Y. 422; *Chicago & C. R. Co. v. Still*, 19 Ill. 508; *Hanover & C. R. Co. v. Coyle*, 54 Pa. St. 396.

<sup>373</sup> *Sheffield v. Rochester & C. R. Co.*, 21 Barb. (N. Y.) 339.

<sup>374</sup> *Bremiller v. Buffalo & C. R. Co.*, 90 Hun (N. Y.) 226; s. c. 35 N. Y. Supp. 561.



train in time to avoid the injury had he maintained a vigilant watch, though the view was partially obstructed, and uncovered ears could have heard the train for a distance of twelve hundred feet;<sup>375</sup> where one permitted himself to be driven upon a railway crossing in a carry-all, filled with persons *singing and shouting*, so as to prevent listening for an approaching train;<sup>376</sup> where a driver, approaching a crossing where the view was obscured, drove at such a *rate of speed as prevented him from hearing* an approaching train, and made it difficult or impossible to stop before reaching the track.<sup>377</sup>

§ 1660. **Further of the Negligence of Voluntarily Disabled Persons.**—The same conclusion was reached where a boy thirteen years old drove upon a familiar crossing with his *ears muffled*, although he had just been told that a train was late and would probably reach the crossing about the same time he did,—and this although the train was running at a high rate of speed and without giving any signal.<sup>378</sup> And so where a traveller, riding on the hounds of his wagon, low down between the hind wheels, failed to stop or take any precautions as he approached the crossing, to ascertain whether a train, which he knew to be about due, was approaching, although he was riding with his back in the direction from which it was coming;<sup>379</sup> and where one driving in a *covered wagon* attempted to cross a railway track immediately after two trains had passed, without looking, and was struck by a third train, which he would have seen if he had looked,—and the fact that he was old, partially blind, and deaf, did not, in the opinion of the court, relieve him from the imputation of negligence;<sup>380</sup> and where one driving in a *covered wagon* which obstructs his view on each side, attempts to cross a railway track without making any effort to hear or see an approaching train, but who urges on his horse when it attempts to stop, where there is nothing having a tendency to divert

<sup>375</sup> *Salter v. Utica &c. R. Co.*, 75 N. Y. 273; reversing s. c. 13 Hun (N. Y.) 187.

<sup>376</sup> *Koehler v. Rochester &c. R. Co.*, 66 Hun (N. Y.) 566; s. c. 50 N. Y. St. Rep. 619; 21 N. Y. Supp. 844.

<sup>377</sup> *Pepper v. Southern &c. R. Co.*, 105 Cal. 389; s. c. 38 Pac. Rep. 974.

<sup>378</sup> *Norfolk &c. R. Co. v. Stone*, 88 Va. 310; s. c. 15 Va. L. J. 621; 13 S. E. Rep. 432 (error not to set aside verdict for the plaintiff). For another case where the traveller's ears were muffled, preventing him from hearing the train,—see *Gunn v. Wisconsin &c. R. Co.*, 70 Wis. 203; s. c. 35 N. W. Rep. 281 (new trial granted the defendant). And for

another such case, where the traveller had a buffalo coat turned up against his ears while the wind was blowing, so that he did not hear a train coming behind him but who did not look to see it or drive with tight reins,—see *Reynolds v. Great Northern R. Co.*, 69 Fed. Rep. 808; s. c. 16 C. C. A. 435; 32 U. S. App. 577; 29 L. R. A. 695 (error not to direct verdict for defendant).

<sup>379</sup> *Brady v. Toledo &c. R. Co.*, 81 Mich. 616; s. c. 45 N. W. Rep. 1110 (new trial granted because of contributory negligence).

<sup>380</sup> *McKinney v. Chicago &c. R. Co.*, 87 Wis. 282; s. c. 58 N. W. Rep. 386; 59 N. W. Rep. 499.



his attention, to prevent his hearing, or to lull him into a feeling of safety;<sup>381</sup> and where a woman, familiar with a railway crossing, attempted to cross on foot with a *shawl fastened over her head and ears*, and looking directly in front of her, although her attention may have been diverted by a train on another track, and by a ditch which crossed the highway;<sup>382</sup> and where one became *voluntarily intoxicated*, diminishing his physical ability and blunting his mental faculties, so as to render himself incapable of exercising reasonable care for his own safety,<sup>383</sup>—the rule being, as already seen,<sup>384</sup> that the self-inflicted disability of drunkenness, will not excuse the traveller from the exercise of such care as is due from a sober person.<sup>385</sup>

§ 1661. **Cases of this Kind which have Gone to the Jury.**—Some cases of this kind, however, *go to the jury*, either because of peculiar facts, or because of the extent to which the independence of juries is upheld in the particular jurisdiction, or because of sympathy for the injured traveller, prejudice against the railway company, ordinary mistake, or other judicial motives or misprisions,—as where a railway employé, following the usual path, where it crossed several tracks, on a stormy morning, with a strong wind blowing and the snow drifting, with his coat collar turned up and his cap pulled down so as to half cover his ears, stepped upon the track and was run upon, but not before he had turned, looked and listened;<sup>386</sup> where a woman attempted to cross a track laid upon the surface of a street, in front of an approaching engine, with a nubia thrown loosely over her head, having previously looked both ways, and the nubia not interfering with her hearing;<sup>387</sup> where a traveller was so muffled up as not to hear three or four short blows of the whistle, since if the bell had been rung, or the whistle blown constantly, as required by statute, it might have been heard;<sup>388</sup> where one sitting in the end of a long smokestack in a wagon, failed to look back *through it* when it was attempted to turn the wagon from the side of the railway track into a street, in doing which he was obliged to pass upon the track, the other persons riding on the wagon being occupied in looking at another engine which in-

<sup>381</sup> *Horn v. Baltimore &c. R. Co.*, 54 Fed. Rep. 301; s. c. 4 C. C. App. 346.

<sup>382</sup> *Rodrian v. New York &c. R. Co.*, 125 N. Y. 526; s. c. 35 N. Y. St. Rep. 814; 26 N. E. Rep. 741.

<sup>383</sup> *Galveston &c. R. Co. v. Harris* (Tex. Civ. App.), 53 S. W. Rep. 599.

<sup>384</sup> Vol. I, §§ 37, 340, 341; *ante*, § 1464.

<sup>385</sup> *Chicago &c. R. Co. v. Bell*, 70

Ill. 102; *Toledo &c. R. Co. v. Riley*, 47 Ill. 514.

<sup>386</sup> *Northern &c. R. Co. v. Krohne*, 86 Fed. Rep. 230; s. c. 56 U. S. App. 593; 29 C. C. A. 674.

<sup>387</sup> *Texas &c. R. Co. v. Fuller*, 13 Tex. Civ. App. 151; s. c. 36 S. W. Rep. 319.

<sup>388</sup> *Petrie v. Columbia &c. R. Co.*, 29 S. C. 303; s. c. 7 S. E. Rep. 515.



terfered with its progress;<sup>389</sup> where a woman travelling upon a public street in a populous city, on a dark, rainy night with her umbrella up, passed the first gate of a railway crossing where no warning was given, and failed to look before passing under the second gate to see whether it was coming down;<sup>390</sup> where a traveller approaching a railway crossing in a covered buggy, failed to let down his buggy top before starting up, stopping his horse at the sign-board and looking each way for trains;<sup>391</sup> and where a driver of a team, hauling wood, approached the track while sitting upon a string piece in the usual manner of those in that business, although, by sitting so low, he could not easily obtain a view of the track, or control his team.<sup>392</sup> So, where neither the plaintiff nor the driver of the wagon in which he was seated knew that they had arrived at the crossing, although the latter had previous knowledge that the road crossed at the point, but there was no sign to give them notice, and the train was running at the rate of thirty miles an hour, giving no signal of its approach, the facts that the driver, a boy ten years of age, had the lappets of his cap tied over his ears, and did not look or listen for the train, nor tell his companion what he knew of the crossing, though competent to go to the jury as evidence of negligence on the part of the plaintiff, were not conclusive against him on that point.<sup>393</sup>

### ARTICLE III. CONTRIBUTORY NEGLIGENCE OF TRAVELLER IN VARIOUS PARTICULARS AT RAILWAY CROSSINGS.

#### SECTION

- 1664. Traveller driving fast upon a crossing.
- 1665. Traveller thrusting himself into danger and taking his chances.
- 1666. Traveller thrusting himself in front of an advancing engine or train.
- 1667. Further of this kind of folly.

#### SECTION

- 1668. What will excuse the traveller in making such attempts.
- 1669. Error of judgment committed by traveller in estimating the time it will take him to get across, and the train to arrive.
- 1670. Traveller taking chances where his view is obstructed, or his hearing impaired.

<sup>389</sup> Dickson v. Missouri &c. R. Co., 104 Mo. 491; s. c. 16 S. W. Rep. 381.

<sup>390</sup> Feeney v. Long Island R. Co., 116 N. Y. 375; s. c. 22 N. E. Rep. 402; 5 L. R. A. 544; 39 Am. & Eng. Rail. Cas. 639.

<sup>391</sup> Stackus v. New York &c. R. Co., 79 N. Y. 464.

<sup>392</sup> Bates v. New York &c. R. Co.,

60 Conn. 259; s. c. 22 Atl. Rep. 538.

<sup>393</sup> Elkins v. Boston &c. R. Co., 115 Mass. 190, 199. And so the question was *for the jury* in Baker v. Kansas City &c. R. Co., 122 Mo. 533; s. c. 26 S. W. Rep. 20 (woman riding with a hood upon her head, train moving down grade, view obstructed, conductor shouting, etc.).



## SECTION

1671. Circumstances under which negligence of traveller where sight or hearing obstructed, becomes a question for the jury.
1672. Traveller deliberately walking or driving against a moving train.
1673. Traveller getting in front of a backing train.
1674. Traveller attempting to climb over or pass between stationary cars obstructing crossings.
1675. Further of decisions ascribing negligence to such attempts.
1676. A few decisions which mitigate the severity of this doctrine.
1677. Attempting to cross in front of standing engines or trains.
1678. Injuries to travellers while crossing between detached

## SECTION

- portions of trains on the highway.
1679. Traveller caught between trains proceeding in opposite directions upon parallel tracks.
1680. Circumstances of this kind where the traveller's negligence was held to be a question for the jury.
1681. Attempting to cross where one train closely follows another.
1682. Contributory negligence of motorman of electric car in getting run upon by train at steam railway crossing.
1683. Facts not raising the presumption of contributory negligence as matter of law.
1684. Facts to which contributory negligence has been ascribed as matter of law.

§ 1664. **Traveller Driving Fast upon a Crossing.**—If the traveller rushes forward at such a high rate of speed as to be unable to stop or check his horses in time to avoid danger, he will be regarded as negligent;<sup>394</sup> and where this is done with knowledge of the existence of the railway at that point, it will generally be regarded as negligence of such a character that no omission of duty on the part of the company's employes will render it liable for the consequences.<sup>395</sup> But where the traveller's rate of speed, though great, is not unreasonably or recklessly so, and would not necessarily lead to a collision, it can not reasonably be imputed to him as negligence.<sup>396</sup> So, where the rapid driving is resorted to as the only practicable means of extricating himself from the difficulties of the situation, by one who has without negligence driven so near the track as to render retreat apparently impossible, this circumstance may render fast driving justifiable on the ground of prudence.<sup>397</sup>

<sup>394</sup> *Grippen v. New York &c. R. Co.*, 40 N. Y. 34; *Salter v. Utica &c. R. Co.*, 59 N. Y. 631; s. c. 13 Hun (N. Y.) 187; *post*, § 1665; Vol. I, § 186, *et seq.*; *ante*, § 1471.

<sup>395</sup> *Haring v. New York &c. R. Co.*,

13 Barb. (N. Y.) 9; *Grows v. Maine &c. R. Co.*, 67 Me. 100.

<sup>396</sup> *Hackford v. New York &c. R. Co.*, 53 N. Y. 654; s. c. 6 Lans. (N. Y.) 381; 43 How. Pr. (N. Y.) 222.

<sup>397</sup> *Sheffield v. Rochester &c. R. Co.*, 21 Barb. (N. Y.) 339.



§ 1665. Traveller Thrusting himself into Danger and Taking his Chances.<sup>398</sup>—It is hardly necessary to say that where the traveller recklessly or heedlessly exposes himself to the danger of being run over by a passing train, his negligence will prevent him from recovering damages, unless the *subsequent negligence* of the railway company supervenes and becomes the *proximate cause* of his injury, under a principle elsewhere explained,<sup>399</sup>—as, for example, where a person was killed by a train while *standing upon the track*, and there was no evidence that the trainmen could have avoided the accident, or that they omitted the use of any means to avoid it;<sup>400</sup> or where the plaintiff passed the safety-gates at a railway crossing, and, before he reached the track, a train came along and the gates were closed behind him, and he stepped close to the track and disregarded the call of the gateman to go back, whereupon the gateman sought by force to compel him to get back, and a tussle ensued between the traveller and the gateman, in which the traveller was thrown down and had his leg cut off by the train,—the conclusion being that the proximate cause of the injury was the resistance of the traveller to the well-meant attempt of the gateman to save him.<sup>401</sup> Quite equal to this is the case of the foot-passenger who created for himself a fool's paradise in the next world by running under the safety-gate when it was down, and braving the passing train: no temporal advantages accruing, from such conduct, to him or to his next of kin.<sup>402</sup> And, without attempting to go into details, it may be stated that the same legal conclusion was predicated upon rash conduct of a similar nature in the cases cited in the margin.<sup>403</sup> Endeavoring to pass under a car while it is in motion

<sup>398</sup> This section is cited in §§ 1532, 1683.

<sup>399</sup> Vol. I, § 186, *et seq.*; *ante*, § 1471.

<sup>400</sup> *Bell v. Hannibal &c. R. Co.*, 86 Mo. 599.

<sup>401</sup> *McAnally v. Pennsylvania R. Co.*, 194 Pa. St. 464; s. c. 45 Atl. Rep. 326.

<sup>402</sup> *Debbins v. Old Colony R. Co.*, 154 Mass. 402; s. c. 47 Am. & Eng. Rail. Cas. 351; 28 N. E. Rep. 274.

<sup>403</sup> *Sheehan v. Philadelphia &c. R. Co.*, 166 Pa. St. 354; s. c. 31 Atl. Rep. 120 (safety gates down); *Chicago &c. R. Co. v. Ptacek*, 171 Ill. 9; s. c. 49 N. E. Rep. 191; 3 Chic. L. J. Wkly. 90; aff'g 62 Ill. App. 375 (safety gates down); *Douglas v. Chicago &c. R. Co.*, 100 Wis. 405; s. c. 76 N. W. Rep. 356; 5 Am. Neg. Rep. 110 (safety gates down); *Illinois &c. R. Co. v. Farrell*, 86 Ill. App.

436; *Reynolds v. Northern &c. R. Co.* (Wash.), 60 Pac. Rep. 120 (network of tracks which pedestrian knew to be unsafe, whereas there was a safe crossing about one hundred and fifty feet away, but he nevertheless attempted to cross, and was injured by a backing train); *Wherry v. Duluth &c. R. Co.*, 64 Minn. 415; *Cleary v. Philadelphia &c. R. Co.*, 140 Pa. St. 19; *Peck v. New York &c. R. Co.*, 50 Conn. 379; *Granger v. Boston &c. R. Co.*, 146 Mass. 276; *Duvall v. Michigan &c. R. Co.*, 105 Mich. 386; *Baltimore &c. R. Co. v. Colvin*, 118 Pa. St. 230; *Grows v. Maine &c. R. Co.*, 67 Me. 100; *Brooks v. Buffalo &c. R. Co.*, 1 Abb. App. Dec. 211; s. c. 25 Barb. (N. Y.) 600; *McMahon v. Northern &c. R. Co.*, 39 Md. 438; *Lewis v. Baltimore &c. R. Co.*, 38 Md. 588; *Central R. Co. v. Moore*, 24 N. J. L. 824;



is negligence of so high a degree that the court would hardly find it necessary to notice alleged negligence on the part of the railway company which fell short of malice.<sup>404</sup> The rule under consideration has no application to cases where the driver is liable to be confused by the fact of there being numerous tracks at the crossing, and by the fact of his view being more or less obscured by smoke, and by the fact of being obliged to watch his horses, and by his attention being diverted in the other direction by a standing train with steam up as if ready to start.<sup>405</sup>

§ 1666. **Traveller Thrusting himself in Front of an Advancing Engine or Train.**<sup>406</sup>—We now come to the very numerous class of cases where travellers have been killed or injured at railway crossings in consequence of recklessly thrusting themselves, generally at a rapid rate of speed, in front of engines or trains, seen or known, or which might easily have been discovered, to be advancing upon the crossing, with no other motive than to get across the track ahead of the engine or train, and thereby avoid a slight delay. In these cases, those in charge of the engine or train are generally unable by the use of all the appliances at hand, and by the use of the greatest efforts, to arrest the speed of the engine or train, so as to avoid a collision with the traveller. His death or injury is, therefore, conclusively ascribed to his own rashness and folly as its proximate cause; and this is generally held to be so, without any regard to the negligence of the men in charge of the engine or train, unless the same is so gross as to amount to *willfulness* or *wantonness*, within the meaning of a rule already considered,<sup>407</sup> and to be tantamount to a willful intention to inflict death or injury; but in such cases the traveller is deemed to assume the risk, to take his chances, and to become a *quasi-insurer* of the result.<sup>408</sup> It will serve no useful purpose to go into the details of the facts and circumstances attending these numerous accidents, because it would be little more than an attempt to codify almost every conceivable variation of rashness and folly. The writer will therefore content himself by saying that the recovery of damages, in the case of travellers killed or injured at railway crossings who had rashly attempted to cross in front of moving engines or trains, was denied on

*Wilds v. Hudson &c. R. Co.*, 29 N. Y. 315. But see *Pittsburgh &c. R. Co. v. Knutson*, 69 Ill. 103.

<sup>404</sup> *McMahon v. Northern &c. R. Co.*, 39 Md. 438.

<sup>405</sup> *Canfield v. New York &c. R. Co.*, 46 N. Y. St. Rep. 911; s. c. 19 N. Y. Supp. 839.

<sup>406</sup> This section is cited in §§ 1470, 1669, 1683, 1695.

<sup>407</sup> Vol. I, §§ 21, 22, 206, 207, 208, 265, 266, 276; *ante*, §§ 1470, 1471, 1606, 1627, 1637.

<sup>408</sup> *Highland Ave. &c. R. Co. v. Mad-dox*, 100 Ala. 618; s. c. 13 South. Rep. 615.



the ground of contributory negligence, in the cases cited in the margin.<sup>409</sup>

- <sup>409</sup> *Korrady v. Lake Shore &c. R. Co.*, 131 Ind. 261; s. c. 29 N. E. Rep. 1069; *Britton v. Michigan &c. R. Co.* (Mich.), 81 N. W. Rep. 253; *Hopkins v. Southern R. Co.* (Ga.), 35 S. E. Rep. 307 (verdict for defendant sustained); *Chicago B'd of Underwriters v. Chicago &c. R. Co.*, 44 Ill. App. 253; *Greenwood v. Philadelphia &c. R. Co.*, 124 Pa. St. 572; s. c. 46 Phila. Leg. Int. 300; 3 L. R. A. 44; 17 Atl. Rep. 188; *Donnelly v. Brooklyn &c. R. Co.*, 109 N. Y. 16; s. c. 11 Cent. Rep. 875; 15 N. E. Rep. 733; *State v. Baltimore &c. R. Co.*, 69 Md. 339; s. c. 12 Cent. Rep. 890; 14 Atl. Rep. 638; *Kennedy v. Chicago &c. R. Co.*, 68 Iowa 559; *Baltimore &c. R. Co. v. Mali*, 66 Md. 53; *Rigler v. Charlotte &c. R. Co.*, 94 N. C. 604; *Koester v. Chicago &c. R. Co.* (Wis.), 82 N. W. Rep. 295; *Pennsylvania Co. v. Morel*, 40 Ohio St. 338; *Grows v. Maine &c. R. Co.*, 69 Me. 412; *Chicago &c. R. Co. v. Fitzsimmons*, 40 Ill. App. 360; *Young v. Old Colony R. Co.*, 156 Mass. 178; s. c. 30 N. E. Rep. 560; *Kelley v. Pennsylvania R. Co.* (Pa.), 7 Cent. Rep. 868; s. c. 8 Atl. Rep. 856; 19 W. N. C. 400; *State v. Maine &c. R. Co.*, 76 Me. 357; s. c. 49 Am. Rep. 622; *Potter v. Flint &c. R. Co.*, 62 Mich. 22; s. c. 28 N. W. Rep. 714; *Fox v. Pennsylvania R. Co.* (Pa.), 46 Atl. Rep. 106; *Irey v. Pennsylvania R. Co.*, 132 Pa. St. 563; s. c. 19 Atl. Rep. 341; 26 W. N. C. 58; *Palys v. Erie R. Co.*, 30 N. J. Eq. 604; *Gulf &c. R. Co. v. Abendroth* (Tex. Civ. App.), 55 S. W. Rep. 1122; *Myers v. Baltimore &c. R. Co.*, 150 Pa. St. 386; s. c. 30 W. N. C. 492; 23 Pitts. L. J. (N. S.) 99; 24 Atl. Rep. 747; *Texas &c. R. Co. v. Brown*, 2 Tex. Civ. App. 281; s. c. 21 S. W. Rep. 424; *Henavie v. New York &c. R. Co.*, 60 N. Y. Supp. 752; *Powell v. New York &c. R. Co.*, 109 N. Y. 613; s. c. 11 Cent. Rep. 909; 16 N. E. Rep. 339; *Curran v. Grand Trunk R. Co.*, Montreal L. Rep. 5 Super. Ct. 251; *Graf v. Chicago &c. R. Co.*, 94 Mich. 579; s. c. 54 N. W. Rep. 388; *Horn v. Baltimore &c. R. Co.*, 54 Fed. Rep. 301; s. c. 6 U. S. App. 381; 4 C. C. A. 346; *Lees v. Philadelphia &c. R. Co.*, 154 Pa. St. 46; s. c. 25 Atl. Rep. 1041; *Highland Ave. &c. R. Co. v. Maddox*, 100 Ala. 618; s. c. 13 South. Rep. 615; *Chicago &c. R. Co. v. White*, 46 Ill. App. 446; *Dullea v. Chicago &c. R. Co.*, 86 Wis. 173; s. c. 56 N. W. Rep. 477; *Brunette v. Chicago &c. R. Co.*, 86 Wis. 197; s. c. 56 N. W. Rep. 478; *Billet v. York &c. Railroad (Pa.)*, 11 York Leg. Rec. 173; *State v. Baltimore &c. R. Co.*, 73 Md. 374; s. c. 21 Atl. Rep. 62; 11 L. R. A. 442; *Cleveland &c. R. Co. v. Arbaugh*, 47 Ill. App. 360; *Lake Shore &c. R. Co. v. Geiger*, 8 Ohio C. C. 41; *Granger v. Boston &c. R. Co.*, 146 Mass. 276; s. c. 5 N. Eng. Rep. 821; 15 N. E. Rep. 619; *White v. Vicksburg &c. R. Co.*, 42 La. An. 990; s. c. 8 South. Rep. 475; *Gangawer v. Philadelphia &c. R. Co.*, 168 Pa. St. 265; s. c. 32 Atl. Rep. 21; 36 W. N. C. 356; *Chicago &c. R. Co. v. Greenfield*, 53 Ill. App. 424; *Herbert v. Southern &c. R. Co.*, 121 Cal. 227; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 94; 53 Pac. Rep. 651; *Pugh v. Illinois &c. R. Co.*, 1 Miss. Dec. (No. 19) 168; s. c. 23 South. Rep. 356 (no off. rep.); *Stewart v. New York &c. R. Co.*, 170 Mass. 430; s. c. 49 N. E. Rep. 650; *Chicago &c. R. Co. v. Fell*, 71 Ill. App. 89; *Bureau v. Great Northern R. Co.*, 67 Minn. 434; s. c. 69 N. W. Rep. 1149; *Miller v. New York &c. R. Co.*, 81 Hun (N. Y.) 153; s. c. 62 N. Y. St. Rep. 734; 30 N. Y. Supp. 751; *Crandall v. Lehigh Valley R. Co.*, 151 N. Y. 642; aff'g s. c. 72 Hun (N. Y.) 431; 55 N. Y. St. Rep. 170; 25 N. Y. Supp. 151; *Martin v. New York &c. R. Co.*, 50 N. Y. St. Rep. 553; s. c. 21 N. Y. Supp. 919; *Chicago &c. R. Co. v. Nelson*, 59 Ill. App. 308; *Burnett v. Easton &c. R. Co.*, 61 N. J. L. 373; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 469; 39 Atl. Rep. 663; *Chicago &c. R. Co. v. Houston*, 95 U. S. 702; s. c. 24 L. ed. 543; *Ring v. Chicago &c. R. Co.* (Iowa), 75 N. W. Rep. 492; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 93; 12 Am. & Eng. Rail. Cas. (N. S.) 452; *Vant v. Chicago &c. R. Co.*, 101 Wis. 363; s. c. 77 N. W. Rep. 713; 12 Am. & Eng. Rail. Cas. (N. S.) 470. See also *Chase v. Maine &c. R. Co.*, 167 Mass. 383; *Hanson v. Pennsylvania Co.*, 62 N. J. L. 391; s. c. 12 Am. & Eng. Rail. Cas. (N. S.) 404; 41 Atl.



§ 1667. **Further of this Kind of Folly.**<sup>410</sup>—The rule of the text has been applied to *children* familiar with the danger, and of sufficient age and intelligence to be chargeable with negligence,—as, for example, to a boy ten years of age;<sup>411</sup> though in the case of a *boy nine years of age*, accustomed to being around the railway track, who attempted to run across the track in front of an approaching train, his contributory negligence was deemed a *question for the jury*.<sup>412</sup> The suggestion already made is to be kept in mind, that the rule is just as applicable where the traveller *might have seen* the train, or *might have discovered* its approach if he had bestowed any attention upon his own safety, as where he actually *did see* it, or *did know* that it was approaching; it is immaterial whether he failed to look, or, having

Rep. 868; *Grows v. Maine &c. R. Co.*, 67 Me. 100; *Chicago &c. R. Co. v. Jacobs*, 63 Ill. 178; *Chicago &c. R. Co. v. Kusel*, 63 Ill. 180, note; *Stout v. Indianapolis &c. R. Co.*, 1 Wils. (Indianapolis) 80; *Pennsylvania R. Co. v. State*, 61 Md. 108; *State v. Maine &c. R. Co.*, 77 Me. 538; s. c. 1 N. E. Rep. 286; *Collins v. Long Island &c. R. Co.*, 31 N. Y. St. Rep. 973; s. c. 10 N. Y. Supp. 701; *Lennon v. New York &c. R. Co.*, 65 Hun (N. Y.) 578; s. c. 48 N. Y. St. Rep. 806; 20 N. Y. Supp. 557; *Campbell v. Richmond &c. R. Co. (Va.)*, 21 S. E. Rep. 480; *Kelsay v. Missouri &c. R. Co.*, 129 Mo. 362; s. c. 30 S. W. Rep. 339; *Hennessy v. Northern &c. R. Co.*, 17 App. Div. (N. Y.) 162; s. c. 45 N. Y. Supp. 147; *Powell v. New York &c. R. Co.*, 109 N. Y. 613; s. c. 16 N. E. Rep. 339; 11 Cent. Rep. 909; *Walker v. Kinnare*, 76 Fed. Rep. 101; s. c. 46 U. S. App. 150; 22 C. C. A. 75; *Washington &c. R. Co. v. Hickey*, 166 U. S. 521; s. c. 41 L. ed. 1101; 17 Sup. Ct. Rep. 661; *Lawrence v. Atchison &c. R. Co.*, 57 Kan. 585; s. c. 47 Pac. Rep. 510; *Baker v. Pennsylvania R. Co.*, 182 Pa. St. 336; s. c. 37 Atl. Rep. 933; *Kelly v. Hannibal &c. R. Co.*, 75 Mo. 138. When *negligence* to attempt to cross before a train known to be approaching,—see, further, *Stephens v. Omaha &c. R. Co.*, 41 Neb. 167; *Hansen v. Chicago &c. R. Co.*, 83 Wis. 631; *McDonald v. International &c. R. Co.*, 86 Tex. 1; *Olson v. Chicago &c. R. Co.*, 81 Wis. 42, 47; *Lewis v. Puget Sound Shore R. Co.*, 4 Wash. 188; *Wilds v. Hudson &c. R. Co.*, 29 N. Y. 315; *Winslow v. Boston &c. R. Co.*, 11 N. Y. St.

Rep. 831; *Prewitt v. Eddy*, 115 Mo. 283; *Toledo &c. R. Co. v. Jones*, 76 Ill. 311. When not negligence, as *matter of law*, but presents *question for jury*, to attempt to cross before a train known to be approaching,—see *Chicago &c. R. Co. v. Netolicky*, 67 Fed. Rep. 665; s. c. 32 U. S. App. 168, 406; 14 C. C. A. 615; *Chicago &c. R. Co. v. Sharp*, 63 Fed. Rep. 532; s. c. 27 U. S. App. 334; 11 C. C. A. 337; *Grand Rapids &c. R. Co. v. Cox*, 8 Ind. App. 29; *Downey v. Pittsburgh &c. Traction Co.*, 161 Pa. St. 131; *Robbins v. Fitchburg R. Co.*, 161 Mass. 145; *International &c. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210; *Cook v. New York &c. R. Co.*, 35 N. Y. St. Rep. 525; *Kenney v. Hannibal &c. R. Co.*, 105 Mo. 270; *Bond v. New York &c. R. Co.*, 69 Hun (N. Y.) 476; *Thomas v. Delaware &c. R. Co.*, 19 Blatch. (U. S.) 533; *McNeal v. Pittsburgh &c. R. Co.*, 131 Pa. St. 184; s. c. 47 Phila. Leg. Int. 83; 20 Pitts. L. J. (N. S.) 39; 25 W. N. C. 181; 18 Atl. Rep. 1028; *Cleveland &c. R. Co. v. Reiss*, 13 Ohio C. C. 405; s. c. 7 Ohio Dec. 450; *Smith v. New York &c. R. Co.*, 4 App. Div. 493; s. c. 38 N. Y. Supp. 666; 39 N. Y. Supp. 1119 (dissenting opinion by Follett, J.); *Ernst v. Hudson River R. Co.*, 35 N. Y. 9; s. c. 90 Am. Dec. 761; *Bellefontaine &c. R. Co. v. Hunter*, 33 Ind. 335; s. c. 5 Am. Rep. 201.

<sup>410</sup> This section is cited in § 1669.

<sup>411</sup> *Chicago &c. R. Co. v. White*, 46 Ill. App. 446.

<sup>412</sup> *Collis v. New York &c. R. Co.*, 71 Hun (N. Y.) 504; s. c. 55 N. Y. St. Rep. 82; 24 N. Y. Supp. 1090.



looked, drove recklessly into danger;<sup>413</sup> and this has been held to be so, although the flagman stationed at the crossing failed to do his duty in warning the traveller;<sup>414</sup> and although the gates were up and no flagman was stationed at the crossing when the traveller approached;<sup>415</sup> and although the train was approaching at an excessive rate of speed, and the traveller, assuming that it was running at its usual and lawful speed, concluded that he had time to cross in safety.<sup>416</sup> Nor was it an excuse for venturing upon the track in front of an engine without looking, that the attention of the traveller was absorbed by some trivial matter, such as directing a child how to recover his hat which was blown into the mud.<sup>417</sup> The rule is of peculiar application where the engine or train is so near that the least delay<sup>418</sup> or the slightest accident to the traveller will probably result in his death or injury,—as where he is driving at such a rate of speed that he is unable to stop on seeing the approaching train;<sup>419</sup> or where he drives recklessly upon the track on seeing a train coming, and his horse shies and backs, in consequence of which he fails to clear the track, and his wagon is struck by the train;<sup>420</sup> or where, in making the attempt to cross in front of an engine moving near her, she falls and is injured by the engine running upon her while she is down;<sup>421</sup> or where, at a point near the crossing, while driving very rapidly, he collides with another wagon, and the momentum of his horse's high speed carries him upon the track before he can stop it;<sup>422</sup> or where, after he succeeds in getting across the track because he regards

<sup>413</sup> *Vant v. Chicago &c. R. Co.*, 101 Wis. 363; s. c. 77 N. W. Rep. 713; 12 Am. & Eng. Rail. Cas. (N. S.) 470. See also *Chase v. Maine &c. R. Co.*, 167 Mass. 383; *Kelsay v. Missouri &c. R. Co.*, 129 Mo. 362; s. c. 30 S. W. Rep. 339; *Hennessy v. Northern &c. R. Co.*, 17 App. Div. 162; 45 N. Y. Supp. 147; *Crandall v. Lehigh Valley R. Co.*, 151 N. Y. 642; aff'g s. c. 72 Hun (N. Y.) 431; 55 N. Y. St. Rep. 170; 25 N. Y. Supp. 151; *Miller v. New York &c. R. Co.*, 81 Hun (N. Y.) 153; s. c. 62 N. Y. St. Rep. 734; 30 N. Y. Supp. 751; *Burau v. Great Northern R. Co.*, 67 Minn. 434; s. c. 69 N. W. Rep. 1149; *Chicago &c. R. Co. v. Greenfield*, 53 Ill. App. 424; *Gangawer v. Philadelphia &c. R. Co.*, 168 Pa. St. 265; s. c. 36 W. N. C. 356; 32 Atl. Rep. 21; *Texas &c. R. Co. v. Brown*, 2 Tex. Civ. App. 281; s. c. 21 S. W. Rep. 424.

<sup>414</sup> *Crandall v. Lehigh Valley R.*

*Co.*, 151 N. Y. 642; aff'g s. c. 72 Hun (N. Y.) 431; s. c. 55 N. Y. St. Rep. 170; 25 N. Y. Supp. 151.

<sup>415</sup> *Walker v. Kinnare*, 76 Fed. Rep. 101; s. c. 46 U. S. App. 150; 22 C. C. A. 75.

<sup>416</sup> *Kelly v. Hannibal &c. R. Co.*, 75 Mo. 138.

<sup>417</sup> *Texas &c. R. Co. v. Brown*, 2 Tex. Civ. App. 281; s. c. 21 S. W. Rep. 424.

<sup>418</sup> *Washington &c. R. Co. v. Hickey*, 166 U. S. 521; s. c. 41 L. ed. 1101; 17 Sup. Ct. Rep. 661.

<sup>419</sup> *Martin v. New York &c. R. Co.*, 50 N. Y. St. Rep. 553; s. c. 21 N. Y. Supp. 919.

<sup>420</sup> *Rigler v. Charlotte &c. R. Co.*, 94 N. C. 604.

<sup>421</sup> *State v. Baltimore &c. R. Co.*, 69 Md. 339; s. c. 12 Cent. Rep. 890; 14 Atl. Rep. 685.

<sup>422</sup> *Brunette v. Chicago &c. R. Co.*, 86 Wis. 197; s. c. 56 N. W. Rep. 478.



this the safer course, the passing of the train frightens his horse.<sup>423</sup> A statute of Massachusetts exonerates the traveller in such cases, unless he is guilty of *gross* or *willful* negligence.<sup>424</sup> It has been held that one who, knowing that a train is rapidly approaching, attempts to cross in front of it, with no other motive than to avoid waiting until it has passed, is guilty of the species of negligence described in this statute.<sup>425</sup>

§ 1668. **What will Excuse the Traveller in Making Such Attempts.**—Let us next consider what, if anything, will excuse the traveller in making such an attempt; or, rather, examine a few cases which, according to the conclusion of the courts therein, fall outside of the rule of the preceding paragraph. And first, it has been obviously well held that whether an attempt to cross a railway track in front of a moving train is negligence, depends upon the speed of the train, and the condition and capability of the person making the attempt.<sup>426</sup> It has been held that the traveller was not guilty of contributory negligence, as matter of law, in attempting to cross in front of an advancing train or engine under the following circumstances:—Where, driving along the highway, he arrived at a point within from thirty to fifty feet of the track before discovering that a train was approaching, and the flagman's wife, who was accustomed to using the flag, made no signal for him to stop, and he whipped up his horses and attempted to cross in front of the train, although the road was dangerous because of an embankment on each side;<sup>427</sup> where a traveller, driving along a narrow road, did not see the approaching train until he was only ten feet from the track, and until his horse was almost upon the track, and he whipped up his horse and endeavored to cross in front of the train,<sup>428</sup> it approaching without giving the statutory

<sup>423</sup> *Potter v. Flint & Co. R. Co.*, 62 Mich. 22; s. c. 28 N. W. Rep. 714. In one case it was held, but with obvious impropriety, that a member of a *hose company*, driving at a rapid rate with other members on the hose carriage looking for a fire, who did not even slacken speed on approaching a railroad crossing, was guilty of contributory negligence which bars his right to recover for injuries received from being struck by a train, *although the gates established at the crossing were not closed, having become out of order that day, and the watchman stationed there displayed no light and gave no warning*: *Greenwood v.*

*Philadelphia & Co. R. Co.*, 124 Pa. St. 572; s. c. 3 L. R. A. 44; 46 Phila. Leg. Int. 300; 23 W. N. C. 425; 17 Atl. Rep. 188.

<sup>424</sup> Pub. Stat. Mass., chap. 112, § 213.

<sup>425</sup> *Sullivan v. New York & Co. R. Co.*, 154 Mass. 524; s. c. 28 N. E. Rep. 911.

<sup>426</sup> *State v. Baltimore & Co. R. Co.*, 69 Md. 339; s. c. 12 Cent. Rep. 890; 14 Atl. Rep. 688.

<sup>427</sup> *Robbins v. Fitchburg R. Co.*, 161 Mass. 145; s. c. 36 N. E. Rep. 752.

<sup>428</sup> *Grand Rapids & Co. R. Co. v. Cox*, 8 Ind. App. 29; s. c. 35 N. E. Rep. 183.



signals and without the traveller hearing it; where the traveller, driving a vehicle, first saw the train when he was on a steep and narrow approach to the track, and could not stop or turn in either direction with safety, and the distance of the train from him did not appear in the evidence;<sup>429</sup> where a train, standing across a highway, backed down to the cattle-guard for the apparent purpose of letting people pass, and a traveller, who had been waiting, attempted to drive in front of the engine, his *horse* being steady, but was *frightened* by the engine blowing off steam while he was crossing;<sup>430</sup> where a traveller, on approaching a crossing, saw an engine at a distance of half a mile, and proceeded on his way under the mistaken belief that it was standing still on a side track;<sup>431</sup> where a traveller, driving across a series of tracks where trains were frequently passing and repassing, saw a train approaching on a track that he had not yet crossed, and made the attempt to cross in front of it, and was injured,<sup>432</sup>—not being able to see the train until it was too late for him to turn back, it running at twice the lawful speed, but, had it been running at lawful speed, he could have crossed in safety; and in the other cases noted in the margin.<sup>433</sup>

§ 1669. **Error of Judgment Committed by Traveller in Estimating the Time it will Take Him to Get Across, and the Train to Arrive.**—Mere *errors of judgment*, where ordinary care has been exercised, are not generally set down as amounting to negligence.<sup>434</sup> This rule is sometimes applied so as to exonerate travellers, killed or injured at railway crossings, from the imputation of contributory negligence,—as where the traveller, unable to see the approach of the train until close upon the track, makes an error of judgment in attempting to cross ahead of it, instead of trying to stop suddenly to avoid the danger;<sup>435</sup> or where one hurrying to his office is struck by a regular freight train, moving contrary to its usual custom, which custom was known to him.<sup>436</sup> But, as already shown,<sup>437</sup> if he runs in front of a train seen or known by him to be approaching, *taking his chances* of getting across ahead of it, but fails, through miscalculating the time it will

<sup>429</sup> *International &c. R. Co. v. N. Y. St. Rep.* 82; 24 N. Y. Supp. Kuehn, 2 Tex. Civ. App. 210; s. c. 1090.  
21 S. W. Rep. 58.

<sup>430</sup> *Geveke v. Grand Rapids &c. R. Co.*, 57 Mich. 589. <sup>434</sup> *Ante*, §§ 1381, 1410, 1450, 1451, 1452.

<sup>431</sup> *Gratiot v. Missouri &c. R. Co.*, 128 N. Y. 635; aff'g 59 Hun (N. Y.) 116 Mo. 450; s. c. 16 S. W. Rep. 384.

<sup>432</sup> *Schmidt v. Burlington &c. R. Co.*, 75 Iowa 606; s. c. 39 N. W. Rep. 916. <sup>435</sup> *Cook v. New York &c. R. Co.*, 128 N. Y. 635; aff'g 59 Hun (N. Y.) 617, *mem.*; s. c. 35 N. Y. St. Rep. 525; 15 N. Y. Supp. 45.

<sup>433</sup> *Frazer v. South &c. R. Co.*, 81 Ala. 85; *Collis v. New York &c. R. Co.*, 71 Hun (N. Y.) 504; s. c. 55 Tex. Civ. App. 554; s. c. 38 S. W. Rep. 370.

<sup>437</sup> *Ante*, §§ 1470, 1471, 1666, 1667.



take him to do so, this will generally be set down as contributory negligence, although the railroad company is itself guilty of negligence.<sup>438</sup> The rule is the same where the traveller is injured through miscalculating any other element of safety or danger. When, therefore, a traveller, after seeing the smoke of an engine, mistook the track on which it was approaching and entered upon the crossing and was run over, it was held that he was guilty of contributory negligence in not stopping to ascertain which track the train was on, whether the automatic bell rang or not.<sup>439</sup>

**§ 1670. Traveller Taking Chances where his View is Obstructed, or his Hearing Impaired.**<sup>440</sup>—The duty of the traveller approaching the crossing to make a fair use of his faculties, according to the circumstances, to ascertain whether a train is approaching, is not done away with by the fact that his *sight and hearing are obstructed*;<sup>441</sup> but this fact may of itself impose upon him the duty of increased vigilance and caution;<sup>442</sup> and this is so, although his view may be obstructed in consequence of the negligence of the railway company.<sup>443</sup> If his view alone is obstructed, the exercise of ordinary prudence will plainly require him to *stop*, so that the *noise* of his vehicle will not prevent him from hearing any train that may be approaching.<sup>444</sup> If his view is obscured by the *smoke* of locomotives, it will be his duty to wait until the smoke passes away.<sup>445</sup> If the obstruction is a moving train, it will be his

<sup>438</sup> Southern &c. R. Co. v. Blake, 101 Ga. 217; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 472; 29 S. E. Rep. 288. Compare *ante*, § 1655; Lake Erie &c. R. Co. v. Pence (Ind.), 55 N. E. Rep. 1036 (saw the approaching train in time to stop in a place of safety, yet voluntarily went on the track in front of the engine,—immaterial that the train was being run at a rate of speed prohibited by ordinance); Mulligan v. New York &c. R. Co., 58 Hun (N. Y.) 602, *mem.*; s. c. 33 N. Y. St. Rep. 534; 11 N. Y. Supp. 452.

<sup>439</sup> Brinker v. Michigan &c. R. Co. (Mich.), 80 N. W. Rep. 28.

<sup>440</sup> This section is cited in § 1447.

<sup>441</sup> Durbin v. Oregon R. &c. Co., 17 Or. 5; s. c. 11 Am. St. Rep. 778; 17 Pac. Rep. 5; Fletcher v. Fitchburg R. Co., 149 Mass. 127; s. c. 3 L. R. A. 742; 6 Rail. & Corp. L. J. 8; 21 N. E. Rep. 302; Heaney v. Long Island R. Co., 112 N. Y. 122; s. c. 20 N. Y. St. Rep. 296; 19 N. E. Rep. 422; Marty v. Chicago &c. R. Co., 38 Minn. 168; s. c. 35 N. W. Rep. 670.

<sup>442</sup> Louisville &c. R. Co. v. French, 69 Miss. 121; s. c. 12 South. Rep. 338; Cincinnati &c. R. Co. v. Howard, 124 Ind. 280; s. c. 8 L. R. A. 593; 24 N. E. Rep. 892; Atlantic &c. R. Co. v. Reiger, 95 Va. 418; s. c. 28 S. E. Rep. 590; Memphis &c. R. Co. v. Martin, 117 Ala. 367; s. c. 23 South. Rep. 231; Partlow v. Illinois &c. R. Co., 51 Ill. App. 597; s. c. aff'd 150 Ill. 321; s. c. 37 N. E. Rep. 663 (view obstructed and hearing distracted by other noises).

<sup>443</sup> Chicago &c. R. Co. v. Williams, 59 Kan. 700; s. c. 12 Am. & Eng. Rail. Cas. (N. S.) 336; 54 Pac. Rep. 1047.

<sup>444</sup> Keyley v. Central R. Co. (N. J. L.), 45 Atl. Rep. 811. As to *stopping*, see *ante*, § 1644, *et seq.*; Michalke v. Galveston &c. R. Co., 14 Tex. Civ. App. 495; 27 S. W. Rep. 164.

<sup>445</sup> Oleson v. Lake Shore &c. R. Co., 143 Ind. 409; s. c. 42 N. E. Rep. 736; 32 L. R. A. 149; Whalen v. New York &c. R. Co., 40 N. Y. St. Rep. 566; s. c. 16 N. Y. Supp. 941; Vahue v. New York &c. R. Co., 18 App. Div.



duty to wait until it has passed;<sup>446</sup> and if it is any other obstruction of a temporary character, such as a *cloud of dust*, it is his duty to wait until it is removed.<sup>447</sup> If, disregarding the suggestion of prudence in these or other particulars, he proceeds upon the track without knowing whether a train is passing or not, thereby taking his chances of crossing uninjured, and is run over, there can, according to many holdings, be no recovery for his death or injury;<sup>448</sup> though in many cases the circumstances were such as, in the view of the court dealing with the question, to make it proper to *leave it to the jury* to say whether his conduct was negligent.<sup>449</sup>

452; s. c. 46 N. Y. Supp. 359; *Manley v. New York & C. R. Co.*, 18 App. Div. 420; s. c. 45 N. Y. Supp. 1108; rev'g s. c. 18 Misc. 502; 42 N. Y. Supp. 1076; *McCrory v. Chicago & C. R. Co.*, 31 Fed. Rep. 531. Further as to the contributory negligence of the traveller in attempting to cross when his view is obscured by *smoke*,—see *West Jersey R. Co. v. Ewan*, 55 N. J. L. 574; *Beynon v. Pennsylvania R. Co.*, 168 Pa. St. 642; s. c. 3 Pa. Dist. R. 308; *Foran v. New York & C. R. Co.*, 64 Hun (N. Y.) 510; *McNamara v. New York & C. R. Co.*, 46 N. Y. St. Rep. 439; *Debbins v. Old Colony R. Co.*, 154 Mass. 402; *Hermans v. New York & C. R. Co.*, 43 N. Y. St. Rep. 900.

<sup>446</sup> *Hamm v. New York & C. R. Co.*, 50 N. Y. Super. Ct. Rep. 78.

<sup>447</sup> *Chicago & C. R. Co. v. Fisher*, 49 Kan. 460; s. c. 12 Rail. & Corp. L. J. 158; 30 Pac. Rep. 462.

<sup>448</sup> *Foran v. New York & C. R. Co.*, 64 Hun (N. Y.) 510; s. c. 46 N. Y. St. Rep. 423; 19 N. Y. Supp. 417 (view obstructed by smoke); *McNamara v. New York & C. R. Co.*, 46 N. Y. St. Rep. 439; s. c. 19 N. Y. Supp. 497 (track covered with smoke); *Gulf & C. R. Co. v. Younger* (Tex. Civ. App.), 4 S. W. Rep. 423 (no off. rep.); *Syme v. Richmond & C. R. Co.*, 113 N. C. 558; s. c. 18 S. E. Rep. 114 (hearing obstructed by a freight train on another track); *Schmolze v. Chicago & C. R. Co.*, 83 Wis. 659; s. c. 53 N. W. Rep. 743; rehearing denied in 83 Wis. 665; s. c. 54 N. W. Rep. 106 (hearing obstructed by the noise of a saw-mill and traveller did not take the precaution of looking); *Clark v. Northern & C. R. Co.*, 47 Minn. 380; s. c. 50 N. W. Rep. 365 (failure by pedestrian to look not excused because view was ob-

structed until within six feet of the crossing); *Beynon v. Pennsylvania R. Co.*, 168 Pa. St. 642; s. c. 3 Pa. Dist. R. 308; 34 W. N. C. 293 (traveller stopped, looked and listened, but view obstructed by smoke); *Houghton v. Chicago & C. R. Co.*, 99 Mich. 308; s. c. 58 N. W. Rep. 314 (a number of qualifying circumstances); *Gothard v. Alabama Great Southern R. Co.*, 67 Ala. 114 (overruling *Nashville & C. R. Co. v. Comans*, 45 Ala. 437) (view obstructed, train running at lawful speed with bell ringing); *Fletcher v. Fitchburg R. Co.*, 149 Mass. 127; s. c. 3 L. R. A. 742; 6 Rail. & Corp. L. J. 8; 21 N. E. Rep. 302 (view obstructed and caught by a train on another track coming in an opposite direction); *Kilbridge v. New York & C. R. Co.*, 17 App. Div. 177; s. c. 45 N. Y. Supp. 302; *Griffin v. Chicago & C. R. Co.*, 68 Iowa 638; *Mixsell v. New York & C. R. Co.*, 22 Misc. (N. Y.) 73; s. c. 49 N. Y. Supp. 413; 27 Civ. Pro. 56; *Lortz v. New York & C. R. Co.*, 83 Hun (N. Y.) 271; s. c. 65 N. Y. St. Rep. 63; 31 N. Y. Supp. 1033; *Oleson v. Lake Shore & C. R. Co.*, 143 Ind. 405; s. c. 42 N. E. Rep. 736; 32 L. R. A. 149; *Gividen v. Louisville & C. R. Co.*, 32 S. W. Rep. 612; s. c. 17 Ky. L. Rep. 789 (not to be rep.); *Central R. Co. v. Smalley*, 61 N. J. L. 277; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 463; 39 Atl. Rep. 695; *Cleveland & C. R. Co. v. Monks*, 52 Ill. App. 627; *Atchison & C. R. Co. v. Booth*, 53 Ill. App. 303; *Nelson v. Duluth & C. R. Co.*, 88 Wis. 392; s. c. 60 N. W. Rep. 703; *Nashville & C. R. Co. v. Spence*, 99 Tenn. 218; s. c. 41 S. W. Rep. 934.

<sup>449</sup> Thus, where plaintiff was struck by a train while driving across the defendant's tracks in the night-



**§ 1671. Circumstances under which Negligence of Traveller where Sight or Hearing Obstructed, Becomes a Question for the Jury.**<sup>450</sup>—

It is not to be inferred from the foregoing that contributory negligence will, under all circumstances, be imputed to the traveller as matter of law, from the fact that, at a place where his sight and hearing are obstructed, he gets upon the track in front of a moving engine or train and is killed. If he does the best he can to discover whether an engine or train is approaching before exercising his right of passage, and if the engine or train advances upon the crossing without giving the statutory, customary, or proper *warning signals*,<sup>451</sup> so that he can not hear it,—and more especially if it advances at a high or excessive rate of *speed* without giving any signals,<sup>452</sup>—then, the conditions being such that the traveller, though fairly exercising his faculties, can neither see nor hear the source of danger, if he fails to wait for the smoke or other obstruction of his sight to disappear, but goes upon the track, the question of his negligence will often be held a question for the jury.<sup>453</sup> Under such circumstances, the rule will be the same where the *evidence is conflicting* as to whether the warning signals were given; since it would be for the jury, and for them alone, to resolve the conflict and decide the question.<sup>454</sup> Again, where the *sight* of the traveller is obstructed, and he is obliged to rely upon his sense of hearing, he may be deceived by the speed at which the train is approaching. He may reasonably and properly conclude that if the train approaches at the customary or lawful rate of speed, he can pass before it reaches the crossing, and so make the attempt; whereas, from the fact that it comes at an unusual, excessive or unlawful rate of speed, it may run over him. Thus, assuming that the traveller has made a fair use of his faculties, the negligence or warning of the company with respect to the rate of speed at which it drives its engine or train, may operate as a deception to him, leading him to his injury or death, in which case negligence will not be conclusively imputed to him.<sup>455</sup> In addition to this, it may be said that many decisions may

time, during a storm of rain and sleet, the question whether he was negligent in failing to see the train was properly left to the jury, although there was evidence that, in the day-time, under ordinary circumstances, an approaching train could be seen for a considerable distance: *Pennsylvania R. Co. v. Miller*, 99 Fed. Rep. 529.

<sup>450</sup> This section is cited in § 1447.

<sup>451</sup> *Tilton v. Boston & C. R. Co.*, 169 Mass. 253; s. c. 47 N. E. Rep. 998.

<sup>452</sup> *Hammon v. San Antonio & C. R.*

*Co.*, 13 Tex. Civ. App. 633; 35 S. W. Rep. 872.

<sup>453</sup> *Randall v. Connecticut River R. Co.*, 132 Mass. 269; *Willett v. Michigan & C. R. Co.*, 114 Mich. 411; s. c. 4 Det. L. N. 620; 9 Am. & Eng. Rail. Cas. (N. S.) 18; 72 N. W. Rep. 260.

<sup>454</sup> *Guggenheim v. Lake Shore & C. R. Co.*, 57 Mich. 488.

<sup>455</sup> *Houghton v. Chicago & C. R. Co.*, 99 Mich. 308; s. c. 58 N. W. Rep. 314; *Skinner v. Prospect Park & C. R. Co.*, 140 N. Y. 621; aff'g s. c. 51 N. Y. St. Rep. 554; 22 N. Y. Supp. 30;



be collected which do not conclusively impute contributory negligence to the traveller for not stopping, where his view is obstructed, until the obstruction clears away, and for not discovering, by his sense of hearing, the approach of an engine or train, but which, upon a state of evidence tending to show that he made a fair use of his faculties under the circumstances, commit the question of his contributory negligence to the jury.<sup>456</sup> There are other decisions which deal with the matter plainly, and with apparent good sense, by holding that contributory negligence is not to be imputed to the traveller for failing to do a foolish thing,—as for failing to look before attempting to cross where the view is so obstructed that he could not see an approaching train if he were to look.<sup>457</sup> And generally it has been, and ought to be said, that if the circumstances are such that the traveller, after fairly using his faculties, can neither see nor hear any indication of a moving train,—can not hear the bell because none is rung,—he is not chargeable with negligence, as matter of law, for assuming that there is no train sufficiently near to make the crossing dangerous;<sup>458</sup> otherwise the law would impose upon him an obligation of timidity which might seriously hamper his right to use the highway.<sup>459</sup>

Atchison &c. R. Co. v. Morgan, 43 Kan. 1; s. c. 22 Pac. Rep. 995; 42 Am. & Eng. Rail. Cas. 184.

<sup>456</sup> Southern R. Co. v. Bryant, 95 Va. 212; s. c. 28 S. E. Rep. 183; Pittsburgh &c. R. Co. v. Burton, 139 Ind. 380; s. c. 38 N. E. Rep. 594 (traveller got too near the track and horses became frightened and unmanageable); Philpott v. Pennsylvania R. Co., 175 Pa. St. 570; s. c. 34 Atl. Rep. 856 (view obstructed by train on one of the tracks and driver killed by an engine approaching on another); Gulf &c. R. Co. v. Shieder, 88 Tex. 152; s. c. 28 L. R. A. 538; 30 S. W. Rep. 902 (woman, attempting to drive across track, caught by an engine wholly or partially concealed, while attempting to control her horse, which had become frightened); Chicago &c. R. Co. v. Hansen, 166 Ill. 623; s. c. 2 Chic. L. J. Wkly. 261; 46 N. E. Rep. 1071; aff'g 2 Chic. L. J. Wkly. 114 (pedestrian, finding his view obstructed by smoke and dust from a train passing on one track, stepped on a parallel track before his view became unobstructed); Hubbard v. Boston &c. R. Co., 162 Mass. 132; s. c. 38 N. E. Rep. 366 (view obstructed except from a point close to the crossing, and hearing confused by the noise of a receding train).

<sup>457</sup> Southern R. Co. v. Bryant, 95 Va. 212; s. c. 28 S. E. Rep. 183.

<sup>458</sup> Donohue v. St. Louis &c. R. Co., 91 Mo. 357; s. c. 6 West. Rep. 848.

<sup>459</sup> In the following cases of obstructed view, contributory negligence was not conclusively imputed to the traveller, but the question was held to be a question for the jury:—Where the view was obstructed by *standing cars*, leaving only an opportunity for an occasional glance at a single point in one direction from the crossing: Hanks v. Boston &c. R. Co., 147 Mass. 495; s. c. 7 N. Eng. Rep. 139; 18 N. E. Rep. 218. View obstructed by a curve in the track, no signals given and no flagman at the crossing: Wilbury v. Delaware &c. R. Co., 85 Hun (N. Y.) 155; s. c. 32 N. Y. Supp. 479; 65 N. Y. St. Rep. 664. Traveller killed, no eye-witness of the accident, evidence justifying the inference that the deceased, owing to obstructions, could not have seen the train if he had looked, at a point as far back as twenty-eight or thirty feet from the track: Wieland v. Delaware &c. Canal Co., 30 App. Div. 785; s. c. 51 N. Y. Supp. 776. Train running thirty-five miles an hour; statutory signals not given; traveller looked and listened at two different points, but saw and heard



§ 1672. **Traveller Deliberately Walking or Driving against a Moving Train.**—But there is not much room for a difference of judicial opinion, where the traveller, with the courage that the Wandering Jew displayed when he parted his coat tails and received a shower of grape-shot at close range at the battle of Wagram, or that Dagobert displayed when he rode upon a row of broken bottles,—quietly walks, runs or drives against a moving train, contributory negligence being conclusively imputed to him.<sup>460</sup>

nothing; view obstructed; wind blowing so as to carry the sound of the train away; and upon reaching track she looked first in the wrong direction, and was then struck: *Louisville &c. R. Co. v. Williams*, 20 Ind. App. 576; s. c. 51 N. E. Rep. 128. Five tracks; view of last obstructed until the first four had been crossed,—for jury to say whether traveller was negligent before driving upon first track: *Lehigh &c. Coal Co. v. Lear* (Pa.), 9 Atl. Rep. 267 (no off. rep.). View obstructed part of the time the traveller was approaching, speed of train increased, and he whipped up his horses in an endeavor to cross in front of it: *International &c. R. Co. v. Starling*, 16 Tex. Civ. App. 365; s. c. 41 S. W. Rep. 181. And also upon the facts of following cases, some of which proceed upon the round doctrine that the traveller is not conclusively guilty of contributory negligence because he enters upon the track in front of an approaching train where his view is obstructed:—*Louisville &c. R. Co. v. Patchen*, 66 Ill. App. 206; *Cleveland &c. R. Co. v. Bruce*, 63 Ill. App. 233; *Petrie v. New York &c. R. Co.*, 66 Hun (N. Y.) 282; s. c. 49 N. Y. St. Rep. 279; 21 N. Y. Supp. 159; *Hermans v. New York &c. R. Co.*, 63 Hun (N. Y.) 625; s. c. 43 N. Y. St. Rep. 900; 17 N. Y. Supp. 319; *Moore v. New York &c. R. Co.*, 2 Misc. (N. Y.) 23; s. c. 49 N. Y. St. Rep. 516; 21 N. Y. Supp. 436; *Norfolk &c. R. Co. v. Burge*, 84 Va. 68; *Smedis v. Brooklyn &c. R. Co.*, 88 N. Y. 13; *Chicago &c. R. Co. v. Netolicky*, 67 Fed. Rep. 665 (view obstructed, ground frozen, wagon making considerable noise, and traveller failed to hear approach of train, although persons behind him in a sleigh did hear it); *Pierce v. Ray* (Ind. App.), 56 N. E. Rep. 776 (view obstructed, train running at high rate of speed;

plaintiff stopped, looked and listened about fifteen steps from the track, but could not hear train; view obstructed at that point; walked his horses until he reached the track, looking in the opposite direction from that from which the train was coming; his fellow-passengers, looking the other way, saw the train just about the time it struck them; plaintiff attempted to start his team forward, but was prevented by the persons riding with him; no signals until almost at the time of the accident); and *Turrell v. Erie R. Co.*, 63 N. Y. St. Rep. 402; s. c. 49 App. Div. 94.

<sup>460</sup> It is an amazing commentary upon human nature, that the books present such cases; but here they are:—*Comby v. New York &c. R. Co.*, 25 App. Div. 309; s. c. 49 N. Y. Supp. 513 (distinguishing *Seeley v. New York &c. R. Co.*, 8 App. Div. 403 (woman familiar with crossing, and train could have been heard or seen had she exercised care)); *Banning v. Chicago &c. R. Co.*, 89 Iowa 74; s. c. 56 N. W. Rep. 277 (traveller was told that train was coming and whistle was sounded and bell rung, but he did not see it until too late, because of obstructions); *Engler v. Ohio &c. R. Co.*, 142 Ind. 618; s. c. 42 N. E. Rep. 217 (traveller drove at a trot toward a crossing without looking until his horse's head bumped against a passenger coach, which he might have seen before reaching the crossing if he had looked); *Hauser v. Central R. Co.*, 147 Pa. St. 440; s. c. 1 Pa. Adv. R. 335; 29 W. N. C. 471; 23 Atl. Rep. 766 (woman walked up against a moving locomotive, and was only prevented from getting upon the track by the physical resistance offered thereby; of course, she testified that she stopped, looked and listened, etc.).



§ 1673. **Traveller Getting in Front of a Backing Train.**—Where a traveller, after having stopped with his team at a railway crossing to wait for a train drawn by a switch engine to pass, knowing the movements of trains at the crossing, and anticipating that the train might immediately back up, nevertheless undertook to cross, and was struck by the backing train, his contributory negligence prevented him from recovering damages.<sup>461</sup> But where a traveller was caught and killed by an engine running backwards in the night-time, without light or signal, past a crossing, and the evidence was conflicting as to the distance at which objects could be discerned, the question of his negligence was very properly held to be for the jury.<sup>462</sup>

1674. **Traveller Attempting to Climb Over or Pass Between Stationary Cars Obstructing Crossings.**<sup>463</sup>—Injuries received while making such attempts have been very frequent. The view of the writer—for whatever it may be worth—on this question, is this:—If the train is *lawfully* obstructing the crossing,—that is to say, if it has not obstructed it for a greater length of time than that prescribed by statute or ordinance, or, in the absence of statute or ordinance, for an *unreasonable length of time*,—then, a pedestrian who attempts to continue his journey upon the highway, by climbing over or between the cars, does so at his own risk. The railway company is under no obligation to keep a special lookout for him, or to take special pains to provide for his safety; but his position is substantially that of a *trespasser* upon its property, and is not different, in law, from what it would be if the train were not obstructing a highway crossing. But after the train has obstructed the crossing beyond the length of time prescribed by statute or ordinance, or beyond a reasonable length of time in the absence of statute or ordinance, then the railway company is guilty of an unlawful obstruction of the highway, which is an indictable nuisance;<sup>464</sup> the right of passage on the part of the public is restored; and if pedestrians undertake to exercise that right by climbing over the obstructing train, the railroad company must see to it that it does not kill them or injure them while so doing, by an *affirmative act* of its own, namely, by starting forward its train without giving them any warning of its purpose so to do, or without looking out for their safety in any way. American courts have, however, held, and with great unanimity, that in such cases the injury is to be ascribed, as matter of law, to the contributory negligence of the traveller, and that there can be

<sup>461</sup> Kennedy v. Chicago &c. R. Co., (N. Y.) 438; 51 N. Y. St. Rep. 54; 21 N. Y. Supp. 916.

<sup>462</sup> Zoliewski v. New York &c. R. Co., 140 N. Y. 621; aff'g s. c. 1 Misc.

<sup>463</sup> This section is cited in § 1675.

<sup>464</sup> Elliott Roads & Str., §§ 645, 646.



no recovery of damages against the railway company.<sup>465</sup> The unanimity of these decisions, in the deliberate opinion of the author, forms a lamentable page in American jurisprudence.

§ 1675. **Further of Decisions Ascribing Negligence to Such Attempts.**—This is so, although the railway company starts up the train or runs without giving any *warning*;<sup>466</sup> although the men in charge of the train inform the traveller that it will remain on the crossing for “a good while;”<sup>467</sup> although the traveller is informed by a brakeman that he can climb over the train in safety;<sup>468</sup> although the person so injured is a *police officer*, in the discharge of his duty;<sup>469</sup> although persons have been assisted on previous similar occasions by the employés of the company in passing under or between its cars;<sup>470</sup> al-

<sup>465</sup> Wherry v. Duluth & c. R. Co., 64 Minn. 415; s. c. 67 N. W. Rep. 223; 4 Am. & Eng. Rail. Cas. (N. S.) 72; Andrews v. Central R. & c. Co., 86 Ga. 192; s. c. 10 L. R. A. 58; 45 Am. & Eng. Rail. Cas. 171; 12 S. E. Rep. 213; note to Central R. & c. Co. v. Rylee, 87 Ga. 491; s. c. 13 L. R. A. 634; Rumpel v. Oregon & c. R. Co., 35 Pac. Rep. 700; s. c. 22 L. R. A. 725 (no off. rep.); Magoon v. Boston & c. R. Co., 67 Vt. 177; s. c. 31 Atl. Rep. 156; Studer v. Southern & c. Co., 121 Cal. 400; s. c. 53 Pac. Rep. 942; Memphis & c. R. Co. v. Copeland, 61 Ala. 376; Lake Shore & c. R. Co. v. Pinchin, 112 Ind. 592; s. c. 13 N. E. Rep. 677; Andrews v. Central R. & c. Co., 86 Ga. 192; s. c. 10 L. R. A. 58; Pannell v. Nashville & c. R. Co., 97 Ala. 298; Corcoran v. St. Louis & c. R. Co., 105 Mo. 399; Wallace v. New York & c. R. Co., 165 Mass. 236; O'Mara v. Delaware & c. R. Co., 18 Hun (N. Y.) 192; Howard v. Kansas City & c. R. Co., 41 Kan. 403; s. c. 21 Pac. Rep. 267; State v. Baltimore & c. R. Co., 24 Md. 84; s. c. 87 Am. Dec. 600; Montgomery v. East Tennessee & c. R. Co., 94 Ga. 332; s. c. 21 S. E. Rep. 571 (traveller, attempting to cross, put his foot in the stirrup of the car and instantly fell to the ground, and was injured by reason of the fact that his foot caught in the stirrup); Hudson v. Wabash & c. R. Co., 123 Mo. 445; s. c. 27 S. W. Rep. 717 (person injured placed his feet in such a position that they must be caught if the cars were moved); Bird v. Flint & c. R. Co., 86 Mich. 79; s. c. 48 N. W. Rep. 691 (traveller's conduct de-

nounced as gross negligence); Lewis v. Baltimore & c. R. Co., 38 Md. 588; s. c. 17 Am. Rep. 521 (the act of climbing over stationary cars without looking to see whether they were attached to an engine, denounced as *gross* negligence, precluding a recovery for an injury received while making the attempt); Gahagan v. Boston & c. R. Co., 1 Allen (Mass.) 187; Spencer v. Baltimore & c. R. Co., 4 Mackey (D. C.) 138; s. c. 54 Am. Rep. 269; Hudson v. Wabash & c. R. Co., 101 Mo. 13; s. c. 14 S. W. Rep. 15; rev'g s. c. 32 Mo. App. 667; Gurley v. Missouri & c. R. Co., 104 Mo. 211; s. c. 16 S. W. Rep. 11 (in a switch yard where the public crossed by sufferance); Atchison & c. R. Co. v. Plaskett, 47 Kan. 107; s. c. 26 Pac. Rep. 401, 403; aff'd 27 Pac. Rep. 824 (boy seven years old attempted to cross and was run over by the starting of the train).

<sup>466</sup> Magoon v. Boston & c. R. Co., 67 Vt. 177; s. c. 31 Atl. Rep. 156; Spencer v. Baltimore & c. R. Co., 4 Mackey (D. C.) 138; s. c. 54 Am. Rep. 269; Studer v. Southern & c. Co., 121 Cal. 400; s. c. 53 Pac. Rep. 942 (boy twelve or thirteen years old killed in this manner); Wherry v. Duluth & c. R. Co., 64 Minn. 415; s. c. 67 N. W. Rep. 223; 4 Am. & Eng. Rail. Cas. (N. S.) 72.

<sup>467</sup> Howard v. Kansas City & c. R. Co., 41 Kan. 403; s. c. 21 Pac. Rep. 267.

<sup>468</sup> Renner v. Northern & c. R. Co., 46 Fed. Rep. 344.

<sup>469</sup> Corcoran v. St. Louis & c. R. Co., 105 Mo. 399; s. c. 16 S. W. Rep. 411.

<sup>470</sup> Bird v. Flint & c. R. Co., 86 Mich. 79; s. c. 48 N. W. Rep. 691.



though the person injured had crawled under cars obstructing the highway crossing *five times* within the space of an hour and a half, but got caught and had his leg crushed when making the sixth attempt;<sup>471</sup> and although *other persons* have climbed between such cars, but without the knowledge of the employés in charge of them.<sup>472</sup> One case makes the concession that if the engineer, conductor or other person having control of the movement of the train, *knows* of the attempt of the traveller to cross, or of his exposure to danger, but nevertheless kills or injures him by a sudden movement of the train, the railroad company will be liable;<sup>473</sup> but judicial authority is to the effect that in such cases there is *no duty to know*.<sup>474</sup> Thus, it has been held negligence for a railroad engineer whose train blocks a street crossing, who *sees a boy* trying to pass over the coupling between two freight cars, to back the train without giving such boy sufficient time to get through safely,—especially where he is in the habit of allowing persons to cross in that way.<sup>475</sup>

**§ 1676. A Few Decisions which Mitigate the Severity of this Doctrine.**—Here and there a decision is met with which mitigates the severity of this doctrine. It has been held that the rule does not apply to a *child* who, by reason of his want of knowledge, is not imputable with negligence for attempting to follow the example of adults in passing cars standing upon a street crossing; but he may recover damages if injured by the negligence of the railway company while making such an attempt.<sup>476</sup> So, it has been held that, where a freight train has blocked a public street for three-quarters of an hour, and there is no other convenient means of crossing, and the traveller attempts to pass between the cars upon the invitation of a brakeman, the question of his negligence in so doing should be submitted to the jury.<sup>477</sup>

<sup>471</sup> *Rumpel v. Oregon Short Line R. Co.* (Id.), 22 L. R. A. 725; s. c. 35 Pac. Rep. 700 (no off. rep.).

<sup>472</sup> *Wherry v. Duluth & C. R. Co.*, 64 Minn. 415; s. c. 67 N. W. Rep. 223; 4 Am. & Eng. Rail. Cas. (N. S.) 72.

<sup>473</sup> *Andrews v. Central R. & C. Co.*, 86 Ga. 192; s. c. 10 L. R. A. 58; 45 Am. & Eng. Rail. Cas. 171; 12 S. E. Rep. 213.

<sup>474</sup> *Ante*, § 1674. For the governing principle, see Vol. I, § 238; *ante*, §§ 1597, 1598.

<sup>475</sup> *Henderson v. St. Paul & C. R. Co.*, 52 Minn. 479; s. c. 55 N. W. Rep. 53.

<sup>476</sup> *Schmitz v. St. Louis & C. R. Co.*, 119 Mo. 256; s. c. 24 S. W. Rep. 472; 23 L. R. A. 250. Similarly, see

*Hofler's Adm'r v. Southern R. Co.* (Ky.), 53 S. W. Rep. 665 (not to be off. rep.); *Cleveland & C. R. Co. v. Keely*, 138 Ind. 600; s. c. 37 N. E. Rep. 406 (boy eleven years old who, after waiting fifteen minutes, attempted to pass through an opening in the train under the direction of the flagman); *Lake Erie & C. R. Co. v. Mackey*, 53 Ohio St. 370; s. c. 29 L. R. A. 757; 34 Ohio L. J. 259; 41 N. E. Rep. 980 (child nine years old—question for the jury, the train having obstructed crossing longer than the law allowed).

<sup>477</sup> *Phillips v. New York & C. R. Co.*, 80 Hun (N. Y.) 404; s. c. 62 N. Y. St. Rep. 59; 30 N. Y. Supp. 333. So, one was not deemed negligent, as



§ 1677. **Attempting to Cross in Front of Standing Engines or Trains.**<sup>478</sup>—The attempt of a traveller to cross in front of an engine or a train standing near the crossing, is not generally so inherently dangerous as to preclude a recovery of damages, if the engine or train is unexpectedly started forward upon him, but in most such cases the question whether he has been guilty of negligence will go to the jury,—especially where it moves upon him without giving any signals;<sup>479</sup> or where he is struck by a car which is put in motion by another car being “shunted” or “kicked” against it.<sup>480</sup> In such a case it has been held that the right to recover damages by reason of the death of the traveller is not lost because of his failure, before attempting to make the crossing, to stop, as well as to look and listen, when the engine is standing about twenty-five feet from him at the time when he makes the attempt;<sup>481</sup> but the traveller has the right to assume that the standing train will not be moved upon him until a warning signal is given.<sup>482</sup> Moreover, in a case where a train of cars obstructs a public crossing, a pedestrian, after waiting for a reasonable time, may lawfully walk around it, although, in doing so, he is obliged to pass over the grounds of the company, without incurring the imputation of being a trespasser.<sup>483</sup> But on a principle elsewhere stated,<sup>484</sup> a traveller who undertakes to drive his team attached to a wagon across a railway track, immediately in front of an engine that has temporarily stopped on the crossing, which is making the usual noise of escaping steam, knowing and appreciating the danger, can not recover damages for injuries inflicted upon him by reason of his horses becoming frightened and running away.<sup>485</sup> In a few cases, the traveller who

matter of law, who attempted to pass between cars which had blocked a crossing for fifteen minutes, when the engineer saw him make the attempt: *Irvin v. Gulf &c. R. Co.* (Tex. Civ. App.), 42 S. W. Rep. 661 (no off. rep.). In one such case, where a boy was injured while climbing through a freight train which was unlawfully obstructing a public street, in consequence of the starting of the train without warning, the unlawful obstruction and the negligent starting of the train were not, according to the reasoning of the court, separable factors, so as to make one of them only the *proximate cause* of his injury: *Burger v. Missouri &c. R. Co.*, 112 Mo. 238; s. c. 20 S. W. Rep. 439.

<sup>478</sup> This section is cited in § 1472.

<sup>479</sup> *Atchison &c. R. Co. v. Shaw*, 56 Kan. 519; s. c. 3 Am. & Eng. Rail. Cas. (N. S.) 248; 43 Pac. Rep. 1129; *Ohio &c. R. Co. v. Hill*, 7 Ind. App.

255; s. c. 34 N. E. Rep. 646; *Illinois Steel Co. v. Szutenbach*, 64 Ill. App. 642; s. c. 1 Chic. L. J. Wkly. 329; *Chicago &c. R. Co. v. Prescott*, 59 Fed. Rep. 237; s. c. 23 L. R. A. 654; 8 C. C. A. 109; *Montgomery v. Alabama &c. R. Co.*, 97 Ala. 305; s. c. 12 South. Rep. 170; *Chicago &c. R. Co. v. Wymore*, 40 Neb. 645; s. c. 58 N. W. Rep. 1120; *Vicksburg &c. R. Co. v. Alexander*, 62 Miss. 496.

<sup>480</sup> *Illinois Steel Co. v. Szutenbach*, 64 Ill. App. 642; s. c. 1 Chic. L. J. Wkly. 323.

<sup>481</sup> *Ohio &c. R. Co. v. Hill*, 7 Ind. App. 255; s. c. 34 N. E. Rep. 646.

<sup>482</sup> *Fusili v. Missouri &c. R. Co.*, 45 Mo. App. 535.

<sup>483</sup> *Smith v. Savannah &c. R. Co.*, 84 Ga. 698; s. c. 11 S. E. Rep. 455; 42 Am. & Eng. Rail. Cas. 105.

<sup>484</sup> *Ante*, § 1422; *post*, § 1929.

<sup>485</sup> *Union &c. R. Co. v. Hutchinson*, 39 Kan. 485; s. c. 18 Pac. Rep. 705.



was injured while attempting to cross in front of a standing train or engine has been held guilty of negligence as matter of law:—As where, in attempting to pass around a train which blocked the crossing, he walked on the main track of the railroad for a distance of thirty or forty yards, without looking around to see whether any train was coming upon him;<sup>486</sup> or where a traveller, driving toward a crossing at the rate of two miles an hour, saw a train standing still when he was within sixty feet of the track, and did not subsequently look or listen, although no bell was rung on the train;<sup>487</sup> and so in the cases noted in the margin.<sup>488</sup>

§ 1678. **Injuries to Travellers While Crossing between Detached Portions of Trains on the Highway.**<sup>489</sup>—In many cases where railway companies have occasion to stand their trains upon crossings for a considerable time, they are sufficiently gracious to the travelling public, or mindful of their duties under the law, to part the trains sufficiently to allow travellers to pass through between the cars, either on foot or driving their vehicles. So to part a train, leaving a portion standing on either side of the highway is, under the judicial conception that railway companies make the laws for the public in such cases, construed as a gracious permission to the public to pass: under the conception that the law in such cases is made by the State for the railway companies, it is construed according to what it imports, that the way is open; and that the public have the right to use, safely and unmolested by the railway company, their ordinary right of passage. If, under such circumstances, the railway company *negligently closes the gap without giving warning*, or without giving time to the traveller in the act of passage to extricate himself from the danger, and thereby kills or injures him, the calamity will not be ascribed to his negligence, but to theirs; and the railway company must pay damages.<sup>490</sup> In such a case it was held that the attempt of a pedestrian to

<sup>486</sup> St. Louis &c. R. Co. v. Taylor, 64 Ark. 364; s. c. 42 S. W. Rep. 831.

<sup>487</sup> Caldwell v. Kansas City &c. R. Co., 58 Mo. App. 453.

<sup>488</sup> Mehegan v. New York &c. R. Co., 46 N. Y. St. Rep. 497; s. c. 19 N. Y. Supp. 444 (attempting to cross in the rear of a switching train, momentarily stopped, without looking, etc.); Eads v. Louisville &c. R. Co., 19 Ky. L. Rep. 1138; s. c. 42 S. W. Rep. 1135 (no off. rep.) (woman leaving the street on a dark night and passing around the rear of a train standing on a crossing, and falling from a pile of lumber on the right of way—case badly decided).

<sup>489</sup> This section is cited in § 1568.

<sup>490</sup> Schmitz v. St. Louis &c. R. Co., 119 Mo. 256; s. c. 24 S. W. Rep. 472; 23 L. R. A. 250; Wilkins v. St. Louis &c. R. Co., 101 Mo. 93; s. c. 13 S. W. Rep. 893; Louisville &c. R. Co. v. Thompson, 64 Miss. 584; s. c. 1 South. Rep. 840; Dahlstrom v. St. Louis &c. R. Co., 108 Mo. 525; s. c. 18 S. W. Rep. 919; Mahar v. Grand Trunk R. Co., 19 Hun (N. Y.) 32; Williams v. Atchison &c. R. Co., 59 Kan. 777; s. c. 4 Am. Neg. Rep. 627; 12 Am. & Eng. Rail. Cas. (N. S.) 370; 53 Pac. Rep. 834.



pass between two cars at a public crossing, with knowledge that the trainmen were at the time attempting to separate the train so as to make a crossing, did not constitute negligence on his part, unless he also knew that the cars were liable to be suddenly pushed together.<sup>491</sup> The closing together of the cars without warning, under such circumstances, is not merely an act of negligence, but an atrocity, and decisions which hold the company liable for an accident so brought about are easily supportable.<sup>492</sup> The question whether a pedestrian was guilty of contributory negligence was held fit to be submitted to a jury, where the evidence was that he attempted to cross between trains standing from twenty-five to fifty feet apart, after having looked and seen the cars, which appeared to be, and probably were then standing still, one of the trains having probably been set in motion suddenly by backing another train against it, without any warning signals.<sup>493</sup> A person was not deemed guilty of negligence as matter of law in *standing so near* one of the sections of a freight train, which had parted at a highway crossing, and was standing on a side track, as to be struck by such section when it started to back over the crossing, where no signals were given, and the gates were open, and there was no flagman or other employé on duty, or about such section.<sup>494</sup> Whatever may be the conclusion as to the contributory negligence of the traveller in attempting to pass through a narrow opening between cars at a crossing,—yet if, after he is first caught and pinioned and is not mortally injured, the yardmaster is notified of his peril and hears and understands the warning in time to signal the engineer to reverse his engine and arrest the motion of the train, and fails to give the signal, whereby the traveller is killed, the railway company will be liable.<sup>495</sup> On the other hand, there are decisions which, even here, ascribe contributory negligence to the traveller, who exercises his ordinary right of passage along the highway between the detached portion of the train,—as where he attempted to pass through the opening without looking or listening, when, by looking he could not have failed to see

<sup>491</sup> *Wilkins v. St. Louis & C. R. Co.*, 101 Mo. 93; s. c. 13 S. W. Rep. 893.

<sup>492</sup> *Louisville & C. R. Co. v. Thompson*, 64 Miss. 584; s. c. 1 South. Rep. 840.

<sup>493</sup> *Dahlstrom v. St. Louis & C. R. Co.*, 108 Mo. 525; s. c. 18 S. W. Rep. 919.

<sup>494</sup> *Williams v. Atchison & C. R. Co.*, 59 Kan. 777; s. c. 4 Am. Neg. Rep. 627; 12 Am. & Eng. Rail. Cas. (N. S.) 370; 53 Pac. Rep. 834. For a case where there were four tracks unlighted at night, and a woman, in-

tending to cross, waited until a train had backed off from the first track, and, the other tracks being clear, except that a train was standing on the third track with its rear car detached and twenty feet from the crossing,—proceeded on, when the detached car was, without warning, “kicked” against her,—see *Stover v. Pennsylvania R. Co.*, 46 Atl. Rep. 132.

<sup>495</sup> *Pannell v. Nashville & C. R. Co.*, 97 Ala. 298; s. c. 12 So. Rep. 236.



an engine attached to the cars with steam up,<sup>496</sup>—a conclusion the soundness of which may well be challenged; or where an adult woman in possession of all her faculties, familiar with the crossing, attempted to pass through a narrow opening in a line of freight cars in the railway yard, which were struck by moving cars and “shunted” upon her, which moving cars if she had carefully looked, she might have seen;<sup>497</sup> and also in other cases noted in the margin.<sup>498</sup>

§ 1679. **Traveller Caught between Trains Proceeding in Opposite Directions upon Parallel Tracks.**<sup>499</sup>—A very numerous class of railway accidents has arisen from the fact that the traveller, attempting to cross behind one train where there are two or more parallel tracks, fails to look to see whether another train may not be coming on another track from the opposite direction, and gets in front of the second train and is killed or injured by it. In these cases the circumstances tend to excuse the negligence of the traveller much more than when he is approaching a crossing having but a single track. The receding train obscures from his view the coming train, and the noise of the receding train prevents him from distinguishing the noise of the coming train. Nevertheless, the books show that, in a majority of accidents of this kind, the judges hold that the contributory negligence of the confused and bewildered traveller prevents any recovery of damages, as matter of law,<sup>500</sup> although he was not apprised, by the

<sup>496</sup> Pannell v. Nashville &c. R. Co., 97 Ala. 298; s. c. 12 South. Rep. 236.

<sup>497</sup> Flynn v. Eastern R. Co., 83 Wis. 238; s. c. 53 N. W. Rep. 494.

<sup>498</sup> Lake Shore &c. R. Co. v. Clemens, 5 Ill. App. 77; Gulf &c. R. Co. v. Moss, 4 Tex. Civ. App. 318; s. c. 23 S. W. Rep. 475; Bryant v. Illinois &c. R. Co. (La.), 3 Am. Neg. Rep. 406; 22 South. Rep. 799.

<sup>499</sup> This section is cited in §§ 1626, 1651, 1652.

<sup>500</sup> Stowell v. Erie R. Co., 98 Fed. Rep. 520; Daily v. Richmond &c. R. Co., 106 N. C. 301; s. c. 11 S. E. Rep. 320; 42 Am. & Eng. Rail Cas. 124; Gebhard v. Detroit &c. R. Co., 79 Mich. 586; s. c. 44 N. W. Rep. 1045; Guta v. Lake Shore &c. R. Co., 81 Mich. 291; s. c. 45 N. W. Rep. 821; Allerton v. Boston &c. R. Co., 146 Mass. 241; s. c. 5 N. Eng. Rep. 828; 15 N. E. Rep. 621; Butts v. St. Louis &c. R. Co., 98 Mo. 272; s. c. 11 S. W. Rep. 754; Holland v. Chicago &c. R. Co., 18 Fed. Rep. 243; s. c. 5 McCrary (U. S.) 549; Hovenden v. Pennsylvania R. Co., 180 Pa. St. 244;

s. c. 36 Atl. Rep. 731; aff'g 13 Mont. Co. L. Rep. 9; Kraus v. Pennsylvania R. Co., 139 Pa. St. 272; s. c. 20 Atl. Rep. 993; West Jersey R. Co. v. Ewan, 55 N. J. L. 574; s. c. 27 Atl. Rep. 1064; Duvall v. Michigan &c. R. Co., 105 Mich. 386; s. c. 2 Det. L. N. 136; 63 N. W. Rep. 437; Schmidt v. Philadelphia R. Co., 149 Pa. St. 357; s. c. 30 W. N. C. 233; 24 Atl. Rep. 218; Adams v. New York &c. R. Co., 49 N. Y. St. Rep. 854; s. c. 21 N. Y. Supp. 681; Purdy v. New York &c. R. Co., 87 Hun (N. Y.) 97; s. c. 67 N. Y. St. Rep. 676; 33 N. Y. Supp. 952; Hughes v. Delaware &c. Canal Co., 176 Pa. St. 254; s. c. 38 W. N. C. 393; 35 Atl. Rep. 190; Derk v. Northern &c. R. Co., 164 Pa. St. 243; s. c. 30 Atl. Rep. 231; Ensley R. Co. v. Chewning, 93 Ala. 24; s. c. 9 South. Rep. 458; Norfolk &c. R. Co. v. Wilson, 90 Va. 263; s. c. 18 S. E. Rep. 35; Smith v. Philadelphia &c. R. Co., 160 Pa. St. 117; s. c. 28 Atl. Rep. 641; Bjork v. Illinois &c. R. Co., 85 Ill. App. 269 (foot-traveller attempted to cross several tracks on



customary or statutory signals, of the approach of the train which ran over him;<sup>501</sup> though in a considerable number of cases the question of his negligence is held fit to be submitted to the jury.<sup>502</sup> Most of these decisions assume that the traveller could have seen the train coming from the opposite direction if he had looked;<sup>503</sup> or they lay stress upon the evidence that he failed to look;<sup>504</sup> or that he fixed his attention upon the train which he had just avoided, and took no precautions to look for trains on the track on which he was exposed;<sup>505</sup> or, after avoiding the first engine or train, that he went upon the other track without looking for the second;<sup>506</sup> or, where the view of the track was cut off by the receding train, or by its smoke, that he failed to wait until the view was opened to him;<sup>507</sup> or that he failed to look in the direction of danger, because his attention was distracted by something in the other direction;<sup>508</sup> or that, standing heedlessly on one track, he was struck by an approaching train while waiting for another train to pass on a more distant track.<sup>509</sup>

which trains were coming from opposite directions, and, in escaping from one, was injured by another, there being nothing to obstruct the view of either train,—no question for the jury); *Daniels v. Staten Island &c. R. Co.*, 125 N. Y. 407; s. c. 35 N. Y. St. Rep. 435; 26 N. E. Rep. 466.

<sup>501</sup> *Holland v. Chicago &c. R. Co.*, 18 Fed. Rep. 243; s. c. 5 McCrary (U. S.) 549.

<sup>502</sup> See *post*, § 1680.

<sup>503</sup> *Daniels v. Staten Island &c. R. Co.*, 125 N. Y. 407; s. c. 35 N. Y. St. Rep. 435; 26 N. E. Rep. 466; *Smith v. Philadelphia &c. R. Co.*, 160 Pa. St. 117; s. c. 28 Atl. Rep. 641; *Holland v. Chicago &c. R. Co.*, 18 Fed. Rep. 243; s. c. 5 McCrary (U. S.) 549; *Butts v. St. Louis &c. R. Co.*, 98 Mo. 282; s. c. 11 S. W. Rep. 754.

<sup>504</sup> *Allerton v. Boston &c. R. Co.*, 146 Mass. 241; s. c. 5 N. Eng. Rep. 828; 15 N. E. Rep. 621; *Guta v. Lake Shore &c. R. Co.*, 81 Mich. 291; s. c. 45 N. W. Rep. 821; *Daily v. Richmond &c. R. Co.*, 106 N. C. 301; s. c. 11 S. E. Rep. 320; 42 Am. & Eng. Rail. Cas. 124.

<sup>505</sup> *Ensley R. Co. v. Chewning*, 93 Ala. 24; s. c. 9 South. Rep. 458; *Duvall v. Michigan &c. R. Co.*, 105 Mich. 386; s. c. 2 Det. L. N. 136; 63 N. W. Rep. 437.

<sup>506</sup> *Derk v. Northern &c. R. Co.*, 164 Pa. St. 243; s. c. 30 Atl. Rep. 231.

<sup>507</sup> *Hughes v. Delaware &c. Canal*

*Co.*, 176 Pa. St. 254; s. c. 38 W. N. C. 393; 35 Atl. Rep. 190; *West Jersey R. Co. v. Ewan*, 55 N. J. L. 574; s. c. 27 Atl. Rep. 1064; *Kraus v. Pennsylvania R. Co.*, 139 Pa. St. 272; s. c. 20 Atl. Rep. 993; *Hovenden v. Pennsylvania R. Co.*, 180 Pa. St. 244; s. c. 36 Atl. Rep. 731; aff'g 13 Mont. Co. L. Rep. 9; *Stowell v. Erie R. Co.*, 98 Fed. Rep. 520; *Purdy v. New York &c. R. Co.*, 87 Hun (N. Y.) 97; s. c. 67 N. Y. St. Rep. 676; 33 N. Y. Supp. 952. *Contra*, *Philadelphia &c. R. Co. v. Carr*, 99 Pa. St. 505.

<sup>508</sup> *Adams v. New York &c. R. Co.*, 49 N. Y. St. Rep. 854; s. c. 21 N. Y. Supp. 681.

<sup>509</sup> *Schmidt v. Pennsylvania R. Co.*, 149 Pa. St. 357; s. c. 30 W. N. C. 233; 24 Atl. Rep. 218. One court applied the doctrine in a case where a traveller, familiar with a crossing where there were nine tracks over which trains were constantly passing and repassing, in broad daylight, and when he could see along the tracks two or three hundred feet, attempted to cross them, and, when he had reached the eighth track, saw an engine approaching, and, without looking around, stepped back upon the seventh track and was struck by another engine: he was deemed guilty of contributory negligence as matter of law: *Gebhard v. Detroit &c. R. Co.*, 79 Mich. 586; s. c. 44 N. W. Rep. 1045. Where the plaintiff was standing at a railway crossing in a street



§ 1680. **Circumstances of this Kind where the Traveller's Negligence was Held to be a Question for the Jury.**<sup>510</sup>—In cases where the traveller was killed or injured by being caught *between engines or trains proceeding in opposite directions upon parallel tracks*, the question whether he was guilty of negligence was held to be fit to be submitted to the jury under the following circumstances:—Where a boy fourteen years old attempted to cross a railroad track in front of a “live” engine, which was standing on the track, without ascertaining that a train was coming along another track at a high rate of speed from the opposite direction,—since the jury might well conclude that the standing engine was sufficient to divert the attention of a boy of that age;<sup>511</sup> where a boy fourteen years old attempted to cross a railway track at a street crossing, where his view was obstructed, and was struck by detached cars, approaching the crossing without warning or signal, while stepping back to avoid an engine approaching on another track, which was in front of the detached cars when first seen by him;<sup>512</sup> where the plaintiff testified that he stopped, looked, and listened on approaching the crossing; that, after watching for the passage of a train on the further of the two tracks, he again looked in the direction of the receding train, and saw nothing; that the train which struck him gave no signal of its approach; and that it was dark, and that the receding train made considerable noise;<sup>513</sup> where a child started to cross a railway at a highway crossing, when the train on the track nearest to it backed off the crossing, and no other train was in view; and the child was run over by a train backing on another track, which was hidden by the first train, the backing train giving no proper signal of its approach,—the conclusion being that the child was not guilty of negligence, in failing to *stop* between the tracks and look;<sup>514</sup> where a traveller at night undertook to pass over a familiar crossing, and, in the belief that a train which was passing was on the nearest track, stood upon another track without looking for engines thereon, until the passing train had gone by, and he was struck by an engine

where many trains were passing and where much switching was done, and, while waiting for one train to pass, was struck from behind by another train, which was running at the rate of ten miles an hour in violation of a city ordinance,—it was held,—the doctrine of *comparative negligence* being then in vogue,—that whatever negligence might be charged to the plaintiff was *slight*, while that of the railway company was *gross*; and accordingly that the plaintiff might recover: Pittsburgh

&c. R. Co. v. Knutson, 69 Ill. 103. See also New Jersey &c. Transp. Co. v. West, 32 N. J. L. 91.

<sup>510</sup> This section is cited in §§ 1626, 1651, 1652, 1679.

<sup>511</sup> Atchison &c. R. Co. v. Hardy, 94 Fed. Rep. 294.

<sup>512</sup> Steele v. Northern &c. R. Co., 21 Wash. 287; s. c. 57 Pac. Rep. 820.

<sup>513</sup> Davidson v. Lake Shore &c. R. Co., 179 Pa. St. 227; s. c. 40 W. N. C. 97; 27 Pitts. L. J. (N. S.) 386; 36 Atl. Rep. 291.

<sup>514</sup> Louisville &c. R. Co. v. Rush,



while so standing,—the construction of the crossing being such that a person whose attention was diverted might pass over the rails of the track without discovering their presence;<sup>515</sup> where a foot-passenger, without waiting long enough to acquire an unobstructed view after the passage of one train, in attempting to cross the other track, fell, and, fifteen seconds after falling, was struck by another train;<sup>516</sup> where a woman, in attempting to cross a railroad consisting of five tracks, looked and listened before going upon the tracks, but was struck by a train coming around a curve at the speed of forty miles an hour, of which she had but six seconds' warning;<sup>517</sup> and under the circumstances of the cases collected in the foot note.<sup>518</sup> Finally, cases are not wanting which hold generally that a person who, in attempting to cross a railway track at a highway crossing, and, after a train proceeding in one direction has passed, is struck by a train coming in the opposite direction, is not guilty of contributory negligence as a matter of law, but that his negligence is a question for the jury, although he may have failed to look and listen for the train which ran upon him;<sup>519</sup> or, having looked once, may have entered upon the track on which such train was coming without looking again.<sup>520</sup>

**§ 1681. Attempting to Cross where One Train Closely Follows Another.**—In a good many cases travellers have been injured at railway crossings by making the mistake of supposing, when one train has passed, that another train or engine may not follow it closely. In such

127 Ind. 545; s. c. 26 N. E. Rep. 1010.

<sup>515</sup> Regan v. Chicago &c. R. Co., 85 Wis. 43; s. c. 54 N. W. Rep. 623.

<sup>516</sup> Philadelphia &c. R. Co. v. Carr, 99 Pa. St. 505.

<sup>517</sup> Hoffmeister v. Pennsylvania R. Co., 160 Pa. St. 568; s. c. 34 W. N. C. 208; 28 Atl. Rep. 945.

<sup>518</sup> Crone v. New York &c. R. Co., 48 N. Y. St. Rep. 408; s. c. 20 N. Y. Supp. 529; White v. New York &c. R. Co., 42 N. Y. St. Rep. 24; s. c. 16 N. Y. Supp. 788; Laible v. New York &c. R. Co., 13 App. Div. 574; s. c. 43 N. Y. Supp. 1003; Indianapolis &c. R. Co. v. Neubacher, 16 Ind. App. 21; s. c. 43 N. E. Rep. 576; rehearing denied 44 N. E. Rep. 669; Lake Shore &c. R. Co. v. Ehlert, 19 Ohio C. C. 177; s. c. 10 Ohio C. D. 443; Roberts v. Boston &c. R. Co., 69 N. H. 354; s. c. 45 Atl. Rep. 94; Chicago &c. R. Co. v. Pearson, 82 Ill. App. 605.

<sup>519</sup> Daume v. Chicago &c. R. Co., 72 Wis. 523; s. c. 7 Am. St. Rep. 879; 40 N. W. Rep. 394; Brown v. Griffin, 71 Tex. 654; s. c. 9 S. W. Rep. 546.

<sup>520</sup> Brown v. Edgerton, 58 Kan. 815; s. c. 48 Pac. Rep. 159. That in such a case the passage of one train is not of itself a warning of the approach of another train on a different track,—see Chicago &c. R. Co. v. Wilson, 133 Ill. 55; s. c. 24 N. E. Rep. 555; 42 Am. & Eng. Rail. Cas. 153. The plaintiff, a girl sixteen years old, was passing along the street across defendant's tracks, five in number. She looked both ways for trains, and, when about midway of the crossing, stopped for a train to pass which was coming from the east. The position in which she stood was sufficiently near another track for her to be struck by the tender of an engine, which, unseen by her, backed up from the west, without any signals or warning. A nonsuit in this case was held to be error: Haycroft v. Lake Shore &c. R. Co., 64 N. Y. 636. See also New Jersey &c. Transp. Co. v. West, 32 N. J. L. 91; Pennsylvania R. Co. v. Matthews, 36 N. J. L. 531.



a case, after the obstruction to the view of the traveller has disappeared, it is his duty to wait long enough to see whether another train is following, before entering upon the crossing;<sup>521</sup> though in many cases of accidents under such circumstances, the facts of the case or the theories of the court have exonerated him from the imputation of contributory negligence as matter of law, and left the question *to the jury*.<sup>522</sup> Thus, it was held that a pedestrian was not guilty of contributory negligence as matter of law, who, after a train at a public crossing had passed, failed to look around the end of a freight car standing on a siding, which obstructed his view, before passing upon the main track, where there was not sufficient space between the main track and the side tracks to afford a safe place for observation.<sup>523</sup>

**§ 1682. Contributory Negligence of Motorman of Electric Car in Getting Run Upon by Train at Steam Railway Crossing.**—It has been

<sup>521</sup> Purdy v. New York & C. R. Co., 87 Hun (N. Y.) 97; Fletcher v. Fitchburg R. Co., 149 Mass. 127; s. c. 3 L. R. A. 743; Schmidt v. Philadelphia & C. R. Co., 149 Pa. St. 357; Benson v. Chicago & C. R. Co., 41 Ill. App. 227; Baltimore & C. R. Co. v. Talmage, 15 Ind. App. 203; s. c. 43 N. E. Rep. 1019 (traveller made the mistake of assuming that no train would follow an engine which had just passed, until after the expiration of one minute).

<sup>522</sup> McGhee v. White, 66 Fed. Rep. 502; s. c. 31 U. S. App. 366; 13 C. C. A. 608 (one train following close behind another at high rate of speed); Grand Rapids & C. R. Co. v. Cox, 8 Ind. App. 29 (one train following another at a high rate of speed, only twelve seconds behind); Ward v. Chicago & C. R. Co., 85 Wis. 601 (making the "flying switch"); McGrath v. Hudson & C. R. Co., 32 Barb. (N. Y.) 144; Puff v. Lehigh Valley R. Co., 71 Hun (N. Y.) 577; York v. Maine & C. R. Co., 84 Me. 117; s. c. 24 Atl. Rep. 790 (traveller saw the first section of a severed train pass over a highway crossing, and attempted to cross without looking or listening for the other section); Gray v. Pennsylvania R. Co., 172 Pa. St. 383; s. c. 37 W. N. C. 466; 26 Pitts. L. J. (N. S.) 271; 33 Atl. Rep. 697; Barkley v. New York & C. R. Co., 35 App. Div. (N. Y.) 228; s. c. 54 N. Y. Supp. 766; 5 Am. Neg. Rep. 218; Peltier v. Louisville & C. R. Co., 16 Ky. L. Rep. 500; s. c. 29 S. W. Rep. 30 (no off. rep.); Stevens v. Missouri & C. R. Co., 67 Mo. App. 356.

<sup>523</sup> Gray v. Pennsylvania R. Co., 172 Pa. St. 383, 387; s. c. 37 W. N. C. 466; 26 Pitts. L. J. (N. S.) 271; 33 Atl. Rep. 697. The same conclusion was reached in a jurisdiction where the burden of disproving contributory negligence is on the plaintiff, where a foot-passenger, before crossing the track with an express package intended for a train standing on another track, looked in both directions, but not seeing the train which struck him, moved quickly, but, returning, was struck by a locomotive which approached at full speed without giving any signals, and which was violating the rules of the company in following another train at an interval of three minutes instead of ten, although another passenger train was at the station at the time, receiving and discharging passengers: Barkley v. New York & C. R. Co., 35 App. Div. 228; s. c. 54 N. Y. Supp. 766; 5 Am. Neg. Rep. 218. And also where a pedestrian was struck by cars propelled across the street on the main railway track in that dangerous operation of making what is known as a "flying switch," although, after seeing the engine and tender pass from the main track upon the switch track, he proceeded a few steps along the main track with his back toward the approaching cars, and without paying further attention to the track in that direction, supposing that there was no further danger to be apprehended: Stevens v. Missouri & C. R. Co., 67 Mo. App. 356.



reasoned that the same character or degree of care to avoid a collision must be exercised by those operating an *electric car* along a public highway, in crossing a steam railroad, that is required from persons driving across it with ordinary vehicles, and they must look and listen for an approaching train.<sup>524</sup> But it is plain that, as between the electric railway company and its *passengers* injured through the negligence of its motorman, in getting his car and passengers run over at a steam railway crossing, the electric railway company stands under a higher and more exact degree of care and diligence than is expected of ordinary travellers approaching crossings, to the end of promoting their own safety. This will appear when dealing with the subject of carriers of passengers, in a succeeding title.<sup>525</sup> The motorman in charge of an electric car is therefore guilty of such contributory negligence as will prevent a recovery for an injury *to him*, where he attempts to cross a steam railway track in front of an approaching train which he can see for nearly nine hundred feet away.<sup>526</sup> But it has been held that the question as to what precautions, *other than looking and listening*, the motorman of an *electric car* should observe before attempting to cross a railroad track, in order to avoid the imputation of contributory negligence, is *for the jury*.<sup>527</sup> It would seem that the most obvious precaution is for him to *stop* until the train gets past. If the view is obstructed, and the car has no conductor or other person to be on the lookout, it is held to be the duty of the driver to *stop the car and walk ahead* to the crossing, to ascertain whether a train is approaching.<sup>528</sup> Where the conductor of an electric car went forward upon the steam railroad track to look for a train, and negligently signaled the motorman to cross, and, in attempting to do so, the car was run upon by a train and the motorman killed, through the negligence of the steam railway company,—it was held that damages for the death of the motorman could be recovered from the steam railway company, notwithstanding the negligence of the conductor of the street railway company, where it appeared that there was no particular arrangement between the two as to the method to be employed in looking for trains, so as to make the conductor the agent, for that purpose, of the motorman,—the question of the negligence of the motorman being for the jury.<sup>529</sup> On a principle already consid-

<sup>524</sup> New York &c. R. Co. v. New Jersey Electric R. Co., 60 N. J. L. 52; s. c. 38 L. R. A. 516; 37 Atl. Rep. 627.

<sup>525</sup> Vol. III.

<sup>526</sup> Highland Ave. &c. R. Co. v. Fennell, 111 Ala. 356; s. c. 21 So. Rep. 324.

<sup>527</sup> Lockwood v. Poughkeepsie &c.

R. Co., 28 App. Div. (N. Y.) 589; s. c. 51 N. Y. Supp. 194.

<sup>528</sup> Central Pass. R. Co. v. Kuhn, 86 Ky. 578; s. c. 6 S. W. Rep. 441.

<sup>529</sup> Harper v. Delaware &c. R. Co., 22 App. Div. 273; s. c. 47 N. Y. Supp. 933.



ered,<sup>530</sup> where, in such a collision, a *passenger* on a street car is injured, the fact that the injury would not have happened but for the concurring negligence of the employés of the street railway company, does not prevent him from recovering damages from the steam railway company.<sup>531</sup>

§ 1683. **Facts not Raising the Presumption of Contributory Negligence as Matter of Law.**—The following facts have not been deemed sufficient to establish contributory negligence as matter of law:—For a traveller to drive his vehicle near the edge of a street approaching a railway, although he could obtain a better view of the track from the middle of the street;<sup>532</sup> for a driver, in attempting to escape from an approaching train, to rise and put his weight upon the footboard of his wagon, after another and heavier man than he had used the same as a means of support in springing from the wagon, the footboard having been in daily use for weeks before;<sup>533</sup> for a man driving toward a railway crossing at night, to *stand up in his wagon* and look for an expected train shortly before reaching the crossing, and to sit down when about twenty feet from the crossing, driving on and continuing to look and listen until he is struck by the train;<sup>534</sup> for a man familiar with a crossing where there are several tracks, and no flagman, to approach it in the evening and, on seeing a train coming which stops on the crossing to switch cars, to step on another track and wait for it to get out of the way, where he is injured by a train coming upon him without signals, he testifying that he did not know which were the main tracks;<sup>535</sup> where a traveller on foot attempted to cross a railroad track when a train was approaching, when otherwise he must have remained standing in a narrow space between two passing trains, and could have crossed in safety if the train had not approached at an *unlawful* speed, and if he had not *caught his foot* between a rail and the plank of the crossing;<sup>536</sup> for a traveller to *stand* for a few minutes at a railroad crossing where there is ample time to avoid any train that might approach at a *lawful speed*;<sup>537</sup> for a traveller to attempt to *drive* across a railway while *standing upright* on a sled loaded with lumber;<sup>538</sup>

<sup>530</sup> Vol. I, § 500.

<sup>531</sup> Chicago &c. R. Co. v. Hines, 183 Ill. 482; s. c. 56 N. E. Rep. 177; aff'g s. c. 82 Ill. App. 488.

<sup>532</sup> Scott v. Wilmington &c. R. Co., 96 N. C. 428.

<sup>533</sup> McIntosh v. Chicago &c. R. Co., 36 Fed. Rep. 661.

<sup>534</sup> Smith v. Rio Grande &c. R. Co., 9 Utah 141; s. c. 33 Pac. Rep. 626.

<sup>535</sup> Blaiser v. New York &c. R. Co., 110 N. Y. 638; s. c. 13 Cent. Rep. 231;

17 N. Y. St. Rep. 145; 17 N. E. Rep. 692.

<sup>536</sup> Chicago &c. R. Co. v. Smith, 180 Ill. 453; s. c. 54 N. E. Rep. 325; aff'g 77 Ill. App. 492.

<sup>537</sup> Chicago &c. R. Co. v. Smith, 180 Ill. 453; s. c. 54 N. E. Rep. 325; aff'g 77 Ill. App. 492.

<sup>538</sup> McDermott v. Chicago &c. R. Co., 91 Wis. 38; s. c. 64 N. W. Rep. 430.



where a woman on foot, rightfully on the sidewalk of a public street, was injured on an isolated railway track of which she had no knowledge, which was laid about two hundred and fifty feet from the main track, which she had just crossed, on a dark night, by a train which failed to give the statutory signals, although she might have seen the train for some distance, but supposed, when she saw its headlight, that it would pass on the side of the street opposite from her;<sup>539</sup> for one who finds himself on the railroad track before he discovers the approaching train, to attempt to cross ahead of it, instead of turning back;<sup>540</sup> where a traveller, injured at a point where the railway track crossed a street, might have seen, if he had looked, the moving cars at another crossing, where there were several tracks, and the evidence was conflicting as to whether he could have discovered the cars on the track which led to the crossing which he was approaching;<sup>542</sup> where the traveller at a railroad crossing which was a general public thoroughfare, might, by going several blocks out of his direct course, have crossed the railway where there were fewer tracks, and less danger;<sup>543</sup> where the traveller approached the crossing on a dark night, and, after seeing a locomotive at a sufficient distance to enable him to cross before it would reach the crossing, attempted to cross, when he was struck by flat cars pushed ahead of the locomotive, without lights or warning, and which he could not see because of the darkness;<sup>544</sup> and also the facts of the cases cited in the margin.<sup>545</sup>

<sup>539</sup> *Doyle v. Pennsylvania Canal & Co.*, 139 N. Y. 637; s. c. 54 N. Y. St. Rep. 719; 34 N. E. Rep. 1063.

<sup>540</sup> *Chicago & C. R. Co. v. Netolicky*, 67 Fed. Rep. 665; *ante*, §§ 1665, 1666.

<sup>542</sup> *Scott v. Wilmington & C. R. Co.*, 96 N. C. 428.

<sup>543</sup> *Chicago & C. R. Co. v. Clough*, 134 Ill. 586; s. c. 45 Am. & Eng. Rail. Cas. 137; 25 N. E. Rep. 664; *aff'g* 33 Ill. App. 129.

<sup>544</sup> *Chicago & C. R. Co. v. Sharp*, 63 Fed. Rep. 532; s. c. 11 C. C. A. 337; 60 Am. & Eng. Rail. Cas. 595.

<sup>545</sup> *Nettersheim v. Chicago & C. R. Co.*, 58 Minn. 10; s. c. 59 N. W. 632 (special finding that the traveller who was killed could have seen or heard the approaching train by looking or listening before going on the track, or before going so close thereto as to become injured,—held not to establish negligence as matter of law where none of the surroundings appeared from the evidence);

*Nolan v. New York & C. R. Co.*, 20 Misc. (N. Y.) 619; s. c. 46 N. Y. Supp. 447 (no danger at the time of attempting to cross, but progress of traveller checked by congestion of traffic); *Lloyd v. St. Louis & C. R. Co.*, 128 Mo. 595; s. c. 29 S. W. Rep. 153; s. c. *aff'd* in Banc in 31 S. W. Rep. 110 (traveller sees only front of engine moving at four miles an hour, without bell rung or whistle blown—not negligence in not discovering that it is moving); *Richey v. Missouri & C. R. Co.*, 7 Mo. App. 150 (cars and wagon colliding at dangerous crossing, fact of wagon being on track not conclusive evidence of contributory negligence); *Totten v. New York & C. R. Co.*, 32 N. Y. St. Rep. 765; s. c. 10 N. Y. Supp. 572 (approaching crossing at slow trot, not negligence *per se*); *Waldele v. New York & C. R. Co.*, 4 App. Div. (N. Y.) 549; s. c. 38 N. Y. Supp. 1009 (not negligence *per se*



§ 1684. **Facts to which Contributory Negligence has been Ascribed as Matter of Law.**—Contributory negligence has been ascribed, as matter of law, to the conduct of the traveller in the following cases, the facts being established:—Where the traveller after waiting for the passage of an east-bound train, crossed the east-bound track and stopped immediately in front of a west-bound train, notwithstanding he had an unobstructed view to the west along the east-bound track for three-quarters of a mile, and no danger was apparent on that track,—since the circumstances required him to look and listen before stepping upon the west-bound track, and the physical facts were inconsistent with his performance of that duty;<sup>546</sup> where the traveller approached a crossing, driving with loose reins at a moderate trot, without stopping, slacking speed, or looking or listening for an approaching train, until he got upon the track, although the train was running at an unlawful speed and without giving any signal;<sup>547</sup> where a driver approached a crossing at a jog trot, without stopping or checking the speed of his team, to listen for approaching trains, although he knew that a train was about due, and that he could not see it until within a few feet of the crossing, and he did not look after reaching the point where his view was unobstructed;<sup>548</sup> where a driver approached a crossing where the railway intersected the highway at an acute angle, behind a gentle horse, the condition of the road being such as to prevent fast driving, the night being dark and misty, but not so much so but that a headlight of the engine could have been

to attempt to walk over a crossing in front of a passing train which might have been seen a few moments before the collision, where another train has just passed, and the flagman has given the signal that the traveller can cross in safety, etc.); *McPeak v. New York & C. R. Co.*, 85 Hun (N. Y.) 107; s. c. 66 N. Y. St. Rep. 29; 32 N. Y. Supp. 647 (not negligence *per se* for traveller seeing the engine which runs upon him at a distance of 229 feet, to get in front of it, where his progress is blocked by another train standing across the street, and he approaches the fatal track to see if he can get through or around the train, and is on the lookout for other trains). See also *Chapman v. New York & C. R. Co.*, 58 N. Y. Supp. 728; *Becker v. Pennsylvania R. Co.*, 10 Pa. Super. Ct. 19; s. c. 44 W. N. C. 343; *International & C. R. Co. v. Bryant* (Tex. Civ. App.), 54 S. W. Rep. 364 (wagon driven upon track upon invitation of brakeman, passengers, standing

up in it, thrown from it, by reason of the driver suddenly urging the team forward to avoid a collision with an approaching train, which he did not see or know was approaching until the wagon was on the track,—passenger not negligent in *standing up*). It has been held that the fact that the driver was told that a train was coming does not necessarily authorize the conclusion that he was guilty of negligence, unless it appears that he *heard and understood* what was told to him: *Gugenheim v. Lake Shore & C. R. Co.*, 66 Mich. 150; s. c. 9 West. Rep. 903; 33 N. W. Rep. 161.

<sup>546</sup> *Pennsylvania & C. R. Co. v. Pfuelb*, 60 N. J. L. 278; s. c. 7 Am. & Eng. Rail. Cas. (N. S.) 738; 37 Atl. Rep. 1100; s. c. *aff'd* in 61 N. J. L. 287; 41 Atl. Rep. 1116.

<sup>547</sup> *Chase v. Maine & C. R. Co.*, 167 Mass. 383; s. c. 45 N. E. Rep. 911.

<sup>548</sup> *Hager v. Southern & C. R. Co.*, 98 Cal. 309; s. c. 33 Pac. Rep. 119.



seen at a distance much more than sufficient to give warning in time to enable him to escape injury, and he was killed;<sup>549</sup> where a driver, when he first saw the train, had his horses over the track, and was in the center of the track, while the train was about three hundred and ninety feet away,—his negligence consisting in his failing to get across before the train struck him;<sup>550</sup> where a driver, with a loaded team, on approaching a crossing, neglected to look west, from which direction a train was approaching, with an unobstructed view at two points, respectively two hundred and fifty and fifty feet distant on the road on which he had come, and whipped up his horses and they passed safely over before his wagon was struck;<sup>551</sup> where a driver of a wagon attempted to cross a railway in the night-time, where there were five tracks, after stopping, and looking, and listening fifteen feet from the first track without waiting for the *smoke* of a train which had just passed to disappear, by which the track, ordinarily visible for nine hundred feet, was obscured one hundred feet away, and was struck and killed by an approaching train running forty miles an hour, without warning or headlight;<sup>552</sup> and in the cases noted in the margin.<sup>553</sup>

<sup>549</sup> Tolman v. Syracuse &c. R. Co., 98 N. Y. 198; s. c. 50 Am. Rep. 649; rev'g s. c. 31 Hun (N. Y.) 397.

<sup>550</sup> Galveston &c. R. Co. v. Porfert, 72 Tex. 344; s. c. 10 S. W. Rep. 207.

<sup>551</sup> Connelly v. New York &c. R. Co., 88 N. Y. 346.

<sup>552</sup> Beynon v. Pennsylvania R. Co., 168 Pa. St. 642; s. c. 32 Atl. Rep. 84.

<sup>553</sup> Haas v. Grand Rapids &c. R. Co., 47 Mich. 401 (driver did not appear to have observed any precaution); Peck v. New York &c. R. Co., 50 Conn. 379 (man and wife riding together at familiar crossing, when train was due; wife heard the train, and if she had leaned forward could have seen the headlight; bell ringing close to the gates, and gateman began to swing them; man could not stop horse and gate got caught in the wheel; wife jumped out, otherwise would have been unharmed; company held not liable, two judges dissenting); Brink v. Erie R. Co., 62 N. Y. St. Rep. 408; s. c. 47 App. Div. 483 (traveller driving gentle horse, over which he had full control, along highway towards railroad crossing, saw safety-gates descending, knew that he was likely to collide with

them, yet made no effort whatever to avoid such a collision or to stop his horse); Glendenning v. Sharp, 22 Hun (N. Y.) 78. Compare Terre Haute &c. R. Co. v. Clark, 73 Ind. 168 (milkman, riding in covered wagon, drove upon crossing level with street, track visible at any point within 160 feet of crossing); Chicago &c. R. Co. v. Nichols, 74 Ill. App. 197 (traveller attempted to drive across in front of approaching train, notwithstanding warning of flagman and giving of statutory signals); McPhillips v. New York &c. R. Co., 12 Daly (N. Y.) 365 (traveller got nearly across, and then attempted to turn back when approaching train was only four hundred feet away). For more or less similar cases, where contributory negligence was imputed to the traveller as matter of law,—see Donahue v. Lake Shore &c. R. Co., 47 N. Y. St. Rep. 161; s. c. 19 N. Y. Supp. 961; Bomboy v. New York &c. R. Co., 47 Hun (N. Y.) 425; s. c. 4 N. Y. St. Rep. 291; Baltimore &c. R. Co. v. McPeck, 16 Ohio C. C. 87; Cordell v. New York &c. R. Co., 75 N. Y. 330.



## CHAPTER LIII.

### VARIOUS OTHER QUESTIONS RELATING TO INJURIES AT RAILWAY STREET CROSSINGS.

| SECTION  | SECTION  |
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| 1688. Instances where negligence was ascribed to the railway company.  | been blocking the highway, without giving warning.   |
| 1689. Various statutes prescribing precautions, construed.   | 1695. Practice of making "flying switches," "shunting," or "kicking" cars across highway crossings, condemned. |
| 1690. Precautions specially applicable at railway street crossings in cities.  | 1696. Instances where it was so held.  |
| 1691. Precautions to be observed at railway crossings of <i>de facto</i> highways, private ways, paths used by license or sufferance, etc. | 1697. Contributory negligence of the person hurt by cars "shunted" or "kicked" over crossings.                 |
| 1692. Injuries where trains obstruct crossings.  | 1698. Burden of proof, presumptions, evidence, in cases of injuries at crossings.                              |
| 1693. Separating train to let travellers pass, and then closing it suddenly and without warning.   | 1699. Illustrative cases where there was evidence of negligence to go to the jury.                             |
| 1694. Starting trains which have   | 1700. Illustrative cases where there was no evidence to go to the jury.  |

§ 1688. **Instances where Negligence was Ascribed to the Railway Company.**—A railway company was held liable for an injury sustained by a traveller, on the highway, whose team came in contact with a *hand-car*, negligently left thereon at night by the section foreman of the company;<sup>1</sup> for running its trains so near together at a highway crossing as to make the statutory signals unavailing to warn travellers on the highway;<sup>2</sup> for negligently killing a pedestrian crossing its track, where the negligence was that of its own servants or those in its employ and of that of *another company*, in *switching and handling cars*, although they were at the time of the accident engaged

<sup>1</sup> Pittsburgh &c. R. Co. v. Sponier, 85 Ind. 165.

<sup>2</sup> Chicago &c. R. Co. v. Boggs, 101 Ind. 522; s. c. 51 Am. Rep. 761.



in *handling the cars of the latter company*;<sup>3</sup> for an injury to a traveler from an engine which was being moved across a highway crossing by a *brakeman*, when the *fireman* was upon the engine and in charge of it, and it was moved by his consent.<sup>4</sup> On the other hand, it has been sagely decided, in a case where a man was run over by a locomotive and killed, that, so long as the locomotive was properly handled, and the usual signal given for starting it, and the rate of speed was not too great, the fact that it was *in charge of a "hostler,"* and not of the engineer, was immaterial.<sup>5</sup>

§ 1689. **Various Statutes Prescribing Precautions, Construed.**—It is said in an official syllabus in Georgia, that the failure of the railroad company to observe the requirement of the Code of that State<sup>6</sup> as to its duty in approaching highway crossings, is not necessarily *negligence per se* as to a person who is more than two hundred yards from a crossing at the time of a collision with him.<sup>7</sup> An apter statement of the same conclusion would have been to say that the provisions of the statute do not apply to persons who are not at or near the crossing, and that a violation of the statute is not the *proximate cause* of an accident to such a person. The Georgia statute just referred to, does not apply to railway crossings of *private ways*.<sup>8</sup> Under a statute<sup>9</sup> making railroad companies responsible for all damages to persons, done or caused by the "running of *trains*," a railroad company is *prima facie* liable where a person is struck and killed by an *engine* on a highway crossing, although no cars are attached to it.<sup>10</sup> The precautions prescribed by the statute of Tennessee,<sup>11</sup> to be observed by those running a railroad train approaching a crossing upon which there is a person, animal, or other obstruction, are not applicable to a case where a wagon is not on the track before the train reaches the crossing, but is *driven against the engine* as it crosses the road.<sup>12</sup>

<sup>3</sup> Gulf &c. R. Co. v. Hamilton (Tex. Civ. App.), 28 S. W. Rep. 906 (no off. rep.).

<sup>4</sup> Dillingham v. Parker, 80 Tex. 572; s. c. 16 S. W. Rep. 335. In sound sense, the conclusion would have been just the same if the fireman had not been upon the engine and in charge of it, and if it had not been moved by his consent.

<sup>5</sup> Armil v. Chicago &c. R. Co., 70 Iowa 130 (Beck, J., dissenting).

<sup>6</sup> Ga. Code, §§ 708, 709, 710.

<sup>7</sup> Central R. &c. Co. v. Golden, 93 Ga. 510; s. c. 21 S. E. Rep. 68.

<sup>8</sup> Georgia &c. R. Co. v. Cox, 61 Ga. 455.

<sup>9</sup> Sand & H. Ark. Dig., § 6349.

<sup>10</sup> Little Rock &c. R. Co. v. Blewitt, 65 Ark. 235; s. c. 45 S. W. Rep. 548.

<sup>11</sup> Tenn. Code, § 1298.

<sup>12</sup> Nashville &c. R. Co. v. Seaborn, 85 Tenn. 391; s. c. 4 S. W. Rep. 661. The penalty prescribed by the act of the legislative assembly of the District of Columbia, passed August 23, 1871, § 2, for crossing a public street with an engine or cars in the daytime without having a person stationed there to give warning of its approach, does not apply to crossings outside the limits of the cities of Washington and Georgetown: Smith v. Stoutenburgh, 24 Wash. L. Rep. 329; s. c. 8 App. Cas. (D. C.) 510.



§ 1690. **Precautions Specially Applicable at Railway Street Crossings in Cities.**—The principle already considered<sup>13</sup> undoubtedly requires *greater precautions* on the part of a railway company at a dangerous crossing in a city, than at an ordinary road crossing in the open country.<sup>14</sup> This is especially so where many tracks are constructed across a public thoroughfare in a populous city, where the crossing is in almost constant use.<sup>15</sup> But the mere fact that the crossing may be located a little without or a little within the corporate limits of a town can not alter the degree of care that the railway company should exercise in avoiding injury to persons crossing its track at such crossing, in the absence of any local law or ordinance imposing special duties within the corporate limits.<sup>16</sup> Decisions are not wanting which contain statements to the effect that railway companies, running their trains through populous cities, are bound to observe *extraordinary precautions* for the safety of the public, particularly at street crossings.<sup>17</sup> But this statement does not necessarily militate against the general doctrine that they are bound to exercise all reasonable or ordinary care, which, it must be constantly kept in mind, is a degree of care proportionate to the danger to be avoided.<sup>18</sup>

§ 1691. **Precautions to be Observed at Railway Crossings of de Facto Highways, Private Ways, Paths Used by License or Sufferance, etc.**—It may be assumed, at the outset, that statutes prescribing pre-

<sup>13</sup> Vol. I, § 25.

<sup>14</sup> Klotz v. Winona &c. R. Co., 68 Minn. 341; s. c. 71 N. W. Rep. 257.

<sup>15</sup> English v. Southern &c. R. Co., 13 Utah 407; s. c. 35 L. R. A. 155; 4 Am. & Eng. Rail. Cas. (N. S.) 63; 45 Pac. Rep. 47. The statement that the duty of a railroad company operating its line through the populous portion of a city, to use reasonable care and give proper signals to prevent injury to persons upon or crossing the tracks of its road,—Louisville &c. R. Co. v. Ward, 44 S. W. Rep. 1112; s. c. 19 Ky. L. Rep. 1900,—does not necessarily proceed in disregard of this principle, seeing that reasonable care is a care adjusted to the dangers of the particular situation: Vol. I, § 25. Even in New York, an engineer on a train approaching a station in a village where he knows that people frequently cross the track, is bound to some degree of vigilance to avoid accidents: Swift v. Staten Island &c. R. Co., 123 N. Y. 645; s. c. 45 Am. &

Eng. Rail. Cas. 180; 33 N. Y. St. Rep. 604; 25 N. E. Rep. 378.

<sup>16</sup> Atchison &c. R. Co. v. McClurg, 59 Fed. Rep. 860; s. c. 8 C. C. A. 322.

<sup>17</sup> Curley v. Illinois &c. R. Co., 40 La. An. 810; s. c. 6 South. Rep. 103; Gulf &c. R. Co. v. Walker, 70 Tex. 126; s. c. 8 Am. St. Rep. 582; 7 S. W. Rep. 831; Norfolk &c. R. Co. v. Burge, 84 Va. 63; s. c. 4 S. E. Rep. 21; Shebley v. Cincinnati &c. R. Co., 85 Ky. 224; s. c. 3 S. W. Rep. 157.

<sup>18</sup> Vol. I, § 25. It has seemingly been well held that a railroad company whose employes back a train at a speed of eight or ten miles an hour over a crossing where many persons are passing to and fro and there is much confusion and noise, and while a train is passing in the opposite direction on the track of another railroad close by, is guilty of negligence rendering it liable for the death of a person who, without contributory negligence, is upon the track: Chicago &c. R. Co. v. Woolridge, 72 Ill. App. 551.



cautions to be used by railway companies at public road or street crossings have no application to crossings of *private ways*, unless the statute in terms so prescribes.<sup>19</sup> On the other hand, where the public have, for a series of years, been in the habit of crossing the railroad at a particular place, with the acquiescence of the railway company, this *continued user and acquiescence* amount to a license or permission to all persons to cross at that point, and impose the duty upon the company, as to all persons so crossing, to exercise reasonable care in the movement of its trains so as to protect them from injury; and whether such care has been exercised in a given instance, is a question *for the jury*.<sup>20</sup> Another court has held that while user by the public for many years, of a *path* across a railroad track, does not convert the company's right of way into a *public highway*, it implies a license from the company, and charges the company with the duty of using ordinary care toward those crossing by the path.<sup>21</sup> This care will be a care varying with the facts and circumstances of the particular situation.<sup>22</sup> Whether a public user of a path across a railway track exists so as to impose upon the railway company the obligation of exercising special care as regards the safety of foot travellers and of giving signals, and whether the company has been guilty of negligence in the particular instance which was the proximate cause of the injury,—are questions of fact *for the jury*.<sup>23</sup> And so is the question whether the construction, by the railroad company, of a *crossing* over its road at a place where the road is crossed by a path, which crossing has been used by the public from fifteen to twenty-five years, amounts to an *invitation* by the company to the public to use the crossing,—in determining which question the jury will consider whether the construction of the crossing was such as reasonably to induce the public to believe that the crossing was a public way.<sup>24</sup> So, the question whether

<sup>19</sup> For example, Ga. Code, § 708, requiring the erection of *blowposts*, the *blowing of the whistle*, and the *checking of speed*, does not render this precaution obligatory where the train approaches the crossing of a private way: Georgia &c. R. Co. v. Cox, 61 Ga. 455. So the statute of West Virginia (W. Va. Code, c. 54, § 61), requiring the bell to be rung or a whistle to be blown at crossings, is designed for those passing over the tracks at such crossings, not for those using the track elsewhere for their convenience as a *footpath*: Huff v. Chesapeake &c. R. Co. (W. Va.), 35 S. E. Rep. 866.

<sup>20</sup> Bryne v. New York &c. R. Co., 104 N. Y. 362; s. c. 6 Cent. Rep. 393. The conclusion is the same, and on

clearer grounds, where the railway company *constructs a walk* across its right of way at a street crossing, from the end of the sidewalk of the street on one side to the end of the sidewalk of the street on the other side, so as to form a connection between the walks: Illinois &c. R. Co. v. Clark, 83 Ill. App. 620.

<sup>21</sup> Taylor v. Delaware &c. R. Co., 113 Pa. St. 162; s. c. 4 Cent. Rep. 628.

<sup>22</sup> Baltimore &c. R. Co. v. Golway (D. C. App.), 6 App. Cas. 143; s. c. 23 Wash. L. Rep. 308.

<sup>23</sup> Taylor v. Delaware &c. R. Co., 113 Pa. St. 162; s. c. 4 Cent. Rep. 628.

<sup>24</sup> Wright v. Boston &c. R. Co., 142 Mass. 296; s. c. 2 N. E. Rep. 727.



there has been such *continuous and frequent user* of a path across the yard and tracks of a railroad company by grown people and children, with its consent or acquiescence, that its employés would be bound to anticipate the presence of a *child* upon the path when cars were moved across it, and to keep a lookout to prevent the injury to such child,—has been held a question of fact *for the jury*.<sup>25</sup>

§ 1692. **Injuries where Trains Obstruct Crossings.**—For a railway company to allow its trains to stand upon a highway crossing so as to obstruct public travel for an unreasonable time, has been frequently characterized as *negligence*.<sup>26</sup> But it is something more than negligence: it is a public offense of an affirmative and positive character, a *public nuisance* for which the railroad company is liable to *indictment* and punishment in a criminal proceeding.<sup>27</sup> It has been characterized as negligence for a railway company to block a highway crossing by leaving, for several days, on a side track a line of box cars, so that only thirty-five feet of crossing is left clear,—the space being necessary for an *unobstructed view* by persons wishing to cross, if not for *room to cross*.<sup>28</sup> In like manner, where a railway company stopped its cars so as wholly to *obstruct a frequented street*, and thereby prevent a woman from seeing a train coming from behind such cars until it was actually upon her,—it was held sufficient to require the submission to the jury of the question of defendant's negligence in running or managing its trains.<sup>29</sup> So, in an action for damages for injury received in crossing the defendant's track with a horse and wagon, at a highway crossing *partially obstructed by a car* which had left the track, and at which time the defendant had not stationed a man to warn travellers of danger,—it was held that the question of negligence was properly left to the jury.<sup>30</sup>

<sup>25</sup> *Mason v. Chicago & c. R. Co.*, 89 Wis. 151; s. c. 61 N. W. Rep. 300.

<sup>26</sup> *Grimes v. Louisville & c. R. Co.*, 3 Ind. App. 573; *Cleveland & c. R. Co. v. Wynant*, 134 Ind. 681; *Baltimore & c. R. Co. v. Webster*, 6 App. D. C. 182; *Dillingham v. Parker*, 80 Tex. 572; *McCoy v. Philadelphia & c. R. Co.*, 5 Houst. (Del.) 599; *Missouri & c. R. Co. v. Jones*, 13 Tex. Civ. App. 376; s. c. 35 S. W. Rep. 322 (instruction that if the employés of the company used ordinary care in placing the cars where they were placed, properly refused, since it may have been negligence to place them there, or to allow them to remain there for an unreasonable length of time); *Golden v. Pennsylv-*

*ania R. Co.*, 187 Pa. St. 635; s. c. 43 W. N. C. 106; 29 Pitts. L. J. (N. S.) 165; 41 Atl. Rep. 302; *Reed v. Chicago & c. R. Co.*, 74 Iowa 188; s. c. 37 N. W. Rep. 149.

<sup>27</sup> *State v. Western & c. R. Co.*, 95 N. C. 602; *Elliott Roads & Str.*, 2d ed., § 662.

<sup>28</sup> *Reed v. Chicago & c. R. Co.*, 74 Iowa 188; s. c. 37 N. W. Rep. 149.

<sup>29</sup> *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669; s. c. 6 Cent. Rep. 394.

<sup>30</sup> *Paine v. Grand Trunk R. Co.*, 63 N. H. 623; s. c. 1 N. E. Rep. 841. So, a railway company which, in violation of an express statute, left a train of cars coupled together standing upon and extending across



§ 1693. **Separating Train to let Travellers Pass, and then Closing it Suddenly and without Warning.**<sup>31</sup>—This is a flagrant species of negligence, and ought to be visited with criminal punishment in every case; and yet judges have been found who have been able to condone it and cast the blame upon the traveller. In some States the legislatures have enacted statutes to prevent or punish this species of criminality. Thus, a statute of South Carolina<sup>32</sup> enacts that if the engine or cars of a railway company shall be at a standstill within "a less distance than one hundred rods" of a crossing, the bell shall be rung or the whistle sounded at least thirty seconds before the engine is moved. This statute has been held to apply to a case where a railway train has stopped upon a highway so as to obscure the view of the crossing; so that a pedestrian who was injured by catching his foot between the bumpers of the cars of a freight train, so stopped upon the highway and moved without the statutory warning, had an action against the company for damages.<sup>33</sup> Outside of any statute, it is evidence of negligence fit to be submitted to a jury, for a railway company to separate its train at a street or road crossing, thus inviting the public to pass through, and then to close it without previous warning, whereby a traveller so passing through is caught and killed or injured.<sup>34</sup> Therefore it was held that a railroad company was liable for injuries to a boy attempting to pass between parts of a freight train which had been separated at a short distance from the crossing, by the sudden backing of a part of the train without previous warning, the crossing

the entire width of a street for an unreasonable length of time, was held liable for injury to a horse which, after becoming frightened and unmanageable and breaking away from its driver without his fault, attempted to leap through one of the spaces between the coupled cars, and struck the end of one of them with such force as to cause its death: *Grimes v. Louisville & C. R. Co.*, 3 Ind. App. 573; s. c. 30 N. E. Rep. 200. It has been held that "staking" across a highway is illegal, and renders the railway company liable for any injury thereby occasioned within the limits of the highway: *Kelley v. Michigan & C. R. Co.*, 65 Mich. 186; s. c. 8 West. Rep. 177. Staking is the moving of cars by a switch engine on a parallel track by means of a "stake." The "stake" acts as a scythe over the space between the parallel tracks. For a railway company to block a farm crossing, by storing cars over it for an unrea-

sonable length of time, is actionable: *Cleveland & C. R. Co. v. Trimnell*, 75 Ill. App. 585.

<sup>31</sup> This section is cited in §§ 1568, 1597.

<sup>32</sup> S. C. Rev. Stat., § 1685.

<sup>33</sup> *Littlejohn v. Richmond & C. R. Co.*, 49 S. C. 12; s. c. 26 S. E. Rep. 967. He had the action under another statute (S. C. Rev. Stat., § 1692), providing that if a person is injured by "collision with the engine or cars of a railroad corporation at a crossing," the company shall be liable for all damages unless he was guilty of gross or willful negligence: *Littlejohn v. Richmond & C. R. Co.*, *supra*.

<sup>34</sup> *Golden v. Pennsylvania R. Co.*, 187 Pa. St. 635; s. c. 43 W. N. C. 106; 29 Pitts. L. J. (N. S.) 165; 41 Atl. Rep. 302; *Fort Worth & C. R. Co. v. Dennis* (Tex. Civ. App.), 33 S. W. Rep. 884 (no off. rep.); *Weber v. Atchison & C. R. Co.*, 54 Kan. 389; *Schmitz v. St. Louis & C. R. Co.*, 46 Mo. App. 380.



having been *blocked for an unreasonable time*, if he was free from contributory negligence.<sup>35</sup>

§ 1694. **Starting Trains which have been Blocking the Highway, without Giving Warning.**<sup>36</sup>—Although the train has not been opened to allow the public to pass through, but has been blocking the highway for an unreasonable length of time, so that foot-passengers, whether adults or children may, out of necessity, be compelled to climb or creep through between the cars,—yet if the cars are started without warning, this, to say the least, is evidence of negligence to be submitted to a jury.<sup>37</sup>

§ 1695. **Practice of Making “Flying Switches,” “Shunting” or “Kicking” Cars Across Highway Crossings, Condemned.**<sup>38</sup>—This practice, when confined by the railway company to its own yards, or to those portions of its track of which it is entitled to exclusive use, may or may not be negligence.<sup>39</sup> But this is a question with which we are not now dealing. The courts have held, with practical unanimity, and often with great emphasis, that the practice called making the “running” or “flying switch,” which consists of “kicking” or “shunting” cars forward, in breaking or making up trains, by moving them forward at a rapid speed detached from the engine or from a portion of the train, and then, by checking or increasing the speed of the engine, or of such portion of the train, allowing them to fly forward over public crossings without the usual warning signals by bell or whistle, or any means of giving such signals, and without any other signals than may be afforded by a brakeman standing on such “running” or “flying” cars, and sometimes even when such brakeman is not standing on the front car, or is on some other car, even the rear

<sup>35</sup> *Golden v. Pennsylvania R. Co.*, 187 Pa. St. 635; s. c. 43 W. N. C. 106; 29 Pitts. L. J. (N. S.) 165; 41 Atl. Rep. 302.

<sup>36</sup> This section is cited in § 1597.

<sup>37</sup> *Carmer v. Chicago &c. R. Co.*, 95 Wis. 513; s. c. 70 N. W. Rep. 560; *Schmitz v. St. Louis &c. R. Co.*, 119 Mo. 256; s. c. 23 L. R. A. 250, and note; *Lake Erie &c. R. Co. v. Mackey*, 53 Ohio St. 370; s. c. 29 L. R. A. 757, and note. When misleading to instruct the jury that it is not negligence *per se* for a railroad company to leave cars standing close to a crossing, if not on the highway: *Cleveland &c. R. Co. v. Richerson*, 10 Ohio C. D. 326.

<sup>38</sup> This section is cited in § 1572.

<sup>39</sup> It has been held not negligence *per se*, in the absence of a statute forbidding the practice, although companies other than the one in question do not resort to it: *Gulf &c. R. Co. v. Smith*, 87 Tex. 348; s. c. 28 S. W. Rep. 520 (not at a crossing—deceased was walking on the track). Another court has held that whether or not a railroad company is negligent in severing a train in two parts and making a *flying switch* over a highway crossing, is a question for the jury, upon all the circumstances: *York v. Maine &c. R. Co.*, 84 Me. 117; s. c. 24 Atl. Rep. 790.



car,—is negligence.<sup>40</sup> Other courts have characterized it as *gross negligence*;<sup>41</sup> and one court has characterized it as negligence of so gross a character as to overcome the defense of contributory negligence, where a boy was run over in this way while picking up pebbles from the street.<sup>42</sup> The least that can be said in favor of the practice is that it presents *evidence of negligence*, to be submitted to a jury.<sup>43</sup>

§ 1696. Instances where it was so Held.<sup>44</sup>—It was so held where the railroad company “kicked” freight cars across a city street with a brakeman stationed on the top of a car midway between the front and the brake, where, if the engine had been attached and a man had

<sup>40</sup> Delaware &c. R. Co. v. Converse, 139 U. S. 469; s. c. 35 L. ed. 213; 11 Sup. Ct. Rep. 569; Alabama &c. R. Co. v. Summers, 68 Miss. 566; s. c. 10 South. Rep. 63; Kentucky &c. R. Co. v. Smith, 93 Ky. 449; s. c. 18 L. R. A. 63; 14 Ky. L. Rep. 455; 20 S. W. Rep. 392; Baker v. Kansas City &c. R. Co., 122 Mo. 533; s. c. 26 S. W. Rep. 20; O’Conner v. Missouri &c. R. Co., 94 Mo. 150; s. c. 13 West. Rep. 587; Drain v. St. Louis &c. R. Co., 86 Mo. 574; s. c. 2 West. Rep. 114; Pinney v. Missouri &c. R. Co., 71 Mo. App. 577; Stevens v. Missouri &c. R. Co., 67 Mo. App. 356; Schindler v. Milwaukee &c. R. Co., 87 Mich. 400; s. c. 49 N. W. Rep. 670; Louisville &c. R. Co. v. Schmidt, 126 Ind. 291; s. c. 26 N. E. Rep. 45; Ward v. Chicago &c. R. Co., 85 Wis. 601; s. c. 55 N. W. Rep. 771; Alabama &c. R. Co. v. Anderson, 109 Ala. 299; s. c. 19 South. Rep. 516; Steele v. Northern &c. R. Co., 21 Wash. 287; s. c. 57 Pac. Rep. 820; International &c. R. Co. v. De Bajligethy, 9 Tex. Civ. App. 108; s. c. 28 S. W. Rep. 829; Gulf &c. R. Co. v. Smith (Tex. Civ. App.), 26 S. W. Rep. 644 (no off. rep.); Missouri &c. R. Co. v. Finch (Tex. Civ. App.), 31 S. W. Rep. 84 (no off. rep.); Pittsburgh &c. R. Co. v. Callaghan, 50 Ill. App. 676; Chicago &c. R. Co. v. Gomes, 46 Ill. App. 255; Alabama &c. R. Co. v. Summers, 68 Miss. 566; Brown v. New York &c. R. Co., 32 N. Y. 597. See Ormsbee v. Boston &c. R. Corp., 14 R. I. 103 (where the cases are reviewed). See also a note on this subject, including the question of contributory negligence in such cases, in 18 L. R. A. 63. In the case last above cited, it appeared that the plaintiff, a deaf mute, attempted to

cross the tracks of a railroad company. An engine had passed, which he kept looking at, when he was struck by cars that had been “kicked,” coming from the other direction. The gate on the opposite side of the track was closed. It was held that the negligence of the deceased would prevent a recovery for his killing: Ormsbee v. Boston &c. R. Co., 14 R. I. 103.

<sup>41</sup> O’Conner v. Missouri &c. R. Co., 94 Mo. 150; s. c. 13 West. Rep. 587; 7 S. W. Rep. 166; Ward v. Chicago &c. R. Co., 85 Wis. 601; s. c. 55 N. W. Rep. 771.

<sup>42</sup> Kentucky &c. R. Co. v. Smith, 93 Ky. 449; s. c. 18 L. R. A. 63; 14 Ky. L. Rep. 455; 20 S. W. Rep. 392. For theories as to *gross, wanton or willful* negligence, which will overcome the defense of contributory negligence, see Vol. I, §§ 7, 21, 22, 206, 207, 208, 265, 266, 276; *ante*, §§ 1606, 1627, 1637, 1666. It has been held proper to instruct the jury that the making of a “flying switch” over a street crossing “was a most dangerous proceeding,” and “that it was the duty of the defendant to have taken special pains to give the public full warning of the danger”: Ward v. Chicago &c. R. Co., 85 Wis. 601; s. c. 55 N. W. Rep. 771. The practice has been characterized as *negligence of the most aggravated character*, not to be excused by mere considerations of convenience, or by the fact that trains can be made up more rapidly in this way: Stevens v. Missouri &c. R. Co., 67 Mo. App. 356.

<sup>43</sup> Chicago &c. R. Co. v. McArthur, 53 Fed. Rep. 464; s. c. 10 U. S. App. 546; 3 C. C. A. 594.

<sup>44</sup> This section is cited in § 1572.



been stationed on the top of the car at the front, the accident would have been averted;<sup>45</sup> where cars were allowed to run detached from the engine upon switch tracks at a much frequented street crossing, with such force as to drive other cars against a person who was upon the crossing;<sup>46</sup> where a railway company, while running its train within the limits of a city at a prohibited rate of speed, detached the rearmost car and ran it across a place habitually used by the public as a *pathway*, without proper brakes or appliances to control it, so that it ran over and killed a pedestrian who had stepped back upon the crossing and was struck by the car after the rest of the train had passed, without knowing or being warned of the approach of the detached car;<sup>47</sup> where an engine was moving without the customary signals and at a prohibited rate of speed, at a place where it was dark and the wind was blowing briskly, and there was considerable noise, and a car was detached from it which ran over a point of the track habitually used by the public as a crossing, and killed a pedestrian;<sup>48</sup> where freight cars were allowed to run down grade at the rate of six miles an hour, after the engine had been detached and had gone in advance of them, although there was a person on such cars performing the duty of brakeman;<sup>49</sup> where a "flying switch" was made across a public highway, when the only person on the detached cars was in such a position that he could not see the tracks ahead of him;<sup>50</sup> where a train of cars was severed in the night-time, and a part of them were left, uncontrolled except by ordinary brakes, to run across a public highway at grade, without giving any warning by a flagman, or by bell or whistle, or in any other effective mode, that they were approaching;<sup>51</sup> where a railway company made a "flying switch" across one of the most frequented streets of a city at night, in violation of a city ordinance prohibiting the making of such switches within the city limits;<sup>52</sup> where a railroad company "kicked" three cars at a rapid rate, with no one upon them to check their speed, across a frequented private crossing, at a time when those in charge of the car knew that a sleigh was approaching the crossing, although they did not know that the child which was injured was in the sleigh.<sup>53</sup>

<sup>45</sup> Chicago &c. R. Co. v. Gomes, 46 Ill. App. 255.

<sup>46</sup> Pittsburgh &c. R. Co. v. Callaghan, 50 Ill. App. 676.

<sup>47</sup> Gulf &c. R. Co. v. Smith (Tex. Civ. App.), 26 S. W. Rep. 644 (no off. rep.).

<sup>48</sup> International &c. R. Co. v. De Bajligethy, 9 Tex. Civ. App. 108; s. c. 28 S. W. Rep. 829.

<sup>49</sup> Baker v. Kansas City &c. R. Co., 122 Mo. 533; s. c. 26 S. W. Rep. 20.

<sup>50</sup> Chicago &c. R. Co. v. McArthur, 53 Fed. Rep. 464; s. c. 10 U. S. App. 546; 3 C. C. A. 594.

<sup>51</sup> Delaware &c. R. Co. v. Converse, 139 U. S. 469; s. c. 35 L. ed. 213; 11 Sup. Ct. Rep. 569.

<sup>52</sup> Alabama &c. R. Co. v. Anderson, 109 Ala. 299; s. c. 19 South. Rep. 516.

<sup>53</sup> Schindler v. Milwaukee &c. R. Co., 87 Mich. 400; s. c. 49 N. W. Rep. 670. It has been characterized as



§ 1697. **Contributory Negligence of the Person Hurt by Cars "Shunted" or "Kicked" over Crossings.**—The decisions which characterize the practice of "shunting" or "kicking" cars over public crossings in making the "running" or "flying switch" as negligence, and which hold that the company is liable for the death or injury of a traveller run over by its detached cars in this way, frequently qualify their statements of doctrine with the proviso that the traveller was not guilty of contributory negligence;<sup>54</sup> and where a *child three years* old was injured in this way, the court qualified the statement of liability with the proviso that there was no negligence on the part of the *parents* of the child.<sup>55</sup> But while the contributory negligence of the traveller will unquestionably be a defense in these, as in other cases, yet the solution of the question what is contributory negligence is undoubtedly modified by the fact of the gross negligence or misconduct of the railway company in thrusting detached cars over the crossing without warning, after the passage of the main portion of the train has tempted the traveller into the belief that the danger is over. While, as already seen, a traveller, on approaching a railway crossing, is bound to keep a sharp lookout for approaching engines or trains, yet he is not bound to anticipate that the railway company will commit an act of negligence so gross as to make a "flying switch" across a public highway;<sup>56</sup> and, in general, it is not negligence not to anticipate

*gross negligence* for the conductor of a freight train upon and in charge of a detached car following the train past a highway crossing, in making a "flying switch" on to a side track, who sees a traveller approaching the crossing with a team while his car is fifty to seventy feet from the crossing and at a distance where he can stop the car, to let the car run without using the brakes, because he thinks he can get over the crossing before such traveller reaches it: *Ward v. Chicago & C. R. Co.*, 85 Wis. 601; s. c. 55 N. W. Rep. 771. The questions whether the rate of speed at which a car was "kicked" across a street, and whether "kicking" is a more dangerous mode of propelling a car than *pushing*,—have been held in an action by one injured by the car, to be *for the jury*: *Howard v. St. Paul & C. R. Co.*, 32 Minn. 214.

<sup>54</sup> *International & C. R. Co. v. De Bajligethy*, 9 Tex. Civ. App. 108; s. c. 28 S. W. Rep. 829; *Gulf & C. R. Co. v. Smith* (Tex. Civ. App.), 26 S. W. Rep. 644 (no off. rep.); *Missouri & C. R. Co. v. Finch* (Tex. Civ.

App.), 31 S. W. Rep. 84 (no off. rep.).

<sup>55</sup> *Louisville & C. R. Co. v. Schmidt*, 126 Ind. 291; s. c. 26 N. E. Rep. 45. One court has gone so far as to hold that the negligence of a railroad company, in making a flying switch across one of the principal streets, without any switchman at the crossing, or any lookout on the front of the cars which were being pushed by an engine sixty feet away, although the bell was ringing, was so gross as to make the railroad company liable for injury to a *boy thirteen years* old, who was struck at the crossing just after he had got out of the way of a train going in the other direction on a parallel track, even if he was guilty of ordinary negligence, where he was engaged at the time in picking up pebbles from the street and in examining them: *Kentucky & C. R. Co. v. Smith*, 93 Ky. 449; s. c. 18 L. R. A. 63; 14 Ky. L. Rep. 455; 20 S. W. Rep. 392.

<sup>56</sup> *O'Conner v. Missouri & C. R. Co.*, 94 Mo. 150; s. c. 13 West. Rep. 587; 7 S. W. Rep. 106.



that another party will be negligent.<sup>57</sup> A traveller is therefore not guilty of negligence, as matter of law, in driving across the track immediately after the passage of a train for which he is watching and waiting, without looking for a *detached car* following after the train, which has no means of signaling or warning, except the voice of a brakeman upon the car.<sup>58</sup> This is especially so where the view of the detached car is obscured by smoke and steam from the engine which has just passed,—in which case it was held that the question of contributory negligence was properly left to the jury.<sup>59</sup> And it was especially so where the weather was very cold, and the traveller had a shawl over his head, which might have interfered with his sight and hearing, while the employes of the railway company, instead of taking care of the detached cars and warning persons of their movements, left them to “go wild” and remained on the engine to protect themselves from the weather.<sup>60</sup>

**§ 1698. Burden of Proof, Presumptions, Evidence, in Cases of Injuries at Crossings.**—The *mere fact of an accident* to a traveller at a railway crossing does not establish any right to recover damages from the railway company. The rule *res ipsa loquitur*, which prevails in the case of an injury to a passenger while on board the carrier's vehicle, has no application to an obscure case where a person has been killed by a railway train at a highway crossing, and there is no evidence of the attendant circumstances except the bare fact that he was so killed; since, according to human experience, that fact is just as consistent with the conclusion that he was killed in consequence of his own negligence, or in consequence of mere *casus* or misadventure, as by the fault of the railway company.<sup>61</sup> This rule is of especial force in those jurisdictions where the policy of the law casts upon the plaintiff the burden of proving that the person killed was himself free from contributory negligence.<sup>62</sup> Where this rule as to contributory negligence prevails, the plaintiff is not helped out by the presumption that men will naturally avoid, rather than court or defy danger, but there must be *some* proof of the absence of contributory negligence.<sup>63</sup> The fault is, *prima facie* his own, and the plaintiff, suing for damages for his death or injury, must show affirmatively, at least by *some* evidence,

<sup>57</sup> Vol. I, § 191; *ante*, §§ 1448, 1612, *et seq.*, 1653.

<sup>58</sup> Ward v. Chicago & C. R. Co., 85 Wis. 601; s. c. 55 N. W. Rep. 771.

<sup>59</sup> Ferguson v. Wisconsin & C. R. Co., 63 Wis. 145.

<sup>60</sup> Phillips v. Milwaukee & C. R. Co., 77 Wis. 349; s. c. 46 N. W. Rep. 543; 9 L. R. A. 521.

<sup>61</sup> Terre Haute & C. R. Co. v. Clem, 123 Ind. 15; s. c. 7 L. R. A. 588; 42 Am. & Eng. Rail. Cas. 229; 23 N. E. Rep. 965.

<sup>62</sup> Lesan v. Maine & C. R. Co., 77 Me. 85.

<sup>63</sup> Pittsburgh & C. R. Co. v. Bennett, 9 Ind. App. 92; s. c. 35 N. E. Rep. 1033 (rule since repealed by statute).



that his negligence did not contribute to the injury, before he can recover. But this, like any other fact or conclusion, may be *proved by circumstances*; and while it is not proved by evidence of the mere fact of the killing or injury, yet this is done if there is also evidence of the circumstances attending the accident, and if all the facts and circumstances illustrating his conduct at the time of his accident are shown, and the inference that he exercised proper caution fairly arises therefrom.<sup>64</sup> On the other hand, neither the fact that a person killed by a passing train while attempting to cross a railroad track was ordinarily a cautious and prudent man, nor the fact that he had on every other occasion been careful in crossing, could avail the plaintiff to show absence of contributory negligence on his part, in contradiction of the circumstances of the case.<sup>65</sup> But it has been held that a finding that a night watchman of a railroad track was in the exercise of ordinary care at the time of an accident causing his death is sustained by uncontroverted evidence of one who had known him well for thirty years, that he was a temperate, quiet, careful man.<sup>66</sup> For example, if there is no proof as to whether one who was killed at a railway crossing, owing (as is alleged) to the failure of the company to *close the gate* on the approach of a train, *looked and listened* before going upon the track, it will not be presumed, as matter of law, that he did not do so, but the question of his negligence will be for the jury.<sup>67</sup> On the other hand, where a box car partially obstructed the highway at a crossing, the presumption was that it had been left there by the fault of the railway company, rather than by the wrong-doing of intermeddlers.<sup>68</sup> It has been very properly held that the failure of the employés of a railway company to give the statutory signals on approaching the crossing is an evidentiary fact, to be taken into consideration by the jury, in determining the question of the contributory negligence of the traveller injured at the crossing.<sup>69</sup>

**§ 1699. Illustrative Cases where there was Evidence of Negligence to Go to the Jury.**—It was held that there was sufficient evidence of negligence on the part of the defendant in cases of accidents at railway crossings, to take the question to the jury in the following

<sup>64</sup> Cincinnati &c. R. Co. v. Howard, 124 Ind. 280; s. c. 8 L. R. A. 593; 24 N. E. Rep. 892; Beckwith v. New York &c. R. Co., 54 Hun (N. Y.) 446; 28 N. Y. St. Rep. 292; 7 N. Y. Supp. 719.

<sup>65</sup> Glascock v. Central &c. R. Co., 73 Cal. 137; s. c. 14 Pac. Rep. 518.

<sup>66</sup> Baltimore &c. R. Co. v. Alsop, 71 Ill. App. 54.

<sup>67</sup> Baltimore &c. R. Co. v. Carrington, 3 D. C. App. 101; s. c. 22 Wash. L. Rep. 284.

<sup>68</sup> Cleveland &c. R. Co. v. Wynant, 134 Ind. 681; s. c. 34 N. E. Rep. 569.

<sup>69</sup> Louisville &c. R. Co. v. Williams, 20 Ind. App. 576; s. c. 51 N. E. Rep. 128.



cases:—Where a *child* was killed at a railway crossing, and the only evidence of the cause of her death was the fact that her *foot was found* between one of the rails and the planking in a worn space;<sup>70</sup> where the employés of a railway company, in charge of a locomotive and tender, backed the same upon a spur track, across a much travelled street crossing, without placing a *lookout* upon the tender, although the locomotive moved by gravitation and without noise other than the rumbling of the wheels, and there were other noises tending to prevent its approach from being heard, notwithstanding the customary signals were given before starting it across the street;<sup>71</sup> where the plaintiff drove his team across a track when those in charge of a train had an opportunity to see him and to stop the train, and, when nearly across, the gateman *lowered the gate*, preventing him from proceeding further, and the train struck the hind end of his sleigh;<sup>72</sup> where a train came round a curve, on a down grade, and approached a street crossing at a speed of twenty-five or thirty miles an hour, without checking its speed, the grade rendering it impossible to stop the train, and ran over the horse and vehicle of a traveller,—the presumption of negligence resulting in the injury to the property of the plaintiff not being rebutted;<sup>73</sup> where the train by which the traveller was killed was running at a rate of from fifteen to thirty miles an hour, without ringing its bell, and the track in the direction of the train was straight and level, and the persons in charge of the engine had an unobstructed view of from one hundred to three hundred yards, with nothing to prevent them from seeing the perilous situation of the traveller, and a train going at the rate of fifteen miles an hour could be stopped, with the proper appliances, in fifty feet, and the speed of the train in question was not checked until the collision occurred.<sup>74</sup>

§ 1700. **Illustrative Cases where there was no Evidence to Go to the Jury.**—On the other hand, *no evidence of negligence* has been dis-

<sup>70</sup> *Brown v. Pennsylvania R. Co.*, 15 Phila. (Pa.) 321.

<sup>71</sup> *Klotz v. Winona &c. R. Co.*, 68 Minn. 341; s. c. 71 N. W. Rep. 257.

<sup>72</sup> *Purinton v. Maine &c. R. Co.*, 78 Me. 569; s. c. 3 N. E. Rep. 397.

<sup>73</sup> *Central R. Co. v. Russell*, 75 Ga. 810. The opinion does not state whether or not the presumption was *statutory*.

<sup>74</sup> *Donohue v. St. Louis &c. R. Co.*, 91 Mo. 357; s. c. 6 West. Rep. 848 (two judges dissenting). And under the facts of the following cases: *Smedis v. Brooklyn &c. R. Co.*, 88 N. Y. 18 (night dark, no headlight, nor

bell, nor whistle, another train coming up another track sounding bell and whistle and making much noise with the exhaust of its engine, deceased found dead, etc.); *Berry v. Pennsylvania R. Co.*, 48 N. J. L. 141; s. c. 5 Cent. Rep. 111 (complicated state of evidence upon which seven judges against six held that it was error to nonsuit plaintiff); *Van Nostrand v. Long Island R. Co.*, 64 N. Y. St. Rep. 77. But compare *Lewis v. Long Island R. Co.*, 162 N. Y. 12; rev'g s. c. 51 N. Y. Supp. 558; 30 App. Div. (N. Y.) 410.



covered in the fact that a traveller was injured at a crossing in consequence of the *breaking in two of a train*, which, so far as the evidence showed, was wholly *fortuitous*;<sup>75</sup> nor in the bare fact that a traveller was killed at a crossing by a train running at the rate of ten miles an hour and making the usual signals;<sup>76</sup> nor in the fact that a traveller was struck by a train upon a crossing in the night-time, which was running at a proper rate of speed, with brakemen and lights in their places, and while the bell was being rung;<sup>77</sup> nor in the fact that, at the time of the accident, the train was backing toward the crossing, and the deceased heedlessly approached and entered upon the track and was killed,—the only theory upon which liability was claimed being based on an improbable guess;<sup>78</sup> nor in the fact that a foot traveller attempted to cross the track at a street crossing, immediately behind an engine, which, after moving ahead ten feet, reversed and went back in obedience to a signal, with its bell ringing, striking him;<sup>79</sup> nor where a man drove upon the track without paying any attention to the signal of the flagman or to his calls to stop and back his team, and the flagman gave him no invitation to go forward, and there was no neglect of the ordinary and necessary precautions on the part of the other servants of the company;<sup>80</sup> nor where the statutory signals were given, and a proper lookout was kept, and when the traveller first came into view from behind an obstruction, alarm whistles were sounded, the brakes promptly and effectively applied, and all possible means employed to avert the collision, which nevertheless took place.<sup>81</sup>

<sup>75</sup> *Buster v. Humphreys*, 34 Fed. Rep. 507.

<sup>76</sup> *Harris v. Minneapolis &c. R. Co.*, 33 Minn. 459.

<sup>77</sup> *Bohan v. Milwaukee &c. R. Co.*, 61 Wis. 391.

<sup>78</sup> *Mehegan v. New York &c. R. Co.*, 125 N. Y. 768; s. c. 26 N. E. Rep. 936; 36 N. Y. St. Rep. 188. Nor in the fact that a boy was first seen at some distance from a crossing, and, when next seen, appeared to be rolling or dragged under a car located at about the middle of the train: *Ogden v. Pennsylvania R. Co. (Pa.)*, 23 W. N. C. 191; s. c. 16 Atl. Rep. 353 (no off. rep.).

<sup>79</sup> *Sullivan v. Pennsylvania R. Co. (Pa.)*, 5 Cent. Rep. 862 (no off. rep.).

<sup>80</sup> *Diekman v. Morgan's &c. Steamship Co.*, 40 La. An. 787; s. c. 5 South. Rep. 76.

<sup>81</sup> *Artenberry v. Southern R. Co.*, 103 Tenn. 266; s. c. 52 S. W. Rep. 873. Liability of *contractors* employed in building a railroad, *to the railroad company*, for their negligence in injuring a traveller at a highway crossing: *Dallas &c. R. Co. v. Able*, 72 Tex. 150; s. c. 9 S. W. Rep. 871.







## TITLE TWELVE.

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RAILWAY INJURIES AT OTHER PLACES  
THAN HIGHWAY CROSSINGS.







## TITLE TWELVE.

### RAILWAY INJURIES AT OTHER PLACES THAN HIGHWAY CROSSINGS.

#### CHAPTER

- LIV. Injuries to Trespassers and Licensees on  
Railway Tracks and Premises, . . . . §§ 1705-1730.
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or Licensee after Discovering his Peril, . §§ 1734-1744.
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#### CHAPTER LIV.

#### INJURIES TO TRESPASSERS AND LICENSEES ON RAILWAY TRACKS AND PREMISES.

##### SECTION

1705. Railway company under no ob-  
ligation to provide in ad-  
vance against the possibil-  
ity of injury to trespassers.

##### SECTION

1706. Not bound to take special pre-  
cautions, or keep a special  
lookout, or give special  
warnings in anticipation of  
trespassers.



## 2 Thomp. Neg.] STEAM RAILWAY INJURIES NOT AT CROSSINGS.

| SECTION   | SECTION   |
|---|---|
| 1707. Not bound to give signals, display lights, etc., in anticipation of trespassers.  | 1718. Who are trespassers and bare licensees within the meaning of these rules.                           |
| 1708. Nor maintain any particular equipment, run at any particular speed, etc.  | 1719. Who are not trespassers and bare licensees within the meaning of these rules.                       |
| 1709. No duty to trespasser until his presence becomes known.   | 1720. Circumstances which do not amount to a license to establish footways upon or across railway tracks. |
| 1710. Or until there is reasonable ground to believe that the trespasser is in peril.   | 1721. Care demanded of the railway company in keeping such crossings safe for trespassers.                |
| 1711. Doctrine that railway company is liable where, by the exercise of reasonable care, it might become aware of the presence of the trespasser in time to avoid injuring him. | 1722. Doctrine that railway company owes no special duty to bare licensees.                               |
| 1712. This doctrine makes the company liable for failing to keep a reasonable lookout for trespassers.  | 1723. Further of this doctrine.   |
| 1713. Doctrine that company is liable for injuries to trespasser only in case of gross, reckless, wanton, or willful negligence.  | 1724. Doctrine that railway company does owe a special duty to bare licensees.                            |
| 1714. What constitutes gross, reckless, wanton, or willful negligence, within the meaning of this rule.   | 1725. Duty to use care in favor of persons using a railway track as a footpath.                           |
| 1715. What is not gross, reckless, wanton or willful negligence within the meaning of this rule.  | 1726. Duty of special care where people are to be expected on the track.                                  |
| 1716. Injuries to trespassers coming suddenly upon the track.   | 1727. Effect of statutory duty to give signals with reference to the safety of trespassers.               |
| 1717. Injuries to trespassers in making the "running" or "flying switch."   | 1728. Neglect of statutory precautions must have been the proximate cause of the injury.                  |
|   | 1729. Duty toward trespassers under the Tennessee statute.  |
|   | 1730. Questions of evidence in the case of injuries to trespassers and licensees.                         |

§ 1705. **Railway Company under no Obligation to Provide in Advance against the Possibility of Injury to Trespassers.**<sup>1</sup>—With reference to the degree of care which the law imposes upon railroad companies to avoid injuring trespassers upon their tracks and other grounds, the author finds that, since the first edition of this work was

<sup>1</sup> This section is cited in §§ 1537, 1848, 1858, 1887, 1914, 1958, 2026, 1560, 1563, 1570, 1711, 1712, 1715, 2087, 2325.  
1722, 1723, 1728, 1739, 1791, 1846,



written, the judicial decisions have, for the most part, been converging toward certain lines of agreement, bringing their conclusions into harmony with the theories on which nearly all of them proceed when dealing with the subject of the care required by the owners or occupiers of real property towards persons coming thereon. We have seen that the owner or occupier of real property is not bound to prepare or use his premises, or conduct his business, in any particular way for the protection of trespassers, of uninvited persons, or, in general, of anyone coming upon his premises without his invitation, express or implied; but such persons take the premises as they find them, and must look out for their own safety, subject, however, to the rule that the owner or occupier will not be held blameless if he injures them through negligence after discovering them in an exposed position on his premises, or if he inflicts upon them while there a wanton or malicious injury.<sup>2</sup> A corporation operating a line of railway certainly does not stand in a worse position in respect of this rule of law, than that of the mere private owner; but if there is any distinction between the two, he stands in a more favorable position. The private owner stands upon his own rights merely, and those rights are merely private rights; but the railway company represents the rights of the public. Its road is, in a large sense, a public highway, and subject to public regulation. In operating it, it represents the right of the public to a reasonable, cheap, safe and rapid transit. It is not to be tolerated that this right should be limited and burdened by the acts of mere trespassers, intruders and intermeddlers. This doctrine has been very strongly stated by saying: "Except at crossings, where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril;"<sup>3</sup> and yet more tersely in the language of the same court in an earlier case: "The law insists upon a clear track."<sup>4</sup> This view follows the policy of the English statute upon this subject,<sup>5</sup> making it a penal offense willfully to trespass upon the line of a railway. And the reason for so positive a ruling is found in the strict accountability to which railway companies are held as carriers of goods and of passengers.<sup>6</sup> This view is also emphasized by a class of decisions about to be considered, which are to the effect that a railroad company is not bound to take special precautions or to give *special warnings* in anticipation of the possibility of trespassers being upon its track.<sup>7</sup> In short,

<sup>2</sup> Vol. I, § 945, *et seq.*

<sup>3</sup> *Mulherrin v. Delaware &c. R. Co.*, 81 Pa. St. 366.

<sup>4</sup> *Railroad Co. v. Norton*, 24 Pa. St. 465.

<sup>5</sup> 3 & 4 Vict., c. 97, § 16.

<sup>6</sup> *Louisville &c. R. Co. v. Howard*, 82 Ky. 212.

<sup>7</sup> *Post*, § 1706; *Savannah &c. R. Co. v. Chaney*, 101 Ga. 420; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 1; 28 S. W. Rep. 1001; *Chicago &c. R. Co.*



a railway company owes no duty to a mere trespasser upon its tracks, in its yards, or upon its ground, of doing or refraining from acts which will facilitate his trespass or render it safe; such as providing any particular machinery or appliance for his benefit; or, when not aware of his presence, giving cautionary signals to warn him of the approach of its trains, provided it exercises ordinary care after seeing him.<sup>8</sup>

**§ 1706. Not Bound to Take Special Precautions, or Keep a Special Lookout, or Give Special Warnings in Anticipation of Trespassers.<sup>9</sup>—**

The railroad company, then, both in its own right and in the right of the public, has the right to a clear track; and it has the right to assume that this right will be respected by third persons. It is not, any more than any other land owner is, bound to take special precautions or to give special warnings in anticipation of the possibility of this right being violated,—in other words, in anticipation of the possibility of trespassers being upon its tracks. It is, for example, under no obligation to maintain a *special lookout* upon its lines, or within its yards for the protection of mere trespassers who may possibly be there, but who have no right to be there.<sup>10</sup> Nor does a *rule* of a railway company, requiring a *lookout* to be maintained for the protection of its passen-

v. Stube, 15 Ill. App. 39 (injury at a street crossing — engine without light showing in what direction it was moving).

<sup>8</sup>Toomey v. Southern &c. R. Co., 86 Cal. 374; s. c. 24 Pac. Rep. 1074; 10 L. R. A. 139; 42 Alb. L. J. 475; Candelaria v. Atchison &c. R. Co., 6 N. M. 266; s. c. 48 Am. & Eng. Rail. Cas. 565; 27 Pac. Rep. 497; Hyde v. Missouri &c. R. Co., 110 Mo. 272; s. c. 19 S. W. Rep. 483 (trespasser in railroad yard used as thoroughfare, but without consent of railway company, injured by a freight train moving without signals other than brakemen's lanterns); Akers v. Chicago &c. R. Co., 58 Minn. 540; s. c. 60 Am. & Eng. Rail. Cas. 30; 60 N. W. Rep. 669 (trespasser in railroad yard injured by failure of company to block "frogs" as required by statute).

<sup>9</sup>This section is cited in §§ 1705, 1725, 1728, 1752, 1753, 1760, 1776, 2106.

<sup>10</sup>Georgia &c. R. Co. v. Ross, 100 Ala. 490; s. c. 14 South. Rep. 282; Houston &c. R. Co. v. Smith, 77 Tex. 179; s. c. 13 S. W. Rep. 972; Carrington v. Louisville &c. R. Co., 88

Ala. 472; s. c. 41 Am. & Eng. Rail. Cas. 543; 6 South. Rep. 910; Columbus &c. R. Co. v. Wood, 86 Ala. 164; s. c. 5 Rail. & Corp. L. J. 500; 5 South. Rep. 463; Ward v. Southern &c. R. Co., 25 Ore. 433; s. c. 23 L. R. A. 715; 36 Pac. Rep. 166; St. Louis &c. R. Co. v. Bishop, 14 Tex. Civ. App. 504; s. c. 37 S. W. Rep. 764; Hale v. Columbia &c. R. Co., 34 S. C. 292; s. c. 13 S. E. Rep. 537; Rome R. Co. v. Tolbert, 85 Ga. 447; s. c. 11 S. E. Rep. 849; Baltimore &c. R. Co. v. Pletz, 61 Ill. App. 161; Eastern &c. R. Co. v. Powell, 17 Ky. L. Rep. 1051; s. c. 33 S. W. Rep. 629 (no off. rep.); Embury v. Louisville &c. R. Co., 18 Ky. L. Rep. 434; s. c. 36 S. W. Rep. 1123 (no off. rep.); Peirce v. Walters, 164 Ill. 560; s. c. 45 N. E. Rep. 1068; aff'g 63 Ill. App. 562; Western &c. R. Co. v. Kehoe, 83 Md. 434; s. c. 28 Chicago Leg. News 423; 35 Atl. Rep. 90; Dull v. Cleveland &c. R. Co., 21 Ind. App. 571; s. c. 1 Repr. 676; 52 N. E. Rep. 1013; Kirtley v. Chicago &c. R. Co., 65 Fed. Rep. 386; Cleveland &c. R. Co. v. Phillips, 24 U. S. App. 489; s. c. 12 C. C. A. 618; Nicholson v. Erie R. Co., 41 N. Y. 525; Philadelphia &c.



gers and employés, give a right of action on the ground of negligence to a trespasser who is injured through the neglect to comply with it.<sup>11</sup>

§ 1707. **Not Bound to Give Signals, Display Lights, etc., in Anticipation of Trespassers.**<sup>12</sup>—It is not bound to give *signals* by ringing its bell or blowing its whistle in anticipation that trespassers may come

R. Co. v. Hummell, 44 Pa. St. 375; Duff v. Allegheny Valley R. Co., 91 Pa. St. 458; s. c. 36 Am. Rep. 375; Toomey v. Southern &c. R. Co., 86 Cal. 374; s. c. 10 L. R. A. 139; 24 Pac. Rep. 1074; Mulherrin v. Delaware &c. R. Co., 81 Pa. St. 366; Wright v. Boston &c. R. Co., 142 Mass. 296; Morrissey v. Eastern R. Co., 126 Mass. 377; s. c. 30 Am. Rep. 386; Baltimore &c. R. Co. v. State, 62 Md. 479; s. c. 50 Am. Rep. 233; Cauley v. Pittsburgh &c. R. Co., 95 Pa. St. 398; s. c. 40 Am. Rep. 664; Illinois &c. R. Co. v. Godfrey, 71 Ill. 500; s. c. 22 Am. Rep. 112; Masser v. Chicago &c. R. Co., 68 Iowa 602 (engineer not bound to keep a lookout for trespassers); Louisville &c. R. Co. v. Vittitoe, 19 Ky. L. Rep. 612; s. c. 41 S. W. Rep. 269 (no off. rep.); Sheehan v. St. Paul &c. R. Co., 76 Fed. Rep. 201; s. c. 22 C. C. A. 121; 46 U. S. App. 498; Felton v. Aubrey, 74 Fed. Rep. 350; s. c. 20 C. C. A. 436; 43 U. S. App. 278; St. Louis &c. R. Co. v. Bennett, 69 Fed. Rep. 525, 530; s. c. 16 C. C. A. 300, 680; 32 U. S. App. 621, 630 (continued trespasses do not raise implied license to use track); Verner v. Alabama &c. R. Co., 103 Ala. 574; s. c. 15 South. Rep. 872; St. Louis &c. R. Co. v. Warren, 65 Ark. 619; s. c. 13 Am. & Eng. Rail. Cas. (N. S.) 739; 48 S. W. Rep. 222 (child ran in front of a freight train backing upon the track; question was whether it was a duty of the trainmen to keep a lookout); Price v. Philadelphia &c. R. Co., 84 Md. 506; s. c. 36 L. R. A. 213; 36 Atl. Rep. 263 (engineer failed to see a drunken man sitting on the track where it was straight and nearly level for several miles, and company not liable); East Tenn. &c. R. Co. v. Baker, 94 Ala. 632; Louisville &c. R. Co. v. Black, 89 Ala. 313; s. c. 45 Am. & Eng. Rail. Cas. 38; 8 South. Rep. 246; Givens v. Kentucky &c. R. Co. (Ky.), 12 Ky. L. Rep. 950; 15 S. W. Rep. 1057 (no off. rep.); Illinois &c. R. Co. v. Frelka, 9 Ill. App. 605;

Hepfel v. St. Paul &c. R. Co., 49 Minn. 263; s. c. 51 N. W. Rep. 1049; East Tennessee &c. R. Co. v. Fain, 12 Lea (Tenn.) 35 (no duty to keep a lookout for trespasser, but caution must be exercised after his presence is discovered). Compare Masser v. Chicago &c. R. Co., 68 Iowa 602; Frazer v. South &c. R. Co., 81 Ala. 185; Corrington v. Louisville &c. R. Co., 88 Ala. 472; Houston &c. R. Co. v. Smith, 77 Tex. 179; Louisville &c. R. Co. v. Black, 89 Ala. 313; Givens v. Kentucky &c. R. Co. (Ky.), 15 S. W. Rep. 1057 (not off. rep.); Burg v. Chicago &c. R. Co., 90 Iowa 106; Ward v. Southern Pac. Co., 25 Or. 433; s. c. 23 L. R. A. 715; Verner v. Alabama &c. R. Co., 103 Ala. 574; South &c. Alabama R. Co. v. Williams, 65 Ala. 74; Bullock v. Wilmington &c. R. Co., 105 N. C. 180; Galveston &c. R. Co. v. Hewitt, 67 Tex. 473; Gunn v. Ohio River R. Co., 42 W. Va. 676; s. c. 36 L. R. A. 575; Thomas v. Chicago &c. R. Co., 103 Iowa 649; s. c. 39 L. R. A. 399; St. Louis &c. R. Co. v. Bishop, 14 Tex. Civ. App. 504. See also Smith v. Norfolk &c. R. Co., 114 N. C. 728; s. c. 25 L. R. A. 287, and note; Pickett v. Wilmington &c. R. Co., 117 N. C. 616; s. c. 30 L. R. A. 257. It has been held that compliance with a city ordinance requiring that "when a locomotive engine is used within the limits of the city, a man shall ride on the front of the locomotive engine when going forward, and when going backward on the tender, not more than twelve inches from the bed of the road," is not due to persons walking on the private way of the railroad company, at an uninhabited point and not at a street crossing, although in a path used by the public with the silent acquiescence of the company: Baltimore &c. R. Co. v. State, 62 Md. 479; s. c. 50 Am. Rep. 233.

<sup>11</sup> Burg v. Chicago &c. R. Co., 90 Iowa 106; s. c. 57 N. W. Rep. 680.

<sup>12</sup> This section is cited in §§ 1778, 1783, 1823.



upon its track, in front of its locomotive or cars.<sup>13</sup> In a jurisdiction where the railway company is not liable for injuries to trespassers upon its tracks, except in case of willful or wanton negligence, a failure on its part to have a platform or furnish a light when needed, or to give the cautionary signals, or to keep a proper lookout, is simple negligence insufficient to render it liable to a person guilty of contributory negligence who is struck by a train.<sup>14</sup> Nor is a railway company rendered liable for killing a trespasser upon its track outside of a highway crossing, upon a dark night when his presence could not be discovered by the trainmen, from the mere fact that the engine drawing the train was in a reversed position, and had no headlight or cow-catcher on the tender, and that the bell was not rung or the whistle blown at the crossing from which the train was coming, and that the train was a special train,<sup>15</sup> though it may be under the duty of giving such warnings upon seeing a trespasser exposed to danger upon its track. For example, the failure to give the customary signals on approaching a crossing is not negligence in respect of trespassers coming upon or using the track outside of the crossing.<sup>16</sup> Nor, according to one view, is a railway company under any obligation to give signals of the moving of its engines and cars in its yard for the benefit of an *infant* trespasser therein.<sup>17</sup> Nor will a railway company be liable to one injured while attempting to cross its tracks at a place other than a public crossing, by reason of the fact that the *safety gates* provided at the crossing were *not closed*, and that a *watchman* stationed there gave no *warning*,<sup>18</sup> nor will the failure of the company to blow the steam *whistle* or ring the bell at a crossing constitute negligence with respect to a trespasser on its track at a point other than the crossing.<sup>19</sup>

**§ 1708. Nor Maintain Any Particular Equipment, Run at Any Particular Speed, etc.**—Nor is a railway company bound to maintain any particular kind of *equipment* which will enable it speedily to stop

<sup>13</sup> *Fulp v. Roanoke & c. R. Co.*, 114 N. C. 697; s. c. 19 S. E. Rep. 362; *Guenther v. St. Louis & c. R. Co.*, 95 Mo. 286; s. c. 18 S. W. Rep. 371; 14 West. Rep. 735; *Toomey v. Southern & c. R. Co.*, 86 Cal. 374; s. c. 24 Pac. Rep. 1074; 10 L. R. A. 139; 42 Alb. L. J. 475; *Shackleford v. Louisville & c. R. Co.*, 84 Ky. 43; s. c. 4 Am. St. Rep. 189; *Louisville & c. R. Co. v. Vittitoe*, 19 Ky. L. Rep. 612; s. c. 41 S. W. Rep. 269 (no off. rep.).

<sup>14</sup> *Ensley R. Co. v. Chewning*, 93 Ala. 24; s. c. 9 South. Rep. 458.

<sup>15</sup> *Toomey v. Southern & c. R. Co.*,

86 Cal. 374; s. c. 10 L. R. A. 139; 42 Alb. L. J. 475; 24 Pac. Rep. 1074.

<sup>16</sup> *Shackleford v. Louisville & c. R. Co.*, 84 Ky. 43; s. c. 4 Am. St. Rep. 189.

<sup>17</sup> *McDermott v. Kentucky & c. R. Co.*, 93 Ky. 408; s. c. 14 Ky. L. Rep. 437; 54 Am. & Eng. Rail. Cas. 121; 12 Rail. & Corp. L. J. 299; 20 S. W. Rep. 380.

<sup>18</sup> *Matthews v. Philadelphia & c. R. Co.*, 161 Pa. St. 28; s. c. 28 Atl. Rep. 936; 34 W. N. C. 199.

<sup>19</sup> *Louisville & c. R. Co. v. Vittitoe*, 19 Ky. L. Rep. 612; s. c. 41 S. W. Rep. 269 (no off. rep.).



its trains for the mere protection of trespassers upon its track.<sup>20</sup> Nor does a railway company owe any duty to mere trespassers upon its tracks, right of way or other grounds, in respect of the *speed of its trains*;<sup>21</sup> nor does it become liable to such persons for an injury which might not have happened if its train had been running at a *lower rate of speed*, although it was running at a rate of speed in excess of that limited by a municipal ordinance.<sup>22</sup>

§ 1709. **No Duty to Trespasser until his Presence Becomes Known.**<sup>23</sup>—Under the foregoing doctrine the railroad company stands under no duty to take special precautions to avoid injuring a trespasser upon its track or grounds until the presence of the trespasser becomes known.<sup>24</sup> It is a part of this doctrine that the mere failure of the trainmen, by the use of reasonable care, to discover the trespasser in time to avoid injuring him will not render the railroad company

<sup>20</sup> *Smith v. Norfolk & C. R. Co.*, 114 N. C. 728; s. c. 19 S. E. Rep. 863, 923; *Toomey v. Southern & C. R. Co.*, 86 Cal. 374; s. c. 24 Pac. Rep. 1074; 10 L. R. A. 139; 42 Alb. L. J. 475.

<sup>21</sup> *Holland v. Sparks*, 92 Ga. 753; s. c. 18 S. E. Rep. 990; *Shackleford v. Louisville & C. R. Co.*, 84 Ky. 43; s. c. 4 Am. St. Rep. 189.

<sup>22</sup> *Prewitt v. Eddy*, 115 Mo. 283; s. c. 54 Am. & Eng. Rail. Cas. 138; 21 S. W. Rep. 742; *Masser v. Chicago & C. R. Co.*, 68 Iowa 602. Nor will a railway company be liable to one who was injured while officiously assisting its employés to run a *hand car*, the latter having no authority to invite him to assist in operating it: *Eastern & C. R. Co. v. Powell*, 33 S. W. Rep. 629; s. c. 17 Ky. L. Rep. 1051 (no off. rep.). It necessarily follows from the foregoing premises, that a railroad company is not bound to the same degree of care in regard to mere strangers who are unlawfully on its premises that it owes to passengers conveyed by it: *Reary v. Louisville & C. R. Co.*, 40 La. An. 32; s. c. 8 Am. St. Rep. 497; 8 South. Rep. 390. Where the plaintiff's intestate went upon the defendant's premises, and stood behind the end of cars on a side track, whereby the plaintiff's intestate was killed, the court held that he had no right, by such concealment, to impose extra vigilance upon the companies' servants, beyond what would have been required had he not been there: *Lehey v. Hudson & C. R. Co.*, 4 Robt. (N. Y.) 204.

<sup>23</sup> This section is cited in § 1770.

<sup>24</sup> *St. Louis & C. R. Co. v. Monday*, 49 Ark. 257; s. c. 4 S. W. Rep. 782; *Williams v. Kansas City & C. R. Co.*, 96 Mo. 275; s. c. 9 S. W. Rep. 573; *State v. Baltimore & C. R. Co.*, 69 Md. 494; s. c. 16 Atl. Rep. 210; 18 Md. L. J. 792; *Baltimore & C. R. Co. v. State*, 69 Md. 551; s. c. 16 Atl. Rep. 212; *International & C. R. Co. v. Kuehn*, 70 Tex. 582; s. c. 18 S. W. Rep. 484; *Norfolk & C. R. Co. v. Harman*, 83 Va. 553; s. c. 18 S. E. Rep. 251; *East Tennessee & C. R. Co. v. Fain*, 12 Lea (Tenn.) 35; *Gherkins v. Louisville & C. R. Co.*, 17 Ky. L. Rep. 201; s. c. 30 S. W. Rep. 651 (no off. rep.); *Texas & C. R. Co. v. Breadow*, 90 Tex. 26; s. c. 5 Am. & Eng. Rail. Cas. (N. S.) 483; 36 S. W. Rep. 410; *Haley v. Kansas City & C. R. Co.*, 113 Ala. 640; s. c. 21 South. Rep. 357; *Louisville & C. R. Co. v. Wade*, 18 Ky. L. Rep. 549; s. c. 36 S. W. Rep. 1125; 5 Am. & Eng. Rail. Cas. (N. S.) 271 (no off. rep.); *Sinclair v. Chicago & C. R. Co.*, 133 Mo. 233; s. c. 3 Am. & Eng. Rail. Cas. (N. S.) 269; 34 S. W. Rep. 76; *Thomas v. Chicago & C. R. Co.*, 103 Iowa 649; s. c. 72 N. W. Rep. 783; 39 L. R. A. 399; 9 Am. & Eng. Rail. Cas. (N. S.) 854; *White v. New York & C. R. Co.*, 65 Hun (N. Y.) 621; s. c. 47 N. Y. St. Rep. 174; 20 N. Y. Supp. 6; *Cleveland & C. R. Co. v. Tartt*, 99 Fed. Rep. 369 (or had reasonable ground to believe that injury would result unless progress of train should be arrested).



liable.<sup>25</sup> Succinctly stated, this doctrine is that a railway company is not liable for injury to a trespasser upon its track or grounds, if no duty or care in his favor is omitted, after becoming aware of his danger,<sup>26</sup> or unless its servant could have avoided injuring him by the exercise of reasonable care, after discovering his exposed position.<sup>27</sup> It follows that it will not be enough to charge the railway company with liability under this rule that the trespasser *might have been* seen by the engineer in time to have avoided injuring him, but it must be made to appear that he *was* so seen.<sup>28</sup> It necessarily follows that the failure of a railroad engineer to try immediately to stop the train on observing a trespasser on the track in danger, will not render the company liable for his death, where the train could not have been stopped in time to avert the accident after the engineer first discovered him.<sup>29</sup> In respect of this rule that the railway company is not imputable with negligence for failing to discover a trespasser upon its track in time to avoid injuring him, it has been held that there is no difference between an adult and an *infant trespasser*;<sup>30</sup> but this, as we shall see,<sup>31</sup> is more doubtful; though the doctrine has been well applied in a case where an *intoxicated* person went to sleep upon a railway track, with the conclusion that the company was not liable unless its servants, after seeing his peril, failed to exercise reasonable care to avoid injuring him.<sup>32</sup>

<sup>25</sup> Texas &c. R. Co. v. Roberts, 2 Tex. Civ. App. 111; s. c. 20 S. W. Rep. 960; Brown v. St. Louis &c. R. Co., 52 Ark. 120; s. c. 12 S. W. Rep. 203.

<sup>26</sup> Raines v. Chesapeake &c. R. Co., 39 W. Va. 50; s. c. 24 L. R. A. 226; 19 S. E. Rep. 565.

<sup>27</sup> Virginia Midland R. Co. v. Barksdale, 82 Va. 330; Shackelford v. Louisville &c. R. Co., 84 Ky. 43; s. c. 4 Am. St. Rep. 189; Glass v. Memphis &c. R. Co., 94 Ala. 581; 10 South. Rep. 215.

<sup>28</sup> Texas &c. R. Co. v. Nicholson (Tex. Civ. App.), 22 S. W. Rep. 770 (no off. rep.); Robinson v. Louisville &c. R. Co., 15 Ky. L. Rep. 626; s. c. 24 S. W. Rep. 625 (no off. rep.).

<sup>29</sup> Sinclair v. Chicago &c. R. Co., 133 Mo. 233; s. c. 3 Am. & Eng. Rail. Cas. (N. S.) 269; 34 S. W. Rep. 76.

<sup>30</sup> Nolan v. New York &c. R. Co., 53 Conn. 461; Felton v. Aubrey, 74 Fed. Rep. 350; s. c. 43 U. S. App. 278; 20 C. C. A. 436.

<sup>31</sup> Post, § 1809.

<sup>32</sup> Smith v. Fordyce (Tex.), 18 S. W. Rep. 663. In a jurisdiction where the doctrine hereafter stated (post,

§ 1713) prevails which exonerates the railway company from liability for injuring a trespasser, in the absence of gross or willful negligence, it has been held that a recovery can not be had for the death of a trespasser on a railroad track by being struck by a locomotive, unless the engineer in charge saw her in time to avoid the accident, and was guilty of gross negligence, evincing a reckless disregard of human life, in not attempting to avoid the collision: Studley v. St. Paul &c. R. Co., 48 Minn. 249; s. c. 51 N. W. Rep. 115: So, it has been held that the company is not liable for the death of a trespasser struck by a train on a bridge, unless the latter could not safely get off, and the engineer saw him and made no effort to avoid injury: White v. New York &c. R. Co., 65 Hun (N. Y.) 621; s. c. 47 N. Y. St. Rep. 174; 20 N. Y. Supp. 6. No liability for an injury to a trespasser from being struck by a timber projecting from a freight car, where none of the employes of the defendant knew that the trespasser was in danger from the timber:



§ 1710. **Or until there is Reasonable Ground to Believe that the Trespasser is in Peril.**—It has been held that it is not essential to the liability of a railroad company for injuries to a trespasser upon the track, that the employés should actually know of the danger to which he is exposed in time to avoid the accident, but it is enough if they have sufficient notice or belief to put a prudent man on the alert.<sup>33</sup>

§ 1711. **Doctrine that Railway Company is Liable where, by the Exercise of Reasonable Care, it might Become Aware of the Presence of the Trespasser in Time to Avoid Injuring Him.**<sup>34</sup>—We come now to the doctrine which is held by a few courts only and which seems to be incapable of vindication upon principle. Ignoring the doctrine already stated,<sup>35</sup> that a railway company, representing the right of the public to a safe and rapid transit, is not bound to anticipate trespassers on its track, in its yards or upon its grounds, and to make special provisions for the protection of trespassers, thereby subjecting its business to unreasonable burdens and limitations,—these courts assimilate the rights of a trespasser to those of a person lawfully upon the track, in the yard or upon the grounds of the company, and hold that the company will become liable in damages for killing or injuring the trespasser if, by the exercise of ordinary or reasonable care, it *might have become aware* of his position of peril in time, by the exercise of the like care in giving warning signals or in checking or stopping its train, to avoid killing or injuring him.<sup>36</sup> The rule of diligence required by the courts which pursue this theory is said to be,

Louisville &c. R. Co. v. Wade, 18 Ky. L. Rep. 549; s. c. 36 S. W. Rep. 1125; 5 Am. & Eng. Rail. Cas. (N. S.) 371 (no off. rep.).

<sup>33</sup> Tucker v. Norfolk &c. R. Co., 92 Va. 549; s. c. 24 S. E. Rep. 229.

<sup>34</sup> This section is cited in §§ 1725, 1748, 1753, 1766, 1770, 1777, 1791, 1846.

<sup>35</sup> *Ante*, § 1705.

<sup>36</sup> Guenther v. St. Louis &c. R. Co., 108 Mo. 18; s. c. 18 S. W. Rep. 846; Davis v. Kansas City &c. R. Co., 46 Mo. App. 180; Duncan v. Missouri &c. R. Co., 46 Mo. App. 198; Lynch v. St. Joseph &c. R. Co., 111 Mo. 601; s. c. 19 S. W. Rep. 1114; Harlan v. St. Louis &c. R. Co., 65 Mo. 22; s. c. 6 Cent. L. J. 229; 1 Thomp. Neg., 1st ed., 439. See also Brown v. Hannibal &c. R. Co., 50 Mo. 561; Isabel v. Hannibal R. Co., 60 Mo. 475; s. c. 2 Cent. L. J. 590; Finlayson v. Chicago &c. R. Co., 1 Dill. (U. S.) 579;

Baltimore &c. R. Co. v. State, 36 Md. 366; Baltimore &c. R. Co. v. State, 33 Md. 542; Lake Shore &c. R. Co. v. Dodmer, 139 Ill. 596; s. c. 29 N. E. Rep. 692; Houston &c. R. Co. v. Harvin (Tex. Civ. App.), 54 S. W. Rep. 629; Yoakum v. Mettash (Tex. Civ. App.), 26 S. W. Rep. 129 (no off. rep.) (bound to exercise reasonable care to protect one who is discovered in a helpless condition upon the track, and also to discover whether he is in such condition); Herbert v. Southern R. Co., 121 Cal. 227; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 94; 53 Pac. Rep. 651; Hoskins v. Louisville &c. R. Co., 17 Ky. L. Rep. 78; s. c. 30 S. W. Rep. 643 (no off. rep.); Guenther v. St. Louis &c. R. Co., 95 Mo. 286; s. c. 14 West. Rep. 735; 8 S. W. Rep. 371; Lay v. Richmond &c. R. Co., 106 N. C. 404; s. c. 42 Am. & Eng. Rail. Cas. 110; 11 S. E. Rep. 412.



such as a person of ordinary prudence and caution would commonly exercise under like circumstances, and varying as the known probability of danger may vary along the different portions of the route.<sup>37</sup> This rule is applied with undoubted propriety in cases where the person injured is lawfully on the track,—as, for example, where the track is laid upon a public highway, to the use of which the general travelling public have a right, in common with the railroad company.<sup>38</sup> It is also applied, although the person killed or injured is guilty of contributory negligence, where the failure to discover him is due to the neglect of a precaution required by a valid city ordinance, such as having a man stationed at the end of a train to give danger signals when the train is backing;<sup>39</sup> or where the negligence of the company consists in the violation of a precaution enjoined by statute, as the failure to maintain a constant lookout upon the locomotive.<sup>40</sup>

§ 1712. This Doctrine Makes the Company Liable for Failing to Keep a Reasonable Lookout for Trespassers.<sup>41</sup>—Contrary to the general doctrine as to trespassers upon railway tracks,<sup>42</sup> the doctrine of the preceding section makes the company liable for an injury to a trespasser, bare licensee or other person on its tracks, from being run over by its train, when the injury could have been averted by keeping a vigilant lookout for persons on the track in front of the train.<sup>43</sup> The

<sup>37</sup> *Houston &c. R. Co. v. Harvin* (Tex. Civ. App.), 54 S. W. Rep. 629. In Missouri, this doctrine seems to have been applied indifferently without reference to the question whether the person in the exposed position on the railway track, or in the railway yard, was a trespasser or rightfully there; though one decision is found in that State which exonerates the company unless the railway company could have avoided the injury, by the exercise of reasonable care, *after discovering* the person on the track. In the case referred to, an instruction that one injured while wrongfully upon a railroad track can recover, if its employes could have avoided the accident by the exercise of reasonable care, should have been qualified by adding “after discovering the danger of the injured person on the track at the time, or if by exercise of ordinary diligence such peril might have been discovered in time to have avoided injuring him”: *Dahlstrom v. St. Louis &c. R. Co.*, 96 Mo. 99; s. c. 15 West. Rep. 85; 8 S. W.

Rep. 777. This rule, as applied in the same jurisdiction, entirely ignores the contributory negligence of the person killed or injured in placing himself in the position of danger, and holds the railway company liable, no matter how gross the negligence of the former may be.

<sup>38</sup> *Kelley v. Union &c. R. Co.*, 18 Mo. App. 151; s. c. affirmed 95 Mo. 279.

<sup>39</sup> *Dunkman v. Wabash &c R. Co.*, 95 Mo. 232; s. c. 10 West. Rep. 396; 4 S. W. Rep. 670.

<sup>40</sup> *East Tennessee &c. R. Co. v. Humphreys*, 12 Lea (Tenn.) 200.

<sup>41</sup> This section is cited in §§ 1748, 1777, 1791.

<sup>42</sup> *Ante*, § 1705.

<sup>43</sup> *Pickett v. Wilmington &c. R. Co.*, 117 N. C. 616; s. c. 30 L. R. A. 257; 23 S. E. Rep. 264; *Houston &c. R. Co. v. Sympkins*, 54 Tex. 615; *Gunn v. Ohio River R. Co.*, 42 W. Va. 676; s. c. 26 S. E. Rep. 546; 2 Chic. L. J. Wkly. 163; *East Tennessee &c. R. Co. v. Pratt*, 85 Tenn. 9; *Columbus &c. R. Co. v. Wood*, 86 Ala. 164; *Germann v. Suburban &c. Transit Co.*,



care and vigilance to be exercised in the discharge of this duty is said to vary according to the danger, and with reference to all the surrounding circumstances.<sup>44</sup> Some of the decisions emphasize the necessity of performing this duty at places where the railway track is frequently used by pedestrians;<sup>45</sup> or where, by reason of the locality or surrounding circumstances, those in charge of the train ought reasonably to apprehend that the track may not be clear of human beings,<sup>46</sup>—as, for example, in *cities* where persons are likely to be found trespassing upon the track.<sup>47</sup> If this duty to keep a lookout exists, it follows that the railway company can not excuse its negligence in failing to perform it, by reason of having voluntarily or negligently disabled itself from so doing. For example, the railway company may become liable for the death of a trespasser on its track, who is killed by being struck by an engine running with its tender in front, where

37 N. Y. St. Rep. 360; Knoxville &c. R. Co. v. Acuff, 92 Tenn. 26; Chesapeake &c. R. Co. v. Perkins, 20 Ky. L. Rep. 608; s. c. 47 S. W. Rep. 259 (no off. rep.); Crawford v. Southern R. Co. (Ga.), 33 S. E. Rep. 826; Pharr v. Southern R. Co., 119 N. C. 751; s. c. 26 S. E. Rep. 149; Texas &c. R. Co. v. Phillips (Tex. Civ. App.), 37 S. W. Rep. 620 (no off. rep.) (where track had been used as a pathway for several years); Texas &c. R. Co. v. Watkins, 88 Tex. 20; s. c. 29 S. W. Rep. 232; Louisville &c. R. Co. v. Thornton, 117 Ala. 274; s. c. 23 South. Rep. 778; Gulf &c. R. Co. v. Burleson (Tex. Civ. App.), 26 S. W. Rep. 1107 (no off. rep.). The doctrine indicated by the above text is reasserted by many courts, without much reference to the question whether the person exposed to danger on a railway track is lawfully or unlawfully there: Virginia Midland R. Co. v. White, 84 Va. 498; s. c. 5 S. E. Rep. 573 (traveller regarded as a licensee); Louisville &c. R. Co. v. Krey, 16 Ky. L. Rep. 797; s. c. 29 S. W. Rep. 869 (no off. rep.) (injury at a highway crossing); Fulp v. Roanoke &c. R. Co., 120 N. C. 525; s. c. 27 S. E. Rep. 74; Bullock v. Wilmington &c. R. Co., 105 N. C. 180; s. c. 42 Am. & Eng. Rail. Cas. 93; 10 S. E. Rep. 988 (portable engine stalled upon defective crossing—engineer paid no attention to signals given by plaintiff, but ran over it); Powell v. Missouri &c. R. Co., 59 Mo. App. 626 (plaintiff a licensee

—doctrine of the case doubtful); Savannah &c. R. Co. v. Shearer, 58 Ala. 672; South. &c. R. Co. v. Sullivan, 59 Ala. 272. It was held that where a standing car was started down grade on a side-track, in an endeavor to couple it to a train, this duty was performed by having a watchman standing by the cars for the purpose of making a coupling: East Tennessee &c. R. Co. v. King, 81 Ala. 177.

<sup>44</sup> Gulf &c. R. Co. v. Burleson (Tex. Civ. App.), 26 S. W. Rep. 1107 (no off. rep.).

<sup>45</sup> Texas &c. R. Co. v. Watkins, 88 Tex. 20; s. c. 29 S. W. Rep. 232; Texas &c. R. Co. v. Phillips (Tex. Civ. App.), 37 S. W. Rep. 620 (no off. rep.).

<sup>46</sup> Crawford v. Southern R. Co., 106 Ga. 870; s. c. 33 S. E. Rep. 826.

<sup>47</sup> Chesapeake &c. R. Co. v. Perkins, 20 Ky. L. Rep. 608; s. c. 47 S. W. Rep. 259 (no off. rep.). One court which has been severe toward trespassers on railway tracks, has conceded so much in favor of humanity as to hold that although a brakeman in charge of a car *disconnected from an engine* may be under no duty to keep a special lookout for persons on the track, it is his duty to save such persons if practicable, where a proper lookout for obstructions of any kind, which he is required to keep, would have revealed such person: Louisville &c. R. Co. v. Thornton, 117 Ala. 274; s. c. 23 South. Rep. 778.



the dangerous position of the trespasser might have been seen by those in charge of the engines, but for the *absence of a proper light* in front of the tender.<sup>48</sup>

§ 1713. **Doctrine that Company is Liable for Injuries to Trespasser only in Case of Gross, Reckless, Wanton or Willful Negligence.**<sup>49</sup>—From the decisions of every court a doctrine may be extracted which is very similar to that which is generally applied by the courts in cases where trespassers and bare licensees upon the premises of another are injured through defects in those premises, or through the mode in which the owner or occupier conducts his business thereon.<sup>50</sup> This doctrine is that where a trespasser or bare licensee exposes himself to the risk of being run over upon a railway track or in a railway yard, and is killed or injured, there can be no recovery against the railway company unless it is made to appear that the accident was the result of willful misconduct, or of negligence or recklessness so gross as to amount, in theory of law, to willful misconduct.<sup>51</sup> This doctrine is frequently so applied as to balance the negligence of the railway company against the contributory negligence of the person on the track, with the conclusion that where both are guilty of simple or ordinary negligence, there can be no recovery: allowing a recovery only where the contributory negligence of the deceased was the failure to exercise ordinary care, and the negligence of the railway company was *gross, wanton or willful*.<sup>52</sup> Under the rule

<sup>48</sup> Lloyd v. Albemarle &c. R. Co., 118 N. C. 1010; s. c. 24 S. E. Rep. 805. Where the body of the plaintiff's intestate was found just after the defendant's freight train had passed, lying a short distance from the bridge of the defendant, it was held, in the absence of direct proof as to the position and conduct of the intestate at the time of the killing, that whether the intestate was a trespasser or a licensee, it was his duty to keep out of the way of a passing train, and that his failure to do so would be considered the proximate cause of his death, in the absence of testimony tending to show that the engineer could, by proper watchfulness, have seen him lying apparently insensible on the track, or in peril upon the bridge, in time to have avoided the injury; and that the engineer would not have been negligent in acting on the assumption that the intestate would step off or get off the track

in time to avert the injury: Norwood v. Raleigh &c. R. Co., 111 N. C. 236; s. c. 16 S. E. Rep. 4. It is scarcely necessary to add that the liability of a railroad company for injuries to one walking on its track is not affected by its failure to keep a lookout, where the engineer *saw him* when several hundred yards away: Newport News &c. R. Co. v. Deuser, 17 Ky. L. Rep. 113; s. c. 29 S. W. Rep. 973 (no off. rep.).

<sup>49</sup> This section is cited in §§ 1739, 1747, 1748, 1760, 1770, 1774, 1775, 1805, 1826, 1848, 1890, 1997, 2121.

<sup>50</sup> Vol. I, § 945, *et seq.*

<sup>51</sup> Rome R. Co. v. Barnett, 89 Ga. 718; s. c. 15 S. E. Rep. 639; Western &c. R. Co. v. Meigs, 74 Ga. 857; Illinois &c. R. Co. v. Beard, 49 Ill. App. 232.

<sup>52</sup> Rome R. Co. v. Barnett, 89 Ga. 718; s. c. 15 S. E. Rep. 639; Louisville &c. R. Co. v. Markee, 103 Ala. 160; s. c. 15 South. Rep. 511; Georgia &c. R. Co. v. Ross, 100 Ala.



conceding the right of a free track to a railway company, in the event of an injury to a trespasser upon its line, it can be held liable only for an act which is wanton,<sup>53</sup> or for such gross negligence in the management of its line, as is equivalent to intentional mischief.<sup>54</sup> In some of these jurisdictions the rule is even more severely stated,—holding that there can be no recovery for the death or injury of the trespasser on the ground that the negligence of the railway company was *gross*, but that in order to a recovery its negligence must have been *willful*.<sup>55</sup>

490; s. c. 14 South. Rep. 282; Parker v. Pennsylvania Co., 134 Ind. 673; s. c. 34 N. E. Rep. 504; Baltimore &c. R. Co. v. Sherman, 30 Gratt. (Va.) 602; Roden v. Chicago &c. R. Co., 133 Ill. 72; s. c. 24 N. E. Rep. 425; aff'g s. c. 30 Ill. App. 354; Southeast &c. R. Co. v. Stotlar, 43 Ill. App. 94; Pittsburgh &c. R. Co. v. Judd, 10 Ind. App. 232; s. c. 36 N. E. Rep. 775; Craig v. Mt. Carbon Co., 45 Fed. Rep. 448; Spicer v. Chesapeake &c. R. Co., 34 W. Va. 514; s. c. 11 L. R. A. 385; 45 Am. & Eng. Rail. Cas. 28; 12 S. E. Rep. 553; Tennis v. Interstate &c. R. Co., 45 Kan. 503; s. c. 25 Pac. Rep. 876; Cumberland &c. R. Co. v. State, 73 Md. 74; s. c. 20 Atl. Rep. 785; Savannah &c. R. Co. v. Meadows, 95 Ala. 137; s. c. 10 South. Rep. 141; Sabine &c. R. Co. v. Hanks, 2 Tex. Civ. App. 306; s. c. 21 S. W. Rep. 947; St. Louis &c. R. Co. v. Bennett, 69 Fed. Rep. 525, 530; s. c. 16 C. C. A. 300, 680; 32 U. S. App. 621, 630; Robards v. Wabash R. Co., 84 Ill. App. 477; Campbell v. Kansas City &c. R. Co., 55 Kan. 536; s. c. 40 Pac. Rep. 997; Ivens v. Cincinnati &c. R. Co., 103 Ind. 27; Lake Erie &c. R. Co. v. Brafford, 15 Ind. App. 655; s. c. 43 N. E. Rep. 882; rehearing denied 44 N. E. Rep. 551; Chicago &c. R. Co. v. Bednorz, 57 Ill. App. 309; Powell v. Missouri &c. R. Co., 59 Mo. App. 626; Barstow v. Old Colony R. Co., 143 Mass. 532; s. c. 3 N. E. Rep. 747; Chicago &c. R. Co. v. Hedges, 105 Ind. 398; s. c. 3 West. Rep. 892; Louisville &c. R. Co. v. Haynes, 47 Ark. 497; Kentucky &c. R. Co. v. Gastineau, 83 Ky. 119; Masser v. Chicago &c. R. Co., 68 Iowa 602; Huff v. Chesapeake &c. R. Co. (W. Va.), 35 S. E. Rep. 866.

<sup>53</sup> Railroad Company v. Norton, 24 Pa. St. 465; Heil v. Glanding, 42 Pa. St. 493; Jeffersonville &c. R. Co. v. Goldsmith, 47 Ind. 43; Lafayette

&c. R. Co. v. Huffman, 28 Ind. 287; Pittsburgh &c. R. Co. v. Collins, 87 Pa. St. 405; s. c. 7 Reporter 153; Pennsylvania Co. v. Sinclair, 62 Ind. 301; s. c. 7 Reporter 558; Cincinnati &c. R. Co. v. Eaton, 53 Ind. 307; Evansville &c. R. Co. v. Wolf, 59 Ind. 89. *Contra*, Hicks v. Pacific R. Co., 64 Mo. 430, 437 (boy injured by piece of timber protruding from passing train, held not a trespasser, but rule of text considered and denied).

<sup>54</sup> Carroll v. Minnesota R. Co., 13 Minn. 30; Green v. Erie R. Co., 11 Hun (N. Y.) 333; Herring v. Wilmington &c. R. Co., 10 Ired. (N. C.) 402; Kenyon v. New York &c. R. Co., 5 Hun (N. Y.) 479; Donaldson v. Milwaukee &c. R. Co., 21 Minn. 293. Contrary to the foregoing, one court has held that a railroad company is bound to the exercise of *ordinary care* to prevent injuring a trespasser on its track; and the avoidance of a willful injury is not the measure of its duty: Felch v. Concord R. Co., 66 N. H. 318; s. c. 29 Atl. Rep. 557. That a railway company is liable for the death of a trespasser on its track, only in case of gross negligence on its part, or its exercise of so slight a degree of care as to evidence a disregard of or indifference to the safety of deceased, and not because it failed to exercise "extraordinary diligence" to stop the train after discovering deceased on the track,—see Sabine &c. R. Co. v. Hanks, 2 Tex. Civ. App. 306; s. c. 21 S. W. Rep. 947.

<sup>55</sup> Terre Haute &c. R. Co. v. Graham, 95 Ind. 286; s. c. 48 Am. Rep. 719; Palmer v. Chicago &c. R. Co., 112 Ind. 250; s. c. 11 West. Rep. 676; 14 N. E. Rep. 70; Gregory v. Cleveland &c. R. Co., 112 Ind. 385; s. c. 11 West. Rep. 825; 14 N. E. Rep. 228; Pennsylvania Co. v. Meyers, 136 Ind. 242; s. c. 36 N. E. Rep. 32;



§ 1714. What Constitutes Gross, Reckless, Wanton, or Willful Negligence, within the Meaning of this Rule.<sup>56</sup>—Gross, reckless, wanton, or willful negligence on the part of the defendant, denounced by this rule, which renders the contributory negligence of the person killed or injured immaterial,—is displayed where the trespasser is seen on the track in front of the advancing engine, and no effort is made to avoid running over him, or to reduce the danger to him, but the engine is driven forward upon him, with a reckless indifference to his fate.<sup>57</sup>

§ 1715. What is not Gross, Reckless, Wanton, or Willful Negligence within the Meaning of this Rule.<sup>58</sup>—It seems entirely plain, from what has preceded,<sup>59</sup> that the failure of the railway company to take special precautions beforehand in anticipation of the presence of trespassers upon the tracks, or in its yards,—as by stationing a lookout, or giving danger signals, or running at a diminished rate of speed, or using care to discover trespassers in positions of danger,—can not be ascribed to it as gross, reckless, wanton or willful negligence within the meaning of the rule under consideration, since the great mass of holdings refuses to impute simple negligence by reason of such acts.

Craig v. Mt. Carbon Co., 45 Fed. Rep. 448. But it seems that, in Michigan, there can be a recovery, notwithstanding the contributory negligence of the plaintiff, where the negligence of the defendant was gross: Battishill v. Humphreys, 64 Mich. 514; Chicago &c. R. Co. v. Smith, 46 Mich. 504.

<sup>56</sup> This section is cited in §§ 1747, 1748, 1848, 1890, 2000.

<sup>57</sup> Thus, where two men were seen on the track in front of an advancing train, and one of them risked his own safety in an effort to signal the other, who was ahead of him, to leave the track, if the engineer saw this signal, he was guilty of a willful wrong in not using reasonable exertion to stop the train; but otherwise if he did not see it: Palmer v. Chicago &c. R. Co., 112 Ind. 250; s. c. 11 West. Rep. 676; 14 N. E. Rep. 70. A railroad company is deemed guilty of "willful negligence" under a statute of Kentucky where its agents, servants and employés, operating a train, see a person on or near its track in a dangerous position in sufficient time to stop the train, and fail to do so: Coleman v. Kentucky &c. R. Co., 33 S. W. Rep. 945 (no off. rep.). A subordinate court in

Ohio has seemingly well held that the crew of a railroad train moving in city streets at a higher speed than allowed by ordinance is guilty of *gross negligence amounting to willfulness* in making no effort to stop the train, although they can easily do so, where they see and hear a man running toward the train calling on them to stop, because teams are on the track which can not be got out of the way in time to prevent a collision: Pittsburgh &c. R. Co. v. Kelly, 12 Ohio C. C. 341; s. c. 1 Ohio C. D. 662 (aff'd without report). In Illinois, while the doctrine of *comparative negligence* was in operation, it was held that the fact of a person being *slightly drunk* on a railroad track did not constitute such negligence as to prevent a recovery of damages for injuring him, when compared with the gross and criminal negligence of the defendant in running a "dark train" at night, at a high rate of speed, without signaling its approach: Indianapolis &c. R. Co. v. Galbreath, 63 Ill. 436.

<sup>58</sup> This section is cited in §§ 1739, 1747, 1748, 1771, 1848.

<sup>59</sup> *Ante*, § 1705, *et seq.*; Vol. I, § 945, *et seq.*



For example, negligence of this degree and kind is not shown where, after discovering the peril of the person on the track, the engineer adopts the means which he believes to be best to stop the train, although there may be a more effective method of stopping it;<sup>60</sup> nor by the mere failure of the railway company to comply with the requirements of a statute, as to blowing the whistle, or ringing the bell at short intervals while moving through the limits of an incorporated town or city;<sup>61</sup> nor by the fact that a railroad company shifted a car upon its track by its own momentum, where there was a brakeman upon the roof of the car, whose duty it was to check its speed when it should be on the desired switch track;<sup>62</sup> nor where the uncontradicted evidence was that the engineer, when he noticed that the trespasser did not leave the track, gave the alarm signals and used every means to stop the train, and had no intention or desire of injuring him, but tried to avoid doing so;<sup>63</sup> nor where a trespasser was injured in attempting to cross a trestle, the view being unobstructed for one hundred and fifty yards, and the fireman was seen on the engine looking out of the window toward him,—this being deemed insufficient to show knowledge of his perilous position in time to avert the danger, but deemed to show simple negligence merely, for which no recovery could be had;<sup>64</sup> nor by the fact that the trainmen could have seen the trespasser walking upon the track at such a distance away that they might have stopped the train in time to avoid injuring him, where he negligently remained on the track, in the absence of other evidence tending to show that the injury was willfully inflicted;<sup>65</sup> nor by the fact that the employés of a railway company knowingly and intentionally placed on a car a plank extending over a footpath, causing the death of a trespasser on the track,—but otherwise if the employés in charge of the train knew that the path was constantly used by pedestrians, but nevertheless failed to keep a lookout for such persons;<sup>66</sup> nor by the fact that the engineer failed to stop his engine when rapidly approaching a path used by the public for convenience in crossing the track, although he saw some one ten feet from the track walking as though he intended to cross it, where there was nothing to obstruct the view of the pedestrian.<sup>67</sup> The Supreme Court of Alabama places this species of negli-

<sup>60</sup> *Louisville &c. R. Co. v. Markee*, 103 Ala. 160; s. c. 15 South. Rep. 511. And see, as to mistakes of judgment, *ante*, §§ 1381, 1669; *post*, § 1739.

<sup>61</sup> *Savannah &c. R. Co. v. Meadows*, 95 Ala. 137; s. c. 10 South. Rep. 141.

<sup>62</sup> *Illinois &c. R. Co. v. Beard*, 49 Ill. App. 232.

<sup>63</sup> *Pittsburgh &c. R. Co. v. Judd*,

10 Ind. App. 232; s. c. 36 N. E. Rep. 775.

<sup>64</sup> *Georgia &c. R. Co. v. Ross*, 100 Ala. 490; s. c. 14 South. Rep. 282.

<sup>65</sup> *Pennsylvania Co. v. Myers*, 136 Ind. 242; s. c. 36 N. E. Rep. 32.

<sup>66</sup> *Haley v. Kansas City &c. R. Co.*, 113 Ala. 640; s. c. 21 So. Rep. 357.

<sup>67</sup> *Birmingham R. &c. Co. v. Bowlers*, 110 Ala. 328; s. c. 20 South. Rep. 345.



gence on a common footing with criminality, by holding in substance that, in order to constitute it, the *mens rea* of the criminal law must exist; or, more fully stated, that, in order to constitute wantonness or willfulness on the part of railroad employes in omitting to use proper preventive efforts after discovery of the peril of another, they must have been conscious, at the time, that they were omitting to use the means at hand which the circumstances reasonably required to avert the injury; and omissions resulting from want of skill, or other unintentional causes, which in law would constitute negligence, are not such conscious or intentional wrongs as are equivalent to wantonness or willfulness.<sup>68</sup>

§ 1716. **Injuries to Trespassers Coming Suddenly upon the Track.**—We have already seen that, even in the case of injuries at highway crossings, where the person injured is not a trespasser, if, without making fair use of his faculties by looking and listening, he thrusts himself suddenly upon the track in front of a train approaching so near that a collision can not be avoided by checking or stopping the train, his death or injury will be ascribed to his own negligence, and not to the failure of those in charge of the train to give the proper or statutory signals.<sup>69</sup> For stronger reasons, the same rule will apply in the case of one who appears on a railway track as a trespasser or as a bare licensee, at a place other than a highway,—in short, at any place where travellers have no right to be.<sup>70</sup> It is scarcely necessary to add that the railway company will not be put at a greater disadvantage in the application of this rule, from the fact that the person coming upon the track had voluntarily disabled himself from hearing or seeing the approaching train, as by having his ears muffled;<sup>71</sup> or by having his

<sup>68</sup> Alabama R. & Co. v. Burgess, 114 Ala. 587; s. c. 22 South. Rep. 169. I have used the expression *mens rea*, because no better one came into my mind, although its use is criticised by as eminent an authority as the late Mr. Justice Stephen: Reg. v. Tolson, 23 Q. B. Div. 168, 186. In this case Mr. Justice Stephen says—erroneously the present writer thinks—that “in the case of manslaughter, it may mean forgetting to notice a signal.” This is precisely what it does not mean in the sense in which I here use it. It was held, *Spiers v. Bennett* (1896), 2 Q. B. 65, that to an offense against the statute relating to the adulteration of food, etc., the defense of *mens rea* is not good, except where

the act uses the word “willfully.” It is more in this sense that I use the expression *mens rea* in the above text.

<sup>69</sup> *Ante*, § 1665, *et seq.*

<sup>70</sup> *Boyd v. Wabash & W. R. Co.*, 105 Mo. 371; s. c. 16 S. W. Rep. 909; *Ivy v. East Tennessee & C. R. Co.*, 88 Ga. 71; s. c. 13 S. E. Rep. 947; *Louisville & C. R. Co. v. Hairston*, 97 Ala. 351; s. c. 12 South. Rep., 299 (traveller stepped aside to let train pass and again stepped on the track and was run over by a detached portion of the train following, in making the “flying switch”).

<sup>71</sup> *Ante*, § 1659; *High v. Carolina & C. R. Co.*, 112 N. C. 385; s. c. 17 S. E. Rep. 79.



view obstructed by an umbrella;<sup>72</sup> since these acts tend only to confirm the imputation of negligence against him. So, it has been held that the negligence of a railroad company in failing to use proper appliances and employ competent servants, which results in the *breaking in two of a moving train*, will not warrant a recovery against it by one who, after waiting for the first section of the train to pass him, and without observing the approach of the other section, steps on the track in front of it and is injured; because such negligence is not the proximate cause of the injury.<sup>73</sup> So, manifestly the railway company will not be liable where the traveller steps so suddenly in front of the train that those in charge of it have not time to avoid injuring him, and fail to warn him of his danger, in the exercise of the best care which they can bestow.<sup>74</sup>

§ 1717. **Injuries to Trespassers in Making the "Running" or "Flying Switch."**<sup>75</sup>—This method of switching has been a fruitful source of accidents to persons either walking upon the track or coming upon it at public crossings. It consists in detaching a portion of the train to be switched off while the cars are in motion, the fore part of the train advancing with increased speed, while the rear portion proceeds more slowly, and at the proper point is switched off upon the desired track. Or the locomotive, without being coupled, may back up a car or a portion of a train with considerable speed, and, giving it a parting kick, send it off alone in any desired direction. This practice has been frequently condemned by the courts.<sup>76</sup> It is so inherently dangerous that many courts have held the railway company liable, on the footing of negligence, even to trespassers injured in this way without any other fault or negligence on their part than the fact of being upon the track. The turning loose of cars in swift motion upon a switch track, where men are constantly passing and repassing upon a footpath,

<sup>72</sup> *Blight v. Camden &c. R. Co.*, 143 Pa. St. 10; s. c. 28 W. N. C. 172; 22 Pitts. L. J. (N. S.) 4; 48 Phila. Leg. Int. 362; 21 Atl. Rep. 995.

<sup>73</sup> *Patton v. East Tennessee &c. R. Co.*, 89 Tenn. 370; s. c. 12 L. R. A. 184; 15 S. W. Rep. 919.

<sup>74</sup> For example, it has been ruled that no negligence is shown on the part of a railroad company in failing to stop a second portion of a train before a section foreman who stepped upon the track in front of it was injured, when there was not time to go to the brake and set it after he stepped upon the track, or in failing to give a warning signal where the brakeman on the front

car hallooed to him as soon as he stepped upon the track, and had no other means of warning him: *Haden v. Sioux City &c. R. Co.* (Iowa), 48 N. W. Rep. 733.

<sup>75</sup> This section is cited in §§ 1785, 1819, 1820, 1850, 1960.

<sup>76</sup> *Ante*, §§ 1695, 1696; *Chicago &c. R. Co. v. Dignan*, 56 Ill. 487; *Haley v. New York &c. R. Co.*, 7 Hun (N. Y.) 84; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269; *Sutton v. New York &c. R. Co.*, 66 N. Y. 243; *Illinois &c. R. Co. v. Baches*, 55 Ill. 379; *Murphy v. Chicago &c. R. Co.*, 45 Iowa 661; s. c. 38 Iowa 539; *Illinois &c. R. Co. v. Hammer*, 72 Ill. 347; s. c. 85 Ill. 526.



though not a street crossing or a public thoroughfare, has justly been held to be actionable negligence, and the court repudiated the suggestion that in such a case persons crossing the track are not entitled to any care for their safety, until their danger is seen.<sup>77</sup> So, another court has held that where a train is broken in two, leaving the trainmen on the rear section, which is permitted to continue on its way by force of gravitation, the company owes the duty, even to trespassers on its tracks, to station *lookouts* in such position on the moving cars that they can watch the tracks ahead of them, and warn persons thereon of the danger, a neglect of which duty may render the company liable for an injury to a person on the track caused thereby.<sup>78</sup> Another court, which certainly has not been tender toward trespassers upon railway tracks, has held that to detach cars from the locomotive, and put it out of the power of the trainmen to stop or control them, starting them down a grade to a point where a person is on the track with his back toward the train, where it is the duty of the company to lookout even for trespassers, and to allow the cars so detached to continue a speed in excess of that limited by a municipal ordinance,—is such gross negligence as will render the company liable to the person thereby injured, although he was on the track as a trespasser, and was guilty of contributory negligence.<sup>79</sup> It was so held where a man attempting to cross a railway at a place other than a public crossing, after he had seen an engine pass and supposed that it was drawing the entire train, stepped upon the track and was killed by the remaining portion of the train which had been detached and allowed to run at a considerable speed into the town.<sup>80</sup>

**§ 1718. Who are Trespassers and Bare Licensees within the Meaning of these Rules.**<sup>81</sup>—Within the meaning of the foregoing

<sup>77</sup> St. Louis &c. R. Co. v. Crosnoe, 72 Tex. 79; s. c. 10 S. W. Rep. 342.

<sup>78</sup> Patton v. East Tennessee &c. R. Co., 89 Tenn. 370; s. c. 15 S. W. Rep. 919; 12 L. R. A. 184.

<sup>79</sup> Georgia &c. R. Co. v. O'Shields, 90 Ala. 29; s. c. 8 South. Rep. 248. See also International &c. R. Co. v. Brooks (Tex. Civ. App.), 54 S. W. Rep. 1056.

<sup>80</sup> Conley v. Cincinnati &c. R. Co., 89 Ky. 402; s. c. 11 Ky. L. Rep. 602; 41 Am. & Eng. Rail. Cas. 537; 12 S. W. Rep. 764. Contrary to the foregoing doctrine, one court has held that a railway company is not guilty of actionable negligence because of running over one who, in walking along its track, after stepping aside while an engine was passing, stepped back upon the track about 100 feet

in front of cars which were following the engine, it being impossible to stop the cars in time to avoid running upon him: Martin v. Georgia R. &c. Co., 95 Ga. 361; s. c. 22 S. E. Rep. 626. Nor, in the opinion of another court, was a railroad company guilty of reckless or wanton misconduct towards a trespasser, so as to render the defense of his being a trespasser, and of his being guilty of contributory negligence, unavailing, from the mere fact that it shunted a detached car forward by its own momentum, where there was a brakeman on the roof of it: Illinois &c. R. Co. v. Beard, 49 Ill. App. 232.

<sup>81</sup> This section is cited in §§ 1730, 1836.



principles, the status of a trespasser has been ascribed to one who goes upon the main line of a railway, not a part of the roadway of a public street or road, so that the engineer is under no special duty to lookout for him;<sup>82</sup> to one who walks along a railway track, laid on cross ties in an alley, but not embedded in the surface so as to be a part of the roadway;<sup>83</sup> to a passenger, wrongfully ejected from a railway train, who presumes to make use of the railway track for travel to his place of destination, although there is another safe and convenient route;<sup>84</sup> but at the same time such a person is not a trespasser from the time when he gets upon the track; on the contrary, the rule that a person who steps upon a railway track, except at a public crossing, does so at his peril, does not apply to him unless he remains upon the track longer than reasonably necessary for him to get off, since he gets upon the track without his own fault;<sup>85</sup> to persons living in the vicinity of a railway track who habitually use it for the purpose of walking on it, even though the company makes no objection to such use;<sup>86</sup> to one who, without license, walks, or stops to play upon a railway track;<sup>87</sup> to one who attempts to cross a series of railway tracks where the company has placed a post eight feet high with a board thereon marked "Dangerous. This is no thoroughfare. People crossing here will be trespassers," although people have been in the habit of crossing there, notwithstanding the warning;<sup>88</sup> to a policeman whose duty requires him to patrol railway tracks and keep tramps off the same, while walking thereon for his own convenience, on his way to enter upon the discharge of his duties at another place;<sup>89</sup> to a former employé of the railway company who goes across its yard without invitation;<sup>90</sup>

<sup>82</sup> *Louisville & C. R. Co. v. Hairston*, 97 Ala. 351.

<sup>83</sup> *Montgomery v. Alabama & C. R. Co.*, 97 Ala. 305; s. c. 12 South. Rep. 170.

<sup>84</sup> *Verner v. Alabama & C. R. Co.*, 103 Ala. 574; s. c. 15 South. Rep. 872; *Ham v. Delaware & C. Canal Co.*, 155 Pa. St. 548; s. c. 20 L. R. A. 682; 32 N. W. C. 335; 26 Atl. Rep. 757 (where it is held that a person wrongfully ejected from a railway train is bound to get off the track at the earliest practicable opportunity that a reasonable person would discover and seize).

<sup>85</sup> *Ham v. Delaware & C. Canal Co.*, *supra*.

<sup>86</sup> *Glass v. Memphis & C. R. Co.*, 94 Ala. 581; s. c. 10 South. Rep. 215; *Blanchard v. Lake Shore & C. R. Co.*, 126 Ill. 416; s. c. 18 N. E. Rep. 799.

<sup>87</sup> *Masser v. Chicago & C. R. Co.*, 68 Iowa 602.

<sup>88</sup> *Pulley v. Chicago & C. R. Co.*, 94 Iowa 565; s. c. 63 N. W. Rep. 328. To the same effect, see *Hyde v. Missouri & C. R. Co.*, 110 Mo. 272; s. c. 19 S. W. Rep. 483; *Paine v. Columbus & C. R. Co.*, 2 Ohio Dec. 264. The constitutional declaration that railroads are "public highways" (Mo. Const. 1875, art. 12, § 14), does not authorize the use of the tracks by foot travellers: *Hyde v. Missouri & C. R. Co.*, 110 Mo. 272; s. c. 19 S. W. Rep. 683. And this rule applies to employes passing along the track, while off duty, in disregard of such a warning: *International & C. R. Co. v. Brooks* (Tex. Civ. App.), 54 S. W. Rep. 1056.

<sup>89</sup> *Pennsylvania Co. v. Myers*, 136 Ind. 242; s. c. 36 N. E. Rep. 32.

<sup>90</sup> *Akers v. Chicago & C. R. Co.*, 58 Minn. 540; s. c. 60 Am. & Eng. Rail. Cas. 30; 60 N. W. Rep. 669.



to one who, voluntarily and unnecessarily, leaves the highway and proceeds along a railway track for the purpose of going around a freight train which would have cleared the crossing in a minute or two, although the person committing this grievous trespass upon the premises of the railway company, is a child and *non sui juris*;<sup>91</sup> to one who makes use of the depot grounds of a railway company as a public crossing, by entering them over a stile placed in the fence of the company by third persons at their own expense, and for their own convenience in reaching the station, without the consent, and notwithstanding the refusal of permission by the company;<sup>92</sup> to a yardmaster of one railway company, whose duties require him to go into the yard of another company to see whether there are cars there for his road, and who, with that purpose, climbs upon a side-ladder on a car of one of the trains of the latter company, which is going to its yard, and is there injured by a projecting switch-arm at the side of its track,—the view being that, in the absence of an express invitation by the latter company to ride as he does, he is a trespasser and can not recover for his injuries.<sup>93</sup>

<sup>91</sup> *Brague v. Northern &c. R. Co.* (Pa.), 43 Atl. Rep. 987.

<sup>92</sup> *Devoe v. New York &c. R. Co.* (N. J. L.), 43 Atl. Rep. 899.

<sup>93</sup> *Grunst v. Chicago &c. R. Co.*, 109 Mich. 342; s. c. 3 Det. L. N. 109; 67 N. W. Rep. 335; 5 Am. & Eng. Rail. Cas. (N. S.) 373. Continuing the subject of the above text, we find that the *status* of a trespasser has been ascribed to one who goes upon a railway track on being informed that the body of a railway employé is there, for the purpose of removing it, and remains on the track after discovering that there is no body there to be removed, at a place which is not a crossing, although it is sometimes used by pedestrians, for whose death the company is not liable, unless the injury was willfully and wantonly inflicted: *Eggman v. St. Louis &c. R. Co.*, 47 Ill. App. 507. To one who, in attempting to get across a railway track at a place other than a crossing, climbs between two cars constituting part of a train standing there, and is killed by falling between them, owing to a sudden starting of the train,—the company not being liable, although guilty of negligence in starting the train without warning: *Hall v. Cleveland &c. R. Co.*, 15 Ind. App. 496; s. c. 44 N. E. Rep. 489. And see *ante*, § 1674, *et seq.* To one who, engaged in loading stock for shipment upon cars standing on a side track, unnecessarily leaves his position between the tracks, and stands on the main track at a point where there is no public crossing, and where persons are not in the habit of passing,—with the conclusion that the trainmen are not bound to look out for his presence or to warn him of an intended movement of the standing locomotive: *Oatts v. Cincinnati &c. R. Co.*, 15 Ky. L. Rep. 87; s. c. 22 S. W. Rep. 330 (no off. rep.). To one who assists a station agent of one railway company, also employed by another company, to sell tickets and look after its freight business at a common station, in propelling a hand-car of the former company upon the tracks of the latter, where such agent has no authority to run the hand-car: *Eastern &c. R. Co. v. Powell*, 33 S. W. Rep. 629; s. c. 17 Ky. L. Rep. 1051 (no off. rep.). To a boy employed by the owner of stock to keep them off a railway track, who sits down at the end of a tie, at a point other than a highway crossing: *Louisville &c. R. Co. v. Vittitoe*, 41 S. W. Rep. 269; s. c. 19 Ky. L. Rep. 612 (no off. rep.). To one who walks upon a



§ 1719. Who are not Trespassers and Bare Licensees within the Meaning of these Rules.<sup>94</sup>—On the other hand, the courts have not ascribed the *status* of a trespasser or bare licensee to one who attempted to cross railway tracks laid through the streets of a city upon, or substantially upon, the level of the streets, although making the attempt at any point where it might suit his convenience, instead of going to a regular street crossing;<sup>95</sup> to the employés of a lumber company, for the mutual accommodation of which, and a railway company, a spur track has been laid through the grounds of the lumber company, while engaged on the spur track in removing a tramway which has been laid for the purpose of moving lumber across the track from the premises of the company;<sup>96</sup> to one who uses a platform constructed by a railway company where its tracks intersect a street, for the purpose of crossing from one side of the street to the other, such person not being a trespasser on the property or right of way of the railway company;<sup>97</sup> to a railway brakeman sent to flag a flying train, who either falls asleep or faints and becomes unconscious and is run over in that condition;<sup>98</sup> to a watchman who goes upon a track parallel and in close proximity to that of the company employing him, for the purpose of checking the numbers of cars standing on the track of his em-

railway track with another, although the whole country is covered with water: *Green v. Louisville & C. R. Co.* (Miss.), 12 South. Rep. 826 (no off. rep.). To one who walks upon a railway track, according to his custom, which is to use the track as a foot-way in going to and returning from his work: *O'Donnell v. Missouri & C. R. Co.*, 7 Mo. App. 190: To a boarding-house keeper who goes upon a platform of the railway company at a station solely on his own business, in which the company is in no way concerned, although he does so by invitation of an employé of the company who has no authority to give it in such matter: *Post v. Texas & C. R. Co.* (Tex. Civ. App.), 23 S. W. Rep. 708 (no off. rep.). To one who crosses on a railroad ferry boat in violation of the rules of the company against the carrying of passengers upon such boat, and who, after concluding his visit, again enters the company's yard and the boat, although the employés of the company directed him as to the way through the yard to the ferry landing: *Kansas City & C. R. Co. v. Cook*, 66 Fed. Rep. 115; s. c. 13 C. C. A. 364; 28 L. R. A. 181.

To one who crosses a railway track near a depot, at which a passenger train is standing, but at a place other than a highway crossing, for the purpose of meeting the telegraph operator of the railway company to deliver a message to him: *Illinois & C. R. Co. v. James*, 67 Ill. App. 649. In short, to one who goes upon a railway track at a point which forms no part of the public highway, but at which the company has the right to maintain its tracks and operate its trains, without license from the company to another upon its track at that point: *Collis v. New York & C. R. Co.*, 71 Hun 504; s. c. 55 N. Y. St. Rep. 82; 24 N. Y. Supp. 1090.

<sup>94</sup> This section is cited in § 2087.

<sup>95</sup> *Baltimore & C. R. Co. v. Cumberland*, 12 App. Cas. (D. C.) 598; s. c. aff'd 176 U. S. 232.

<sup>96</sup> *St. Louis & C. R. Co. v. Miles*, 79 Fed. Rep. 257; s. c. 49 U. S. App. 101; 24 C. C. A. 559.

<sup>97</sup> *Baltimore & C. R. Co. v. Anderson*, 85 Fed. Rep. 413; s. c. 56 U. S. App. 137; 29 C. C. A. 235.

<sup>98</sup> *Helton v. Alabama & C. R. Co.*, 97 Ala. 275; s. c. 12 South. Rep. 276.



ployer, in accordance with a custom generally recognized by the officers of both companies;<sup>99</sup> to one who goes upon a side track, for the purpose of seeking employment from a shipper of stock, to feed and water his stock, the reason being that he goes there upon business indirectly connected with the operation of the road, and has a right to be there, and consequently the company owes him a duty of active vigilance;<sup>100</sup> to an employé of one railway company who goes upon the track of another such company, under a custom which authorizes signals by the employés of other roads, to be made therefrom;<sup>101</sup> to the employés of a contractor engaged in repairing and building a railway, who are accustomed to pass across its tracks to and from a car from which their supplies are obtained;<sup>102</sup> to one who walks along a railway track to ascend steps which the railroad company maintained where the street ascended a bluff, the track being used by pedestrians as a thoroughfare at all hours, although the company had put up signs forbidding all persons except employés to go upon the tracks;<sup>103</sup> to a boy seven years old who attempts to cross between cars standing upon a highway crossing;<sup>104</sup> to the driver of a team, in the business of the company, who drives along a passageway in a railway yard, which is generally used by persons having business with the company, without any protest on the part of the company's servants;<sup>105</sup> to one who, in crossing a railway track, makes use of a footpath known to the railway officials to exist, and the use of which has not been objected to or obstructed by the company,—the conclusion being that he is entitled to all the rights and protection of one lawfully upon the track of the company;<sup>106</sup> to an employé of one railway company when engaged in transporting a car from the track of his employer to that of another company, under a custom to deliver cars upon such track in the usual course of business;<sup>107</sup> to persons who cross a railway track parallel to and not separated from a public street, for the purpose of approaching the station house, in the neighborhood of which there is no crossing, at a place where the tracks have been filled with cinders, so as to make a level place, which is used by the employés of the com-

<sup>99</sup> *Watts v. Richmond &c. R. Co.*, 89 Ga. 277; s. c. 15 S. E. Rep. 365.

<sup>100</sup> *Shebley v. Cincinnati &c. R. Co.*, 85 Ky. 224; s. c. 3 S. W. Rep. 157.

<sup>101</sup> *McMarshall v. Chicago &c. R. Co.*, 80 Iowa 757; s. c. 45 N. W. Rep. 1065.

<sup>102</sup> *Dempsey v. New York &c. R. Co.*, 81 Hun (N. Y.) 156; s. c. 62 N. Y. St. Rep. 686; 30 N. Y. Supp. 724.

<sup>103</sup> *International &c. R. Co. v.*

*Brooks* (Tex. Civ. App.), 54 S. W. Rep. 1056.

<sup>104</sup> *Philadelphia &c. R. Co. v. Layer*, 112 Pa. St. 414; s. c. 3 Cent. Rep. 381.

<sup>105</sup> *Reifsnnyder v. Chicago &c. R. Co.*, 90 Iowa 76; s. c. 57 N. W. Rep. 692.

<sup>106</sup> *Clampit v. Chicago &c. R. Co.*, 84 Iowa 71; s. c. 50 N. W. Rep. 673; 49 Am. & Eng. Rail. Cas. 468.

<sup>107</sup> *Turner v. Boston &c. R. Co.*, 158 Mass. 261; s. c. 33 N. E. Rep. 520.



pany and by the public generally in approaching the station,—the conclusion being that they are not trespassers, although a walk has been established by the company 600 feet away;<sup>108</sup> to one who, for a long time, has been permitted to use the track of a railway for the purpose of towing boats upon the river adjacent to it;<sup>109</sup> to a track repairer who is on the railway track, after the usual working hours, pursuant to the orders of his foreman;<sup>110</sup> to a person who passes diagonally across a railway at a street crossing, and in so doing walks upon the tracks, or who walks upon them in leaving the street at the crossing;<sup>111</sup> to a person who walks upon a railway track in a portion of a city not laid out into streets, where the tracks and the right of way of the company are habitually used by the public for a way to the streets, there being gates in the railway fence for that purpose;<sup>112</sup> to a person who walks upon railway tracks which pass through a town where the company makes a foot-way between the tracks for persons to walk, and also constructs foot bridges across a ditch which runs along the tracks from the houses facing the road and acquiesces in this use of the track by the public.<sup>113</sup>

§ 1720. **Circumstances which do not Amount to a License to Establish Footways upon or across Railway Tracks.**—We come now to a

<sup>108</sup> *Louisville &c. R. Co. v. Hirsch*, 69 Miss. 126; s. c. 13 South. Rep. 244.

<sup>109</sup> *Le May v. Missouri &c. R. Co.*, 105 Mo. 361; s. c. 16 S. W. Rep. 1049 (within the meaning of a statute).

<sup>110</sup> *Swadley v. Missouri &c. R. Co.*, 118 Mo. 268; s. c. 24 S. W. Rep. 140.

<sup>111</sup> *Fehnrich v. Michigan &c. R. Co.*, 87 Mich. 606; s. c. 49 N. W. Rep. 890.

<sup>112</sup> *Lynch v. St. Joseph &c. R. Co.*, 111 Mo. 601; s. c. 19 S. W. Rep. 1114.

<sup>113</sup> *Norfolk &c. R. Co. v. Carper*, 88 Va. 556; s. c. 16 Va. L. J. 29; 14 S. E. Rep. 328. Continuing an examination of the cases, we find that the *status* of the trespasser or bare licensee has not been ascribed to a section-hand injured while walking along the track, it being a question of fact for the jury and error for the court to instruct them that he was a trespasser: *Kingma v. Chicago &c. R. Co.*, 85 Ill. App. 138. To one who goes upon the grounds of a railway company for the purpose of passing around an engine and cars with which the company has un-

lawfully blocked a highway,—such person not being a trespasser while on such grounds, until there has been a reasonable opportunity to quit the same: *Mayer v. Chicago &c. R. Co.*, 63 Ill. App. 309; s. c. 1 Chic. L. J. Wkly. 149. To one who, in going to or returning from his work, makes use of the right of way of a railway company which others in his situation have been in the habit of using with the acquiescence of the company: *Chicago &c. R. Co. v. O'Neil*, 64 Ill. App. 623; s. c. 1 Chic. L. J. Wkly. 437. To a person approaching a railway by a trodden path, in the use of which by the public the railway company has acquiesced: *Larkin v. New York &c. R. Co.*, 46 N. Y. St. Rep. 658; s. c. 19 N. Y. Supp. 479. To a telegraph operator in the employ of the railway company, who goes upon its track to stop a train which has failed to obey his signal, in order to prevent a collision: *Illinois &c. R. Co. v. Mahan*, 17 Ky. L. Rep. 1200; s. c. 34 S. W. Rep. 16 (no off. rep.). Compare *Illinois &c. R. Co. v. James*, 67 Ill. App. 649.



class of decisions, some of them at variance with the doctrine of the preceding section, which are to the effect that a mere tacit or negative permission by a railway company for people to cross its tracks at a given place, does not amount to a license for them so to cross, so as to impose upon it any special measure of care for their protection, or to take them out of the category of trespassers or bare licensees.<sup>114</sup> A license so to use a railway track was not implied from the fact that an irregular path had been used by the public for a period reaching from 15 to 22 years, where there was no planking over the switch track which it crossed, and different directions were taken by different persons while using it,—these facts all tending to show that the path had not been prepared by the railway company with the intention that it should be used as a public way, and the court holding that a mere permission or license to cross the tracks was not tantamount to an invitation, which imposes special care on the company for the safety of the persons so crossing;<sup>115</sup> nor from the mere use of a path across a railway track outside of a street or highway crossing, for the purpose of reaching a depot, when the company had furnished safe and convenient means of access to the depot from the street, and there were no means of reaching the depot platform from the path in question;<sup>116</sup> nor by the fact that it is the habit of a railway company to stop its trains, upon being signaled, at a place where there is no station, to allow passengers to get on or off,—this not amounting to a license to persons *not intending* to get on or off a train to use the right of way as a means of passage.<sup>117</sup> Finally, it has been held in a Federal Court of Appeals,—as is seen by the preceding section, the Federal courts having been liberal in favor of the travelling public with respect to the doctrine here under consideration,—that a long, continuous and habitual use by the general public of a crossing over a railway track at a place other than a highway, must be established in order to create a presumption of an invitation on the part of the railway company to the public so to cross its track, or to imply a license from the railway

<sup>114</sup> *Wabash R. Co. v. Jones*, 163 Ill. 167; s. c. 44 Cent. L. J. 10; 45 N. E. Rep. 50; superseding 45 N. E. Rep. 813 (especially where the railroad company has operated its road but a short time); *St. Louis & C. R. Co. v. Bennett*, 69 Fed. Rep. 525, 530; s. c. 32 U. S. App. 621, 630; 16 C. C. A. 300, 680. See also *Louisville & C. R. Co. v. Miller*, 12 Ind. App. 414; s. c. 40 N. E. Rep. 539; *Brown v. Louisville & C. R. Co.*, 17 Ky. L. Rep. 145; s. c. 30 S. W. Rep. 639 (not to be rep.).

<sup>115</sup> *Wright v. Boston & C. R. Co.*, 142

Mass. 296; s. c. 2 N. E. Rep. 727. The reader will perceive a strict analogy between this decision and the holdings of the same court, with respect to the obligations of other owners of land toward persons coming upon it: Vol. I, § 946, note 6, cases there cited.

<sup>116</sup> *Heiss v. Chicago & C. R. Co.*, 103 Iowa 590; s. c. 72 N. W. Rep. 787.

<sup>117</sup> *Matson v. Port Townsend & C. R. Co.*, 9 Wash. 449, 529; s. c. 37 Pac. Rep. 705, 707.



company in favor of the public so to do, such as will put the company under a duty of taking special care for the safety of persons so crossing.<sup>118</sup> It seems to have been well held that a permissive acquiescence by a railway company in the use of its tracks and right of way by pedestrians is not sufficient to constitute an invitation to them so to use it, where the tracks are enclosed by fences on both sides, and trains in great numbers pass over them daily.<sup>119</sup> Another court, which has evidently given careful consideration to the question, has held that the path of travel across a railway *yard* by pedestrians must be confined to a certain and well defined way, and be continuous, frequent, and well established, in order to raise an inference of acquiescence in such use by the company, and to impose upon its employes the duty of anticipating that the path may be used by foot passengers when cars are moved across it, and the duty of exercising special care for their safety; and that the question whether they have in this manner, acquired an implied license to use the pathway must be submitted to a jury.<sup>120</sup> Following the backward motion of the pendulum, we find that it is held,—and there are several holdings of this kind noted in a preceding section,—that a license to use a railroad track may be inferred from facts and circumstances short of an actual invitation or consent on the part of the company.<sup>121</sup> And this doctrine is certainly not opposed to the analogies of the law; for ratifications, waivers and estoppels, to say nothing of the authority of agents and many other things of a contractual nature, are constantly proved by circumstances alone.

**§ 1721. Care Demanded of the Railway Company in Keeping such Crossings Safe for Trespassers.**—It seems to be going to a wild length to hold, as one court has done, that the fact that a railway company,—by mere negative acquiescence, by not keeping up a quarrel with the travelling public, so as to prevent them from using a particular portion of its track as a footway,—puts itself under the obligation of preparing that portion of its track as a footway for them, and of making it safe for them. The analogies of the law are to the effect that at most they are bare licensees and take the premises as they find them, and the proprietor is under no duty to prepare the premises in any particular way for their safety. A decision has already been noted, which makes the railway company liable for a cattle-guard on such a footpath, in-

<sup>118</sup> *Felton v. Aubrey*, 43 U. S. App. 278; 20 C. C. A. 436; s. c. 74 Fed. Rep. 350. <sup>120</sup> *Mason v. Chicago & C. R. Co.*, 89 Wis. 151; s. c. 61 N. W. Rep. 300.

<sup>119</sup> *Cleveland & C. R. Co. v. Adair*, 103 Iowa 649; s. c. 39 L. R. A. 399; 12 Ind. App. 569; s. c. 39 N. E. Rep. 672; rehearing denied 40 N. E. Rep. 822. <sup>121</sup> *Thomas v. Chicago & C. R. Co.*, 9 Am. & Eng. Rail. Cas. (N. S.) 854; 72 N. W. Rep. 789.



juring the licensee who used it.<sup>122</sup> And the fact that the railway company had blocked its track so as to invite the public to cross over its depot grounds from one end of a street which terminated against the railway track, to the end of a street on the opposite side of the track, which did not connect with the former street on a direct line,—did not oblige the company to keep open a passage way other or wider than that upon which it had invited travel by planking it; so that it was not liable for leaving a car standing upon its track adjacent to the highway, at which the horse of a traveller became frightened and ran away, causing her personal injury.<sup>123</sup>

§ 1722. **Doctrine that Railway Company Owes no Special Duty to Bare Licensees.**—The doctrine, already discussed, which exonerates the owners or occupiers of real property from any special care or duty with respect to the condition of such property for the benefit and protection of bare licensees, whose presence upon it they tolerate, but whom they do not invite to come upon it,<sup>124</sup> has been frequently applied with reference to railway companies; and the doctrine is manifestly capable of quite as strong an application in this relation, since such companies are engaged in the performance of public duties, representing public rights, and are entitled to freedom from interference in the performance of those duties. Many decisions are met with which proceed upon this principle, and which hold that, although a railway company may tolerate a succession of trespasses, as by allowing the public to cross their tracks at a particular place, where there is no public right of way, yet this does not amount to an invitation to the public to come upon their tracks and expose themselves to danger, and does not impose upon the railroad company the obligation of taking any special precautions in anticipation of the possible presence of members of the public at such places.<sup>125</sup> A fair expression of this doctrine is, that a railway company is under no obligation to protect a person on the track under an implied license to use its right of way,

<sup>122</sup> *Hansen v. Southern &c. R. Co.*, 105 Cal. 379; s. c. 38 Pac. Rep. 957. On the contrary, it has been held that a railway company is not liable for the death of one who had a license to use a path running along the edge of the railroad embankment, caused by the removal of a rock liable to fall on the railroad track, leaving the surface of the path unsupported, where its employés, who removed the rock, did not know that the path was left in a dangerous condition: *Norfolk &c.*

*R. Co. v. De Board*, 91 Va. 700; s. c. 22 S. E. Rep. 514; 29 L. R. A. 825.

<sup>123</sup> *O'Donnell v. Chicago &c. R. Co.*, 69 Iowa 102. That it is not negligence, as matter of law, for a railroad company to leave a space between its rails and the plank at a highway crossing through which the foot of a small child could pass,—see *Atchison &c. R. Co. v. Roemer*, 59 Ill. App. 93.

<sup>124</sup> Vol. I, § 945, *et seq.*

<sup>125</sup> *Ante*, § 1705; *Hanks v. Boston &c. R. Co.*, 147 Mass. 495; s. c. 18 N. E. Rep. 218; 7 N. Eng. Rep. 139.



by taking steps to prevent harm to such person, unless it has so acted as to mislead him; but that the extent of its duty is not to injure him wantonly or willfully; and that one who enters the *yard* of a railway company under a mere license, assumes the risk of all dangers which are caused by a natural and proper use of the tracks and trains.<sup>126</sup> Other courts express the doctrine differently, by saying that the mere fact that persons have frequently trespassed upon a railroad track, and that the company has resorted to no means to stop such trespasses, does not amount to a permission or license to use the track as a footpath.<sup>127</sup> The doctrine is better expressed by saying that an acquiescence in such a continued series of trespasses does not amount to an *invitation* on the part of the company for the public so to trespass, such as puts the company under special obligations to such trespassers. We have discovered in a former relation a very considerable difference of judicial opinion upon the question what constitutes an invitation to third persons to come upon the premises of an owner or occupier, in contradistinction from a bare license, or toleration of the presence of such persons.<sup>128</sup> The same question has arisen in this relation, and it has been held, but upon grounds which do not seem to be tenable, that a person having business with the freight department of a railroad company, injured by being struck by a car while standing on the track in the freight yard, is only a licensee to whom the company owes no special duty.<sup>129</sup> This is contrary to the generally accepted doctrine that one who has business with the owner or occupier of particular premises, and who is rightfully there on that business, is deemed to be there by his implied invitation.<sup>130</sup> Even in a court where the doctrine has obtained that persons who use a railway track for the purpose of passage without opposition from the company, acquire the right to have special care taken by the company to avoid injuring them,<sup>131</sup> it has been held that an implied license to cross a railroad trestle so narrow that there is no room on it outside of a passing train, and over which at least twelve regular trains pass each day, besides special trains and switch engines, is contrary to public policy,—especially in view of a statute prohibiting persons from walking on railroad tracks except where laid along a public road or street.<sup>132</sup> But even under the rule which demands special care in favor of licensees, the company

<sup>126</sup> *Richards v. Chicago &c. R. Co.*, 50 N. J. L. 478; s. c. 14 Atl. Rep. 81 Iowa 426; s. c. 47 N. W. Rep. 63; 576; 12 Cent. Rep. 799.  
45 Am. & Eng. Rail. Cas. 54.

<sup>127</sup> *Ward v. Southern &c. R. Co.*, 25 Or. 433; s. c. 36 Pac. Rep. 166; 23 L. R. A. 715.

<sup>128</sup> *Ante*, § 978, *et seq.*

<sup>129</sup> *Diebold v. Pennsylvania R. Co.*,

<sup>130</sup> *Ante*, § 978, *et seq.*

<sup>131</sup> *Post*, § 1724.

<sup>132</sup> *Anderson v. Chicago &c. R. Co.*, 87 Wis. 195; s. c. 58 N. W. Rep. 79; 23 L. R. A. 203.



will be exonerated where a licensee is injured, whose presence is unknown and unexpected by the trainmen, who, in moving the cars, give the usual signals, by ringing the bell and sounding the whistle, thus discharging the duty of ordinary care toward any person who may chance to be in danger.<sup>133</sup> It has been well held, that conduct on the part of the railway company amounting to an invitation or license to cross its tracks at a point where there is no street or public highway, is not to be construed as a license to walk along its tracks; but that one so walking can not claim of the railway company the duty of exercising special care in the movement of its trains to avoid injuring him, until it discovers his exposed position, even though the tracks have been habitually so used by the public and without disapproval on the part of the company.<sup>134</sup>

§ 1723. Further of this Doctrine.—Keeping in mind, then, the distinction between *invited persons*, and trespassers or bare licensees,—in other words, between persons who come upon the tracks of the railway company by its invitation, express or implied, and those who come there as trespassers or whose presence there is merely tolerated,—we find, in addition to cases already cited, a very considerable class of decisions which assimilate the situation of such uninvited persons to that of the same class of persons who come upon the premises of other owners or occupiers of real property,—a subject discussed in the preceding volume.<sup>135</sup> The railway company owes no obligation of special or active care or vigilance to such persons, but they take its premises as they find them, together with all the attendant dangers, and the company discharges its legal duty to them if it abstains from inflicting upon them wanton or intentional injury.<sup>136</sup> For example, it owes to such persons no duty to fence its track;<sup>137</sup> nor to establish rules and regulations to be observed by them for the promotion of their own safety, when they officiously undertake to run *between cars* over its track without the knowledge of the company;<sup>138</sup> nor so to guard a semaphore wire as to prevent such a person from falling over it as he is

<sup>133</sup> Hogan v. Chicago &c. R. Co., 59 Wis. 139.

<sup>134</sup> Richards v. Chicago &c. R. Co., 81 Iowa 426; s. c. 47 N. W. Rep. 63; 45 Am. & Eng. Rail. Cas. 54.

<sup>135</sup> Vol. I, § 945, *et seq.*

<sup>136</sup> *Ante*, § 1705; Mills v. New York &c. R. Co., 5 App. Div. 11; s. c. 39 N. Y. Supp. 280; Cleveland &c. R. Co. v. Tartt, 64 Fed. Rep. 823; s. c. 12 C. C. A. 618; Cleveland &c. R. Co. v. Adair, 12 Ind. App. 569; s. c. 40

N. E. Rep. 822; denying rehearing in 39 N. E. Rep. 672; Settoon v. Texas &c. R. Co., 48 La. An. 807; s. c. 19 South. Rep. 759.

<sup>137</sup> Robertson v. New York, 149 N. Y. 609; aff'g s. c. 7 Misc. (N. Y.) 645; 58 N. Y. St. Rep. 391; 28 N. Y. Supp. 13.

<sup>138</sup> Texas Transp. Co. v. Shelton, 12 Tex. Civ. App. 651; s. c. 35 S. W. Rep. 874.



crossing the track of the company on its grounds;<sup>139</sup> nor to block the frogs of its switches in its private yards, for the benefit of persons who use such yards as a footway.<sup>140</sup> Under this doctrine no recovery can be had against a railway company for the killing of an adult person in full possession of his faculties while walking upon a track of the defendant, without observing the approach of the engine which struck him, although persons were in the habit of walking there, and although the persons in charge of the engine might, by the exercise of ordinary care, have discovered him in time to avert the accident.<sup>141</sup>

§ 1724. **Doctrine that Railway Company does Owe a Special Duty to Bare Licensees.**<sup>142</sup>—Opposed to the doctrine just stated, and difficult to defend upon sound principle, is a doctrine to the effect that where the track or the grounds of a railway are used by pedestrians as a passage way, for a considerable time without objection, or with a tacit acquiescence on the part of the company, a pedestrian crossing over such grounds or along such tracks becomes a licensee in such a sense that he is not to be considered as a mere trespasser acting at his peril, to whom the company owes no special duty until his peril is discovered, but that it becomes the duty of the company, in operating its road at such a place, to use increased prudence and caution in proportion to the danger to such persons,<sup>143</sup> by maintaining a *lookout* upon its engines and trains,<sup>144</sup> and, according to a considerable mass of au-

<sup>139</sup> *Clark v. Michigan &c. R. Co.*, 113 Mich. 24; s. c. 4 Det. L. N. 194; 71 N. W. Rep. 327.

<sup>140</sup> *International &c. R. Co. v. Lee* (Tex. Civ. App.), 34 S. W. Rep. 160 (no off. rep.).

<sup>141</sup> *Kirtley v. Chicago &c. R. Co.*, 65 Fed. Rep. 386.

<sup>142</sup> This section is cited in § 1722.

<sup>143</sup> *Anderson v. Chicago &c. R. Co.*, 87 Wis. 195, 205 (where the doctrine is formulated); *Townley v. Chicago &c. R. Co.*, 53 Wis. 626; *Johnson v. Lake Superior &c. R. Co.*, 86 Wis. 64; s. c. 56 N. W. Rep. 161; *Texas &c. R. Co. v. Watkins*, 88 Tex. 20; s. c. 26 S. W. Rep. 760; *Davis v. Chicago &c. R. Co.*, 58 Wis. 646; s. c. 46 Am. Rep. 667; *Whalen v. Chicago &c. R. Co.*, 75 Wis. 654.

<sup>144</sup> *Smith v. Pittsburgh &c. R. Co.*, 90 Fed. Rep. 783; s. c. 41 Ohio L. J. 113; 13 Am. & Eng. Rail. Cas. (N. S.) 716 (citing *Harriman v. Pittsburgh &c. R. Co.*, 45 Ohio St. 11); *Delaney v. Milwaukee &c. R. Co.*, 33

Wis. 67; *Central &c. R. Co. v. Brinson*, 70 Ga. 207; *Nuzum v. Railway Co.*, 30 W. Va. 228; s. c. 4 S. E. Rep. 242; *Virginia &c. R. Co. v. White*, 84 Va. 498; s. c. 5 S. E. Rep. 573; *Troy v. Cape Fear &c. R. Co.*, 99 N. C. 298; s. c. 5 Am. St. Rep. 521; 6 S. E. Rep. 77; *South &c. R. Co. v. Donovan*, 84 Ala. 141; s. c. 4 South. Rep. 142. It has been reasoned that such a license or permission does not give the public the same right in the use of the track which is enjoyed by employes of the company, but that the public are deemed to accept the license, subject to the superior right of the company to use the track for its own purpose: *Texas &c. R. Co. v. Watkins*, 88 Tex. 20; s. c. 26 S. W. Rep. 760. For a *declaration* alleging that the plaintiff, while walking on the defendant's railroad track with its consent, was injured by the running of the cars improperly loaded, which was held good on demurrer, see *Baston v.*



thority, by giving *audible signals* on approaching such places, such as would be reasonably required on approaching a public crossing.<sup>145</sup> It has been so held in the face of a statute making it a penal offense to walk upon a railroad track, except where laid upon a public street or highway.<sup>146</sup> It also follows that the fact that the public had long been accustomed, with the acquiescence of the railway company, to walk on its track at a place at or near which the injury happened, is a relevant circumstance which may be shown in evidence to be considered by the jury in determining whether or not the defendant's trainmen exercised proper diligence at the time of the accident. This follows from the premise that they are bound to greater caution in running trains at such places than elsewhere.<sup>147</sup> The duty which the railway company imposes upon itself by thus suffering a long continued series of trespasses is such that when it is backing one of its trains, at such a place, where its fireman and engineer can not keep a lookout, it will be bound to station a man on the end of the train for that purpose, if, in the opinion of a jury, that would be a reasonable precaution.<sup>148</sup>

**§ 1725. Duty to Use Care in Favor of Persons Using a Railway Track as a Footpath.**—Where the public for years have been accustomed to cross the track of a railway company upon a well defined path, with the acquiescence of the company, although without its express license, a license to do so will be presumed, and persons so crossing to and fro are not, in a strict sense, trespassers, but are licensees, and the company is bound to take reasonable precautions to avoid injuring them.<sup>149</sup> For example, the assent of a railway company to the

Georgia R. Co., 60 Ga. 339. In a case holding the doctrine of the text, it appeared that *stairs had been*, without the opposition of the railway company, *constructed* down the side of an embankment and a footway made over its track, by pedestrians employed in a factory near by. It was held that the non-action of the company amounted to a license to cross its track at the particular point; so that one who was injured through its negligence in backing its engine upon him, when so crossing, without warning of any kind, neither the engineer nor the fireman being on the lookout,—was entitled to recover damages: *Clampit v. Chicago &c. R. Co.*, 84 Iowa 71; s. c. 49 Am. & Eng. Rail. Cas. 468; 50 N. W. Rep. 673.

<sup>145</sup> *Johnson v. Lake Superior &c.*

R. Co., 86 Wis. 64; s. c. 56 N. W. Rep. 161; *Clampit v. Chicago &c. R. Co.*, 84 Iowa 71.

<sup>146</sup> *Davis v. Chicago &c. R. Co.*, 58 Wis. 646; s. c. 46 Am. Rep. 667: But see to the contrary, in case of walking on a trestle, *Anderson v. Chicago &c. R. Co.*, 87 Wis. 195.

<sup>147</sup> *Western &c. R. Co. v. Meigs*, 74 Ga. 857; *Townley v. Chicago &c. R. Co.*, 53 Wis. 626.

<sup>148</sup> *Johnson v. Lake Superior &c. R. Co.*, 86 Wis. 64; s. c. 56 N. W. Rep. 161.

<sup>149</sup> *Cahill v. Chicago &c. R. Co.*, 74 Fed. Rep. 285; s. c. 46 U. S. App. 85; 20 C. C. A. 184; *Nuzum v. Pittsburgh &c. R. Co.*, 30 W. Va. 228; *Virginia &c. R. Co. v. White*, 84 Va. 498; *Troy v. Cape Fear &c. R. Co.*, 99 N. C. 298; *South &c. R. Co. v. Donovan*, 84 Ala. 141; *Garner v.*



custom of people of passing over its track in going to and returning from their work at a certain point on the track, relieves said persons from the character of trespassers, and imposes upon the company the duty, in moving its engines and cars, of using proper regard for their safety.<sup>150</sup> We have seen that toward ordinary trespassers on railway tracks, the general doctrine is that the railway company owes *no duty to keep a lookout*,<sup>151</sup> though judicial opinion is not uniform on this question;<sup>152</sup> but where persons are upon a railway track with the license or invitation of the company, express or implied, it is under a duty to keep a lookout for them and to exercise ordinary care to discover them on the track, no less than to avoid injuring them after so discovering them. The doctrine applies to *bridges*, as well as to paths across or upon the railway tracks at other places. For example, it has been held that a girl twelve years old is not a trespasser in walking on a railroad bridge which for seventeen years has been used by the public in considerable numbers as a foot crossing, with the knowledge of the railroad company, and without objection on its part.<sup>153</sup> It has even been held that a statute<sup>154</sup> making it unlawful to walk along the track of a railroad, does not apply to a licensed path in and about the depot grounds of a railway company, so as to prevent a recovery of damages for injuries received while using such path.<sup>155</sup> A person

Trumbull, 94 Fed. Rep. 321; Thomas v. Chicago &c. R. Co., 103 Iowa 649; s. c. 72 N. W. Rep. 783; 39 L. R. A. 399; 9 Am. & Eng. Rail. Cas. (N. S.) 854; Wabash R. Co. v. Jones, 53 Ill. App. 125 (especially if the railway company has not only permitted, but encouraged and invited such use of its track); Taylor v. Delaware &c. R. Co., 113 Pa. St. 162; s. c. 4 Cent. Rep. 628; 57 Am. Rep. 446; Young v. Clark, 16 Utah 42; Barry v. New York &c. R. Co., 92 N. Y. 292; s. c. 44 Am. Rep. 377; Hooker v. Chicago &c. R. Co., 76 Wis. 542; Hyde v. Union &c. R. Co., 7 Utah 356; Hansen v. Southern Pac. R. Co., 105 Cal. 379; Roth v. Union Depot Co., 13 Wash. 525; s. c. 31 L. R. A. 855; Blackenship v. Chesapeake &c. R. Co., 94 Va. 449; s. c. 27 S. E. Rep. 20 (bound to exercise reasonable care to discover and keep from injuring them whether they are licensees or trespassers, provided it is a place where it is the duty of the servants of the company to keep a lookout for all persons whether trespassers or licensees); Seymour v. Central &c. R. Co., 69 Vt. 555; s. c.

38 Atl. Rep. 236; O'Conner v. Illinois &c. R. Co., 77 Ill. App. 22.

<sup>150</sup> Cahill v. Chicago &c. R. Co., 74 Fed. Rep. 285; s. c. 46 U. S. App. 85; 20 C. C. A. 184. Thus, it has been held that travellers upon a highway are entitled to use a platform constructed by a railway company at the intersection of its tracks with the street, constituting a convenient mode of crossing from one side of the street to the other; and such use of the track is not negligence; Baltimore &c. R. Co. v. Anderson, 85 Fed. Rep. 413; s. c. 56 U. S. App. 137; 29 C. C. A. 235.

<sup>151</sup> *Ante*, § 1706.

<sup>152</sup> *Ante*, § 1711.

<sup>153</sup> Young v. Clark, 16 Utah 42; s. c. 50 Pac. Rep. 832.

<sup>154</sup> Here, Wis. Rev. Stat., § 1811.

<sup>155</sup> Mason v. Chicago &c. R. Co., 89 Wis. 151; s. c. 61 N. W. Rep. 300. It has been held that in the absence of any objections by a railway company, the public are not deprived of the right to go upon a railroad track approaching a bridge upon an embankment constructed in a public thoroughfare, by an ordinance re-



using such a footpath across a railway track in a city has a right to expect that the reasonable care which the law demands of the railway company will be exercised in his favor, and he has the right to assume that a train terminating with a flat car will not be backed along the track with a beam projecting across the car a foot and a half beyond its side, without any notice or warning to him, so as to strike him and injure him, especially where by reason of a fair being held at the city, an unusual number of people are congregated in the vicinity.<sup>156</sup> This principle has been extended so far as to make it obligatory upon the railway company to prepare such a way, so as to make it safe for those who are in the habit of using it, or at least to remove dangerous pitfalls from its vicinity. It was therefore held that where a railway company had placed a cattle-guard, which it knew or ought to have known to be dangerous, at a place where it allowed people to cross its right of way, it became liable to one whose foot was caught therein without fault on his part, whereby he was injured by a passing train.<sup>157</sup> It has been held that it is a *question for the jury* to determine whether or not the extent of the use of a railway track at a footpath, and the length of time such use has continued, have been sufficient to impose upon persons operating the trains the duty of anticipating the probable presence of persons on the track, and of exercising ordinary watchfulness to avoid injuring them.<sup>158</sup> But, as we shall conclude from what follows in the next section, it is in most cases a *question for the court*. It is scarcely necessary to add that one who makes use of a railway track at a point commonly used by the public as a crossing, may recover damages, although in theory of law a trespasser, for an injury due to the wanton or willful negligence of the employés of the railway company,<sup>159</sup> since he could recover damages for such negligence under any circumstances.

**§ 1726. Duty of Special Care where People are to be Expected on the Track.**<sup>160</sup>—It is a sound and wholesome rule of law, humane and conservative of human life, that, without regard to the question whether the person killed or injured in the particular case was or was not a trespasser or a bare licensee upon the track of the railway com-

quiring that the track be located at least 60 feet from the front of lots lying upon the street, and that the street shall be of uniform width, and requiring a passageway for teams underneath the embankment at the end of the bridge: Toledo &c. R. Co. v. Chisholm, 83 Fed. Rep. 652; s. c. 49 U. S. App. 700; 27 C. C. A. 663.

<sup>156</sup> Kansas &c. R. Co. v. Ward, 4 Colo. 30.

<sup>157</sup> Hansen v. Southern &c. R. Co., 105 Cal. 379; s. c. 38 Pac. Rep. 957.

<sup>158</sup> Garner v. Trumbull, 94 Fed. Rep. 321.

<sup>159</sup> O'Conner v. Illinois &c. R. Co., 77 Ill. App. 22.

<sup>160</sup> This section is cited in § 1846.



pany,—the company is bound to exercise special care and watchfulness at any point upon its track, where people may be expected upon the track in considerable numbers,<sup>161</sup> as, for example, in a city where the population is dense;<sup>162</sup> even between streets where the track has been extensively used for a long time by pedestrians;<sup>163</sup> or where the road-bed is constantly used by pedestrians;<sup>164</sup> or at a bridge in a thickly settled community which the public, in considerable numbers, have used for many years.<sup>165</sup> At such places the railway company is bound to anticipate the presence of persons on the track, to keep a reasonable lookout for them, to give warning signals, such as will apprise them of the danger of an approaching train, to moderate the speed of its train so as to enable them to escape injury; and a failure of duty in this respect will make the railway company liable to any person thereby injured, subject, of course, to the qualification that his contributory negligence may bar a recovery.

§ 1727. **Effect of Statutory Duty to Give Signals with Reference to the Safety of Trespassers.**—A statute requiring railway companies to give signals upon the approach of their trains to public crossings, has been held to raise no duty to strangers upon the track elsewhere than at such crossings,<sup>166</sup> nor to bystanders in railroad yards, not intending to cross.<sup>167</sup> A statute making it the duty of locomotive engineers, on perceiving a pedestrian on the track, to use all means within their power known to skillful engineers, such as applying the brakes, or reversing the engine in order to stop the train,—does not make the railway company liable to pay damages in a case where there was no lack of care and watchfulness, and where, when the person on the track was first discovered, it would have been impossible to prevent a collision.<sup>168</sup>

<sup>161</sup> *Cassida v. Oregon &c. R. Co.*, 14 Or. 551; *Ward v. Southern &c. Co.*, 25 Or. 433; s. c. 23 L. R. A. 715; *Campbell v. Kansas City &c. R. Co.*, 55 Kan. 536; s. c. 40 Pac. Rep. 998; *Roth v. Union Depot Co.*, 13 Wash. 525; s. c. 31 L. R. A. 855; *Whalen v. Chicago &c. R. Co.*, 75 Wis. 654; s. c. 44 N. W. Rep. 849; 41 Am. & Eng. Rail. Cas. 558.

<sup>162</sup> *Louisville &c. R. Co. v. McCombs* (Ky.), 54 S. W. Rep. 179.

<sup>163</sup> *Powell v. Missouri &c. R. Co.*, 59 Mo. App. 626.

<sup>164</sup> *St. Louis &c. R. Co. v. Shifflet* (Tex. Civ. App.), 56 S. W. Rep. 697.

<sup>165</sup> *Young v. Clark*, 16 Utah 42; s. c. 50 Pac. Rep. 832.

<sup>166</sup> *Martin v. Georgia R. &c. Co.*, 95 Ga. 361; s. c. 22 S. E. Rep. 626; *At-*

*lanta &c. R. Co. v. Gravitt*, 93 Ga. 369; s. c. 26 L. R. A. 553; 20 S. E. Rep. 550; 44 Am. St. Rep. 145; *Harty v. Central R. Co.*, 42 N. Y. 468; *Elwood v. New York &c. R. Co.*, 4 Hun (N. Y.) 808; *Philadelphia &c. R. Co. v. Spearen*, 47 Pa. St. 300; *O'Donnell v. Providence &c. R. Co.*, 6 R. I. 211; *Holmes v. Central R. &c. Co.*, 37 Ga. 593; *Railroad v. Houston*, 95 U. S. 697; s. c. 2 *Thomp. Neg.*, 1st ed., 444.

<sup>167</sup> *Hale v. Columbia &c. R. Co.*, 34 S. C. 292; s. c. 13 S. E. Rep. 537.

<sup>168</sup> *Savannah &c. R. Co. v. Jarvis*, 95 Ala. 149; s. c. 10 South. Rep. 323. A city ordinance providing for precautions to be observed in moving and backing standing cars within the limits of the city, does not



§ 1728. **Neglect of Statutory Precautions must have been the Proximate Cause of the Injury.**—Statutes have been enacted, it may be assumed, in all States and organized Territories of the Union, prescribing various precautions to be observed by railroad companies to the end of promoting the public safety. The general rule is that, in order to charge the railroad company, the failure to observe the statutory precaution must have been the *proximate cause* of the injury; since, to visit the company with damages for a hurt which was not produced by its dereliction, or which was due to some other cause for which it was not responsible, would be a mere judicial confiscation.<sup>169</sup> Certainly, if an injury happens at a time when the servants of the railway company have been negligent in failing to give cautionary signals prescribed by a statute, in order to make this a ground of recovering damages, it must appear that the failure to give the signals produced the accident.<sup>170</sup> On the other hand, where a man was killed by being run over by a locomotive which had been standing on a street crossing, it was deemed immaterial whether or not the railway company was a trespasser in using the street as a place for standing the engines while not in use, since the moving of the engine, and not its standing in the street, was the proximate cause of the injury.<sup>171</sup> A doctrine already considered,<sup>172</sup> rests on the conception that the negligence of the railway company, and not that of the trespasser, is the proximate cause of his death or injury. The proposition is ordinarily formulated, by saying

apply where employes are simply engaged in setting cars in a car yard: *Rafferty v. Missouri &c. R. Co.*, 91 Mo. 33; s. c. 8 West. Rep. 255.

<sup>169</sup> Thus, it was held that contributory negligence will defeat a recovery of damages for an injury produced by the failure of a railway company to observe the requirements of a statute, providing that all persons running trains shall keep a constant lookout for persons and property on the track, and making the railway company liable for all damages resulting from a neglect to keep such lookout: *St. Louis &c. R. Co. v. Leathers*, 62 Ark. 235; s. c. 35 S. W. Rep. 216; *St. Louis &c. R. Co. v. Dingman*, 62 Ark. 245; s. c. 35 S. W. Rep. 219. So, where a trespasser made a foot-path of a railway track, without making any reasonable effort, by looking or listening, to inform himself of the approach of a train, although he knew it was about the hour for the passage of the train, he could not recover damages for being injured by

the train, although the lookout required by this statute was not kept: *St. Louis &c. R. Co. v. Dingman*, 62 Ark. 245; s. c. 35 S. W. Rep. 219.

<sup>170</sup> *Tennessee &c. R. Co. v. King*, 81 Ala. 177.

<sup>171</sup> *Armil v. Chicago &c. R. Co.*, 70 Iowa 130. It is a confusion of legal conceptions and nomenclature to speak of a railway company being a *trespasser* merely because it stands its engine on a street crossing. The true conception is that if it stands its engine on a street crossing for an unreasonable length of time, it is guilty of a *nuisance*; and while the standing of the engine in such a place will not ordinarily be productive of an injury to one who attempts to cross the railway track, yet it may become so where he is tempted upon the track by the fact that the engine is not in motion, and when it suddenly starts up after he gets in front of it in the place of danger.

<sup>172</sup> *Ante*, §§ 1705, 1706.



that the death or injury of a person going upon a railway track or a railway bridge or trestle, does not preclude a recovery of damages where he is struck by a train, if the trainmen could, by the exercise of reasonable care, have discovered his dangerous situation, and could have avoided the accident by the use of means that would not have endangered the safety of the train,—for the reason that in such a case the negligence of the trainmen, and not that of the trespasser, is the proximate cause of the accident to him.<sup>173</sup>

§ 1729. **Duty toward Trespassers under the Tennessee Statute.**—In the State of Tennessee, the subject of injuries to persons upon the track is regulated entirely by statute,<sup>174</sup> which provides that “every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction, appears upon the road, the alarm-whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.” By a subsequent section<sup>175</sup> of this statute, the burden of proof that all the statutory requirements have been observed is upon the railway company. The strict application of this statute which has invariably prevailed has led to some interesting results: *e. g.*, a drunken man, lying asleep on the track, being killed by a passing train, the company will be responsible in damages unless it shows affirmatively the performance of every statutory precaution. It is not sufficient to show that the accident would have inevitably happened, even if the precautions had been adopted which were omitted.<sup>176</sup> This statute, as applied by the court, does not permit the engineer to presume that a person on the track will obey the ordinary instincts of self-preservation, and get off, on signal of warning. Therefore, where a drunken man was seen by the engineer approaching the train, and afterwards left the track, and then staggered on again, in season to be struck and killed by the locomotive, the company was held responsible in damages because efforts were not made to stop the train when the person was first seen upon the track, although the engineer was not aware that the deceased was intoxi-

<sup>173</sup> *McLamb v. Wilmington & C. R. Co.*, 122 N. C. 862; s. c. 29 S. E. Rep. 894; *Missouri & C. R. Co. v. Weisen*, 65 Tex. 443. Compare Vol. I, §§ 230–238.

<sup>174</sup> *Thomp. & Steg. (Tenn.) Stat.*, § 1166, subsec. 5; *Mill & V. Tenn. Code*, § 1298.

<sup>175</sup> *Thomp. & Steg. Stat.*, § 1168.

<sup>176</sup> *Louisville & C. R. Co. v. Burke*, 6 Coldw. (Tenn.) 45; *Smith v. Nashville & C. R. Co.*, 6 Coldw. (Tenn.) 589; s. c. 6 Heisk. 174; *Nashville & C. R. Co. v. Prince*, 2 Heisk. (Tenn.) 580; *East Tennessee & C. R. Co. v. St. John*, 5 Sneed (Tenn.) 524; *Railroad v. Walker*, 11 Heisk. (Tenn.) 383.



cated.<sup>177</sup> Under this statute, it is not sufficient that the statutory requirements were observed immediately upon the discovery of the person on the track. The discovery should be made as soon as, in the nature of things, it was possible.<sup>178</sup> The rigor of the application of this statute is strangely modified, however, by allowing the contributory negligence of an injured person to be shown *in mitigation of damages*.<sup>179</sup> The statute does not apply to a case where a person goes upon a railway track so short a time before he is struck by the train that it would be impossible to sound the alarm and whistle down the brakes, or to use any other means to stop the train in time to avoid injuring him.<sup>180</sup> Nor does this statute apply to the case of a person injured by cars which are being pushed by an engine employed in switching in a switch yard.<sup>181</sup> But the statute is held to apply to a train which is being backed, as well as to a train which is being pulled by an engine attached in front of it.<sup>182</sup> So, the provisions of the statute are applicable to a train on a regular trip, running through the grounds of a station on the main track.<sup>183</sup>

§ 1730. Questions of Evidence in the Case of Injuries to Trespassers and Licensees.—In the view of some courts, in actions of this nature, evidence tending to prove that, prior to and at the time of the accident, the public were constantly in the habit of walking on the tracks of the railway company at and near the place of the accident, though it was neither a crossing nor other place where the public had a right to be upon the tracks, is properly admitted;<sup>184</sup> but it is plain that, upon the theory of other courts,<sup>185</sup> it would be properly excluded. For example, where the wife of the plaintiff was killed while attempt-

<sup>177</sup> Hill v. Louisville &c. R. Co., 9 Heisk. (Tenn.) 823. In this case, it was urged that the deceased came to his death by his own willful act. To this argument the court responded, that "there are cases in which it has been said that the law does not require impossibilities of a railroad company; but they rest upon their own peculiar facts": Hill v. Louisville &c. R. Co., 9 Heisk. (Tenn.) 826.

<sup>178</sup> Louisville &c. R. Co. v. Connor, 9 Heisk. (Tenn.) 19.

<sup>179</sup> Smith v. Nashville &c. R. Co., 6 Heisk. (Tenn.) 174; Hill v. Nashville &c. R. Co., 9 Heisk. (Tenn.) 823; Railroad v. Walker, 11 Heisk. (Tenn.) 383.

<sup>180</sup> Byrne v. Kansas City &c. R. Co., 61 Fed. Rep. 605; s. c. 24 L. R. A. 693.

<sup>181</sup> Southern R. Co. v. Pugh, 95 Tenn. 419; s. c. 32 S. W. Rep. 311.

<sup>182</sup> Knoxville &c. R. Co. v. Acuff, 92 Tenn. 26; s. c. 20 S. W. Rep. 348.

<sup>183</sup> Mobile &c. R. Co. v. House, 96 Tenn. 552; s. c. 35 S. W. Rep. 561. So much of the same statute as provides that, on approaching a *city* or *town*, the bell or whistle shall be sounded at the distance of one mile, and then sounded at intervals on leaving until past the corporate limits, applies only to cities or towns which are incorporated: Webb v. East Tennessee &c. R. Co., 88 Tenn. 119; s. c. 42 Am. & Eng. Rail. Cas. 44; 12 S. W. Rep. 428.

<sup>184</sup> Western &c. R. Co. v. Meigs, 74 Ga. 857; Cassida v. Oregon &c. Co., 14 Or. 551.

<sup>185</sup> *Ante*, § 1718.



ing to walk across a high trestle work which had no railings or flooring, it was held that evidence tending to show a *custom* on the part of persons in the neighborhood to walk across the trestle work was erroneously admitted.<sup>186</sup> Evidence tending to show that one end of a street remained open to the public was not admissible in an action for injuries received while walking along a *railway trestle*, over a ravine, where there was no passage for the public, although the other end of such street, as originally laid out, lay along such ravine.<sup>187</sup>

<sup>186</sup> *Mason v. Missouri &c. R. Co.*, 27 Kan. 83; s. c. 41 Am. Rep. 405.

<sup>187</sup> *Glass v. Memphis &c. R. Co.*, 94 Ala. 581; s. c. 10 South. Rep. 215.



## CHAPTER LV.

### DUTY OF RAILWAY COMPANY TO TRESPASSER OR LICENSEE AFTER DISCOVERING HIS PERIL.

#### SECTION

- 1734. Liable for failing to use ordinary care to avoid injuring him after discovering his exposed position.
- 1735. Explanations and illustrations of this doctrine.
- 1736. How far act on presumption that trespasser will get out of the way.
- 1737. Circumstances under which the foregoing rule does not apply.
- 1738. What do or not do after discovering peril of trespasser.

#### SECTION

- 1739. When not liable for running upon trespasser after discovering him.
- 1740. Duty of the engineer on seeing an object on the track which may be a human being.
- 1741. Duty to give warning signals to trespasser after discovering him.
- 1742. Cases exhibiting negligence of this kind.
- 1743. Circumstances under which the railroad company was not liable.
- 1744. Care due to trespassers after the injury.

§ 1734. **Liable for Failing to Use Ordinary Care to Avoid Injuring Him after Discovering His Exposed Position.**<sup>1</sup>—The best judicial opinion has not hesitated to apply to the protection of human life the doctrine which has been so often applied to the protection of property,<sup>2</sup> by holding that a railway company is liable for injuries to a trespasser on its track, if its servants discover him in a dangerous position in time to stop or slacken the speed of the train and avert the accident or lessen the injury, in safety to themselves, or to others upon the train, by using the ordinary means and appliances, and fail to exercise all ordinary or reasonable prudence, care and effort to this end.<sup>3</sup>

<sup>1</sup> This section is cited in §§ 1750, 1759, 1775, 1790, 1811, 1866, 1869, 2108.

<sup>2</sup> *Ante*, § 235.

<sup>3</sup> *Reardon v. Missouri &c. R. Co.*, 114 Mo. 384; s. c. 21 S. W. Rep. 731; *Christian v. Illinois &c. R. Co.*, 71 Miss. 237; s. c. 15 South. Rep. 71; *Raines v. Chesapeake &c. R. Co.*, 39 W. Va. 50; s. c. 24 L. R. A. 226; 19 S. E. Rep. 565; *Missouri &c. R. Co.*

*v. Weisen*, 65 Tex. 443; *Galveston &c. R. Co. v. Matula*, 79 Tex. 577; s. c. 15 S. W. Rep. 573; *Central &c. R. Co. v. Vaughn*, 93 Ala. 209; s. c. 9 South. Rep. 468; *Central R. &c. Co. v. Denson*, 84 Ga. 774; s. c. 8 Rail. & Corp. L. J. 425; 11 S. E. Rep. 1039; *Saldana v. Galveston &c. R. Co.*, 43 Fed. Rep. 862; *Louisville &c. R. Co. v. Black*, 89 Ala. 313; s. c. 45 Am. & Eng. Rail. Cas. 38; 8 South. Rep.



The degree of care to be exercised by those who are driving the train after the discovery of the peril of the trespasser has been variously expressed, and the writer has used the expression which would seem to fit the consensus of judicial opinion. While the engineer is to use ordinary or reasonable care after discovering that the trespasser is in peril, yet this care is, as in other cases, a care proportionate to the danger to be avoided;<sup>4</sup> and hence it has been described, not only by the use of such expressions as "ordinary and reasonable care" or "proper care and due diligence," but he is required to put forth every reasonable effort; he is required to exercise all reasonable care and diligence,<sup>5</sup> and to put forth every reasonable effort to avert the injury.<sup>6</sup>

- 246; *Swift v. State Island &c. R. Co.*, 123 N. Y. 645; s. c. 45 Am. & Eng. Rail. Cas. 180; 33 N. Y. St. Rep. 604; 25 N. E. Rep. 378; *State v. Baltimore &c. R. Co.*, 69 Md. 339; s. c. 12 Cent. Rep. 890; 14 Atl. Rep. 688; *Hepfel v. St. Paul &c. R. Co.*, 49 Minn. 263; s. c. 51 N. W. Rep. 1049; *Dickson v. Missouri &c. R. Co.*, 104 Mo. 491; s. c. 16 S. W. Rep. 381, (negligence *per se* on part of railroad company in that its servants discovered plaintiff's peril in time to avert the injury); *McLamb v. Wilmington &c. R. Co.*, 122 N. C. 862; s. c. 29 S. E. Rep. 894; *Louisville &c. R. Co. v. Howard*, 82 Ky. 212; *Missouri &c. R. Co. v. Weisen*, 65 Tex. 443; *Seaboard &c. R. Co. v. Joyner*, 92 Va. 354; s. c. 23 S. E. Rep. 773; *St. Louis &c. R. Co. v. Ross*, 61 Ark. 617; s. c. 33 S. W. Rep. 1054; *Matthews v. Chicago &c. R. Co.*, 63 Mo. App. 569; s. c. 2 Mo. App. Rep. 866; *Remer v. Long Island &c. R. Co.*, 113 N. Y. 669; aff'g s. c. 48 Hun (N. Y.) 352; 15 N. Y. St. Rep. 884; *Kansas &c. R. Co. v. Fitzhugh*, 61 Ark. 341; 33 S. W. Rep. 960 (railway servant killed by backing switch engine upon him without warning); *St. Louis &c. R. Co. v. Christian*, 8 Tex. Civ. App. 246; s. c. 27 S. W. Rep. 932; *Purcell v. Chicago &c. R. Co.*, 109 Iowa 628; s. c. 80 N. W. Rep. 682; *Chicago &c. R. Co. v. Wymore*, 40 Neb. 645; s. c. 58 N. W. Rep. 1120; *Richmond &c. R. Co. v. Anderson*, 31 Gratt. (Va.) 812; *Alabama &c. R. Co. v. Moorer*, 116 Ala. 642; s. c. 7 Am. & Eng. Rail. Cas. (N. S.) 742; 22 South. Rep. 900; *Louisville &c. R. Co. v. Morlay*, 86 Fed. Rep. 240; s. c. 30 C. C. A. 6; 58 U. S. App. 526; *Rine v. Chicago &c. R. Co.*, 88 Mo. 392; s. c. 3 West. Rep. 800; *Southern R. Co. v. Bush*, 122 Ala. 470; s. c. 26 South. Rep. 168.
- <sup>4</sup>Vol. I, § 25.
- <sup>5</sup>*Alabama &c. R. Co. v. Moorer*, 116 Ala. 642; s. c. 9 Am. & Eng. Rail. Cas. (N. S.) 742; 22 South. Rep. 900.
- <sup>6</sup>*Louisville &c. R. Co. v. Morlay*, 58 U. S. App. 526; s. c. 30 C. C. A. 6; 86 Fed. Rep. 240. There is a holding which condemns an instruction telling the jury that the failure of the employes of a railway company to use "all means" in their power to prevent running over one discovered in a perilous situation on the track, constitutes negligence. The court refines upon this question to the extent of holding that the limit of the duty of the men driving the train is to exercise such care and caution as ordinarily prudent persons would exercise under similar circumstances: *Austin &c. R. Co. v. McSween* (Tex. Civ. App.), 32 S. W. Rep. 376. (no off. rep.). This is true; but in the practical administration of justice the question is how shall the impression of the degree of care which the law demands under such circumstances be conveyed to the minds of a jury; and surely it is no misstatement of legal doctrine to say that where a man is seen and known by the servants of a railway company to be in such a situation that they are likely immediately to run over him with their train, it is their duty to use all the means in their power to avert such a catastrophe. The same observations will apply to a holding to the effect that those in charge of an engine are not, upon seeing a person on the track in a position of peril, required to use



§ 1735. **Explanations and Illustrations of this Doctrine.**—It must be kept in mind that this obligation of care and effort does not necessarily commence at the time when the men who are driving the train see the trespasser on the track, for he may be a mile away, and in no immediate danger; it arises at the moment when he is seen to be in a perilous situation; then, but not until then, the effort to stop the train must commence.<sup>7</sup> In fact, the language of most of the decisions which speak upon this question, speak of the obligation of care and effort in favor of the trespasser as arising at the point of time when his perilous situation is discovered or is known;<sup>8</sup> they must have become aware both of his presence and his peril. When this condition arises their obligation of care and effort to avert injuring him is exactly the same as though he were lawfully upon the track.<sup>9</sup> Where those who are driving the train fail in the discharge of this duty after discovering the perilous situation of the trespasser, his contributory negligence in getting himself into the dangerous situation is eliminated from the case. It would be useless, for example, for the railway company to set up the defense, where a trespasser is overtaken by a train on a bridge or a trestle, that he might have laid down on the ties or jumped to the ground, thereby preventing the train from running over him; the company will be liable if those in charge of the train neglected to exercise reasonable care to avert the catastrophe, after discovering him on the bridge or trestle.<sup>10</sup> This is especially true where the trespasser on the track is seen to be a *child* of tender years. For here, as we shall see,<sup>11</sup> the engineer can not rightfully indulge in the presumption that the child will heed the noise of the approaching train and his signals, and quit the track in time to avoid the injury.<sup>12</sup> In a

every means within their ability and power to stop the train, but only such means as an ordinarily prudent person would exercise under the circumstances: *Texas & C. R. Co. v. Harby*, 94 Fed. Rep. 303.

<sup>7</sup> *Southern R. Co. v. Bush*, 122 Ala. 470; s. c. 26 South. Rep. 168.

<sup>8</sup> *Cahill v. Chicago & C. R. Co.*, 74 Fed. Rep. 285; s. c. 46 U. S. App. 85; 20 C. C. A. 184 (but held that he was not a trespasser in the particular case); *St. Louis & C. R. Co. v. Christian*, 8 Tex. Civ. App. 246; s. c. 27 S. W. Rep. 932 (trespassing child on trestle); *Mathews v. Chicago & C. R. Co.*, 63 Mo. App. 569; s. c. 2 Mo. App. Rep. 866; *St. Louis & C. R. Co. v. Ross*, 61 Ark. 617; s. c. 33 S. W. Rep. 1054; *Seaboard & C. R. Co. v. Joyner*, 92 Va. 354; s. c. 23 S. E. Rep. 773; *Missouri & C. R. Co. v. Weisen*, 65 Tex. 443; *Louis-*

*ville & C. R. Co. v. Howard*, 82 Ky. 212; *McLamb v. Wilmington & C. R. Co.*, 122 N. C. 862; s. c. 29 S. E. Rep. 894.

<sup>9</sup> *Louisville & C. R. Co. v. Wade*, 18 Ky. L. Rep. 549; s. c. 36 S. W. Rep. 1125; 5 Am. & Eng. Rail. Cas. (N. S.) 371 (no off. rep.).

<sup>10</sup> *Purcell v. Chicago & C. R. Co.*, 109 Iowa 628; s. c. 80 N. W. Rep. 682.

<sup>11</sup> *Post*, § 1824.

<sup>12</sup> *Chrystal v. Troy & C. R. Co.*, 105 N. Y. 164; s. c. 7 Cent. Rep. 245; 11 N. E. Rep. 380; *Louisville & C. R. Co. v. Coleman*, 86 Ky. 556; s. c. 6 S. W. Rep. 438; *Troy v. Cape Fear & C. R. Co.*, 99 N. C. 298; s. c. 5 Am. St. Rep. 521; 6 S. E. Rep. 77; *Keyser v. Chicago & C. R. Co.*, 66 Mich. 390; s. c. 10 West. Rep. 646; 33 N. W. Rep. 867 (small child seen half a mile ahead of the engine on the track).



jurisdiction where the standard of liability in the case of an injury to a trespasser on a railway track by an approaching train is not simple negligence, but reckless and wanton negligence, it has been held that the failure of an engineer, knowing of the dangerous proximity to the track of a person who is oblivious of the approach of the train, to use all the means in his power to avoid striking him, is such *recklessness* and *wantonness* as will render the company liable for his death if such preventive effort would have been effectual.<sup>13</sup> This obligation is manifestly more strong, where, to the knowledge of the engineer, the trespasser is *upon a trestle* from which it is impossible for him to escape; though a decision to the effect that the company will be liable if the train could have been stopped in time to prevent running upon the trespasser, after the engineer discovered his peril, although the engineer, by a miscalculation, judged that the man would be able to get across the trestle before being overtaken,<sup>14</sup>—can not be commended, because it allows a recovery, notwithstanding the trespass and gross negligence of a person walking upon the track, balancing against this a mere miscalculation on the part of the engineer, which a competent and careful engineer might easily make. So, where the trespasser on the trestle, seeing that the train was not stopped or checked, let himself down under the ties to avoid being run over, and, being unable to get upon the track again, fell and was killed,—it was held that the company was liable.<sup>15</sup> This duty is stronger and clearer *in regard to employes working upon the track*; because they are rightfully there, and their presence is always to be anticipated by the engineer, and he is consequently bound, in the exercise of reasonable care, to give them signals of the approach of his train. Their position, on the other hand, is that of men absorbed in their work, entitled to presume that the signals will be given. Moreover, if, by reason of being absorbed in their work, they fail to heed the signals, the law will extend some indulgence to their negligence and will not exonerate the company if the engineer, seeing that they did not heed the signals and attempt to leave the track, fails to make any effort to stop his train, if there is time to do so, so as to avoid injuring them.<sup>16</sup> In these cases, there are often *close questions of fact* as to whether by using the greatest possible effort to check the speed of his train the trespasser, or other person on the track, would have escaped injury. But here it is to be

<sup>13</sup> Louisville &c. R. Co. v. Trummell, 93 Ala. 350; s. c. 9 South. Rep. 870.

<sup>14</sup> Clark v. Wilmington &c. R. Co., 109 N. C. 430; s. c. 14 L. R. A. 749; 48 Am. & Eng. Rail. Cas. 546; 14 S. E. Rep. 43.

<sup>15</sup> Cook v. Central R. &c. Co., 67 Ala. 533.

<sup>16</sup> Erickson v. St. Paul &c. R. Co., 41 Minn. 500; s. c. 5 L. R. A. 786; 43 N. W. Rep. 332.



observed that even a slight checking of speed, especially where danger signals are given, will give more time to enable the endangered person to extricate himself from his peril. It is, therefore, conceived that whether by arresting the speed of the train the person killed or injured might have escaped will generally present a question of fact for a jury. In line with this theory, it has been held that the fact that the engineer, after discovering at a considerable distance a trespasser on the track, failed to make any effort to stop the train, warrants the jury in finding the company liable for his death, where other evidence justifies an inference that a very brief additional time would have enabled him to get off the track.<sup>17</sup> In another case, evidence that it was possible to see a person standing upon a track, from an engine at a distance of seventy-one rods, and that the train by which a person was struck might have been stopped inside of forty rods, was held sufficient to warrant a finding of want of ordinary care upon the part of the engineer.<sup>18</sup>

§ 1736. **How Far Act on Presumption that Trespasser will Get Out of the Way.**<sup>19</sup>—It is good sense and clear law, that a locomotive engineer is not bound to stop his train or slacken its speed on seeing an adult person walking upon or near the track at a considerable distance in advance of the train, appearing to have the use of his faculties and not to be laboring under any mental or physical disability, and where there is nothing in his appearance or conduct to indicate that he will not leave the track in time to avoid injury, or refrain from going upon it;<sup>20</sup> but that, after having given sufficient warning by whistle or bell, he has a right to act on the assumption that the trespasser will quit the track in time to save himself from injury, unless the actions of the trespasser, or the circumstances in which he is placed, plainly indicate the contrary;<sup>21</sup> and manifestly his right to act upon

<sup>17</sup> *Texas & C. R. Co. v. Robinson*, 49 Ark. 257; s. c. 4 S. W. Rep. 782; *Williams v. Kansas City & C. R. Co.*, 96 Mo. 275; s. c. 9 S. W. Rep. 573; *State v. Baltimore & C. R. Co.*, 69 Md. 494; s. c. 18 Md. L. J. 792; 16 Atl. Rep. 210; *Baltimore & C. R. Co. v. State*, 69 Md. 551; s. c. 18 Md. L. J. 824; 16 Atl. Rep. 212; *International & C. R. Co. v. Kuehn*, 70 Tex. 582; s. c. 8 S. W. Rep. 484; *Norfolk & C. R. Co. v. Harman*, 83 Va. 553; s. c. 8 S. E. Rep. 251; *Artus v. Missouri & C. R. Co.*, 73 Tex. 191; s. c. 11 S. W. Rep. 177; *Tyler v. Sites*, 88 Va. 470; s. c. 15 Va. L. J. 793; 13 S. E. Rep. 978; *Reardon v. Missouri & C. R. Co.*, 114 Mo. 384; s. c. 21 S. W. Rep. 731; *France v. Louisville & C. R. Co.* (Ky.), 22 S. W. Rep. 851 (no off. rep.);

<sup>18</sup> *Felch v. Concord R. Co.*, 66 N. H. 318; s. c. 29 Atl. Rep. 557. That a railroad engineer who starts an engine and backs it down upon a person whom he has a moment before seen in a dangerous position, without looking to see whether such person has left the spot, is guilty of negligence,—see *German v. Suburban & C. T. Co.*, 37 N. Y. St. Rep. 360; s. c. 13 N. Y. Supp. 897.

<sup>19</sup> This section is cited in §§ 1737, 1738, 1770, 1782, 1812. Compare Vol. I, § 190.

<sup>20</sup> *Maloy v. Wabash & C. R. Co.*, 84 Mo. 270.

<sup>21</sup> *St. Louis & C. R. Co. v. Monday*,



this assumption is plainer where he has given the statutory or reasonable signals,<sup>22</sup> unless he sees that the signals are being disregarded by the trespasser. Some of the courts express this doctrine more strongly by saying that the engineer is justified in acting upon this assumption up to the last moment.<sup>23</sup> One court reasons that the engineer may reasonably suppose that the trespasser knows of the approach of the train and is consequently not negligent in failing to blow the whistle until it is too late, where he gives the usual signal of approach by ringing the bell.<sup>24</sup> But plainly the extent to which those in charge of the train may act upon this assumption does not, in any particular case, present for decision a mere question of law, but will present a *question*

Meredith v. Richmond &c. R. Co., 108 N. C. 616; s. c. 13 S. E. Rep. 137; Louisville &c. R. Co. v. Black, 89 Ala. 313; s. c. 45 Am. & Eng. Rail. Cas. 38; 8 South. Rep. 246; Johnson v. Truesdale, 46 Minn. 345; s. c. 48 N. W. Rep. 1136; Railway Co. v. Hicks, 89 Tenn. 301; June v. Boston &c. R. Co., 153 Mass. 79; s. c. 26 N. E. Rep. 238; Saldana v. Galveston &c. R. Co., 43 Fed. Rep. 862; Houston &c. R. Co. v. Smith, 52 Tex. 178; Central Trust Co. v. Wabash &c. R. Co., 26 Fed. Rep. 896; Frazer v. South &c. R. Co., 81 Ala. 185; Campbell v. Kansas City &c. R. Co., 55 Kan. 536; s. c. 40 Pac. Rep. 997; Florida &c. R. Co. v. Williams, 37 Fla. 406; s. c. 20 South. Rep. 558; Markham v. Raleigh &c. R. Co., 119 N. C. 715; s. c. 25 S. E. Rep. 786; Holmes v. South &c. R. Co., 97 Cal. 161; High v. Carolina &c. R. Co., 112 N. C. 385; Norwood v. Raleigh &c. R. Co., 111 N. C. 236; Foley v. New York &c. R. Co., 78 Hun (N. Y.) 248; Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179; St. Louis &c. R. Co. v. Christian, 8 Tex. Civ. App. 246. But see Railroad v. Scott, 87 Tenn. 494; Georgia R. &c. Co. v. Daniel, 89 Ga. 463; Burg v. Chicago &c. R. Co., 90 Iowa 106; Texas &c. R. Co. v. Roberts, 14 Tex. Civ. App. 532; s. c. 37 S. W. Rep. 870; Meacham v. Louisville &c. R. Co. 20 Ky. L. Rep. 112; s. c. 45 S. W. Rep. 363 (not to be rep.); Ludden v. Columbus &c. R. Co., 7 Ohio N. P. 106; Smalley v. Southern R. Co. (S. C.), 35 S. E. Rep. 489; Illinois &c. R. Co. v. Hocker (Ky.), 55 S. W. Rep. 438 (no off. rep.); Starbard v. Detroit &c. R. Co., 122 Mich. 23; s. c. 80 N. W. Rep. 878 (collection of facts which furnish a good illustration of the doctrine); Her-

ring v. Wilmington &c. R. Co., 10 Ired. L. (N. C.) 402; Poole v. North Carolina &c. R. Co., 8 Jones L. (N. C.) 340; Harty v. Central R. Co., 42 N. Y. 468; Indianapolis &c. R. Co. v. McClaren, 83 Ind. 319; s. c. 5 Reporter 650; 8 Cent. L. J. 244; Terre Haute &c. R. Co. v. Graham, 46 Ind. 239; Frech v. Philadelphia &c. R. Co., 39 Md. 574; Manly v. Wilmington &c. R. Co., 74 N. C. 655; Holmes v. Central &c. R. Co., 37 Ga. 593; Maher v. Atlantic &c. R. Co., 64 Mo. 267; Kenyon v. New York &c. R. Co., 5 Hun (N. Y.) 479; affirmed 76 N. Y. 607; Willets v. Buffalo &c. R. Co., 14 Barb. (N. Y.) 585; Cogswell v. Oregon &c. R. Co., 6 Or. 417; Illinois &c. R. Co. v. Modglin, 85 Ill. 481; O'Donnell v. Missouri &c. R. Co., 7 Mo. App. 190; s. c. 8 Cent. L. J. 414; Mobile &c. R. Co. v. Stroud, 64 Miss. 784; s. c. 2 South. Rep. 171.

<sup>22</sup> Raines v. Chesapeake &c. R. Co., 39 W. Va. 50; s. c. 24 L. R. A. 226; 19 S. E. Rep. 565.

<sup>23</sup> High v. Carolina &c. R. Co., 112 N. C. 385; s. c. 17 S. E. Rep. 79; Tyler v. Sites, 90 Va. 539; s. c. 19 S. E. Rep. 174; Pittsburg &c. R. Co. v. Judd, 10 Ind. App. 213; s. c. 36 N. E. Rep. 775. For instance, it has been held that a railroad engineer who sees a person walking along the track or sitting upright at the end of a cross tie, is justified in believing up to the last moment, in the absence of knowledge that such person is insane or deaf, that he will take reasonable precaution by moving out of the way: Norwood v. Raleigh &c. R. Co., 111 N. C. 236; s. c. 16 S. E. Rep. 4.

<sup>24</sup> Holmes v. South &c. R. Co., 97 Cal. 161; s. c. 31 Pac. Rep. 834.



of fact for a jury.<sup>25</sup> This doctrine has been frequently applied where deaf persons walking upon the track, with their backs to an approaching train, have been run over and killed, their conduct not being such as to apprise the engineer that they possessed any infirmity of hearing.<sup>26</sup> It has also been applied where the rumbling of a heavy freight train on another track was such as to drown the noise of the train which did the injury; the court proceeding on the view that in such a case the engineer of the latter train had a right to presume that the trespasser would use his faculties by looking.<sup>27</sup> It has been applied, but seemingly on untenable grounds, in a case where the engineer discovered an object upon the track whose character he was unable to determine, with the conclusions that he was not bound to slow up his train before becoming aware that it was a human being, and that he might rightfully assume that if it was a man he would leave the track.<sup>28</sup> As already indicated, this doctrine is generally applied in the case of adults or of children so large as to be presumptively able to take care of themselves. It does not, however, apply to *children of such tender years* as to be regarded as *non sui juris* within the meaning of principles already considered.<sup>29</sup> For example, the locomotive engineer is not entitled to indulge in the presumption that an infant nineteen months old, seen upon the track in front of his train, will quit the track in time to escape injury.<sup>30</sup> Nor does the rule apply in cases where, after discovering the trespasser upon the track in front of the advancing train, no suitable warning signals are given;<sup>31</sup> nor when it is obvious that the trespasser, though an adult, is laboring under a disability, and does not hear or comprehend the signals.<sup>32</sup>

§ 1737. **Circumstances under which the Foregoing Rule does not Apply.**<sup>33</sup>—As just seen,<sup>34</sup> the rule which authorizes those who are driving the train to assume that the trespasser on the track will exercise his faculties and take care of himself, does not apply in the case of a

<sup>25</sup> Texas &c. R. Co. v. Roberts, 2 Tex. Civ. App. 111; s. c. 20 S. W. Rep. 960.

<sup>26</sup> Tyler v. Sites, 90 Va. 539; s. c. 19 S. E. Rep. 174.

<sup>27</sup> Syme v. Richmond &c. R. Co., 113 N. C. 558; s. c. 18 S. E. Rep. 114.

<sup>28</sup> Murch v. Western &c. R. Co., 78 Hun 601; s. c. 61 N. Y. St. Rep. 445; 29 N. Y. Supp. 490.

<sup>29</sup> Post, § 1824; Vol. I, § 306, et seq.

<sup>30</sup> Galveston City R. Co. v. Hewitt, 67 Tex. 473; s. c. 3 S. W. Rep. 705;

Pennsylvania R. Co. v. Morgan, 82 Pa. St. 134; Kenyon v. New York &c. R. Co., 5 Hun (N. Y.) 479; Philadelphia &c. R. Co. v. Spearen, 47 Pa. St. 300; Meyer v. Midland &c. R. Co., 2 Neb. 319; McMillan v. Burlington &c. R. Co., 46 Iowa 231.

<sup>31</sup> Houston &c. R. Co. v. Harvin (Tex. Civ. App.), 54 S. W. Rep. 629.

<sup>32</sup> Frech v. Philadelphia &c. R. Co., 39 Md. 574.

<sup>33</sup> This section is cited in §§ 1738, 1770, 1782.

<sup>34</sup> Ante, § 1736; post, § 1824.



*child of tender years*;<sup>35</sup> nor in case of an adult obviously laboring under some disability, such as *drunkenness*;<sup>36</sup> nor in case where no warning signal is given;<sup>37</sup> nor in case where the trespasser is obviously, to the view of the engineer, in a place from which he can not extricate himself before the train comes upon him,<sup>38</sup>—as where he is on a bridge of considerable elevation, from which he can not escape by leaping to the ground;<sup>39</sup> nor in general, where, upon any ground, or from any indications, the engineer has reason to believe that the trespasser is not aware of the approach of the train.<sup>40</sup>

§ 1738. **What Do or not Do after Discovering Peril of Trespasser.**<sup>41</sup>—Next, let us consider what the engineer and trainmen ought to do or to refrain from doing, after discovering the trespasser exposed to danger in front of their advancing engine or train. The measure of their duty toward him is to exercise *reasonable care* to avoid injuring him; but it must be constantly kept in mind that this is a care proportionate to the danger, and that in such a situation it may demand the promptest and most efficient exertion. In the first place, it is to be observed that if there is nothing in the appearance of the trespasser to indicate to the engineer that he is deaf, insane, intoxicated or otherwise incapable of caring for himself, the duty of the railway company toward him will be sufficiently discharged by giving him a *warning signal*, generally with the *steam whistle*, when the engine or train has approached near enough to him to enable him, after hearing the signal, to get off the track, by making ordinary exertions.<sup>42</sup> This statement applies to children of advanced years,<sup>43</sup> as well as to adults;

<sup>35</sup> St. Louis &c. R. Co. v. Christian, 8 Tex. Civ. App. 246; s. c. 27 S. W. Rep. 932; Pennsylvania R. Co. v. Morgan, 82 Pa. St. 134; Kenyon v. New York &c. R. Co., 5 Hun (N. Y.) 479; Philadelphia R. Co. v. Spearen, 47 Pa. St. 300; Meyer v. Midland &c. R. Co., 2 Neb. 319; McMillan v. Burlington &c. R. Co., 46 Iowa 231; Riley v. Missouri &c. R. Co., 68 Mo. App. 652; Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179; s. c. 4 West. Rep. 257.

<sup>36</sup> Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179; s. c. 4 West. Rep. 257.

<sup>37</sup> Houston &c. R. Co. v. Harvin (Tex. Civ. App.), 54 S. W. Rep. 629. Compare Illinois &c. R. Co. v. Hocker (Ky.), 55 S. W. Rep. 438.

<sup>38</sup> In Smalley v. Southern R. Co., 57 S. C. 243; s. c. 35 S. E. Rep. 489,

it was held that the fact that a person was *sitting on a trestle*, or stooping over it, was no evidence to the engineer of an approaching train that he was in a position from which he could not extricate himself before being reached by the engine.

<sup>39</sup> Pierce v. Walters, 164 Ill. 560; s. c. 45 N. E. Rep. 1068; aff'd 63 Ill. App. 562; Callaway v. Walters, 63 Ill. App. 562; aff'd in 164 Ill. 560; Callaway v. Spurgeon, 63 Ill. App. 571.

<sup>40</sup> St. Louis &c. R. Co. v. Bishop, 14 Tex. Civ. App. 504; s. c. 37 S. W. Rep. 764; Missouri &c. R. Co. v. Weisen, 65 Tex. 443.

<sup>41</sup> This section is cited in §§ 1759, 1866.

<sup>42</sup> *Ante*, §§ 1601, 1627, 1736.

<sup>43</sup> *Ante*, §§ 1736, 1737; *post*, § 1824.



but does not apply to children of tender years.<sup>44</sup> Next, when the engineer discovers, or has reasonable cause to believe, that the trespasser will not leave the track in time to avoid being run over, his duty to attempt to stop the train begins.<sup>45</sup> Beyond question, the obligation of reasonable care toward the trespasser now requires him *to make the most vigorous and sustained exertion with all the means at his command*, to stop the train in time to avert the catastrophe; but, in doing this, he must have reference as well to the safety of those on the train, both passengers and employes, as to the safety of the trespasser.<sup>46</sup> This does not mean that the engineer is required to stop or check the speed of his train on seeing a person on the tracks, unless it is reasonably apparent that he is in danger,<sup>47</sup> or unless it becomes apparent that the trespasser is incapable of taking care of himself.<sup>48</sup> A railway company has been held liable for running over and killing a trespasser upon one of its bridges, where the engineer could have stopped the train in time to avoid the accident, if the fireman, after he had discovered the trespasser on the bridge, had promptly notified the engineer of the danger,—the company being answerable, under the rule of *respondet*

<sup>44</sup> *Ante*, §§ 1736, 1737; *post*, § 1824.

<sup>45</sup> See, *Gulf & C. R. Co. v. Hill* (Tex. Civ. App.), 58 S. W. Rep. 255 (where certain instructions of the trial court on this subject were condemned); *St. Louis & C. R. Co. v. Wilkerson*, 46 Ark. 513.

<sup>46</sup> It has been reasoned that reasonable care in operating a locomotive engine, to the end of avoiding injury to one in imminent peril of being struck by it, requires that, after those in charge of it know of his peril, they shall use *every means within their power*, consistent with safety, to avoid or lessen his injury: *Houston & C. R. Co. v. Wallace*, 21 Tex. Civ. App. 394; s. c. 53 S. W. Rep. 77. And this is, without doubt, the doctrine of the courts generally. The same court has said that the employes in charge of a train are bound to use *all practicable means in their power* to prevent an injury to a trespasser who is discovered asleep under a car: *Garza v. Texas & C. R. Co.* (Tex. Civ. App.), 41 S. W. Rep. 172 (no off. rep.). To the same effect, see the following cases: *Omaha & C. R. Co. v. Cook*, 42 Neb. 577; s. c. 60 N. W. Rep. 899; rehearing denied 42 Neb. 905; s. c. 62 N. W. Rep. 235; *Houston & C. R. Co. v. Wallace*, 21 Tex. Civ. App. 394; s. c. 53 S. W. Rep. 77;

*Riley v. Missouri & C. R. Co.*, 68 Mo. App. 652; *Callaway v. Walters*, 63 Ill. App. 562; *aff'd* 164 Ill. 560.

<sup>47</sup> *Baker v. Chicago & C. R. Co.*, 95 Iowa 163; s. c. 63 N. W. Rep. 667; *Erb v. Eggleston*, 41 Neb. 860; s. c. 60 N. W. Rep. 98.

<sup>48</sup> *Omaha & C. R. Co. v. Cook*, 42 Neb. 577; s. c. 60 N. W. Rep. 899; denying rehearing in 42 Neb. 905; s. c. 62 N. W. Rep. 235. Or, to state it differently, where there is no ground to suspect that he is deaf, blind or helpless: *Cincinnati & C. R. Co. v. Murphy*, 17 Ohio C. C. 223. It has been held that an engineer is not required in the exercise of reasonable care to heed a signal to stop his train by a stranger, when no danger is in sight, or reasonably to be apprehended: *Blair v. Grand Rapids & C. R. Co.*, 60 Mich. 124; s. c. 26 N. W. Rep. 855. But this does not seem to be sound. On the contrary, it has been held that a railway company is not relieved from liability for an injury to a trespasser resulting from the negligent failure of its engineer to obey the signal of a brakeman to stop, merely because the engineer did not know the occasion of the signal: *Garza v. Texas & C. R. Co.* (Tex. Civ. App.), 41 S. W. Rep. 172 (no off. rep.).



*superior*, for the negligence of the fireman, as well as for that of the engineer.<sup>49</sup>

§ 1739.

**When not Liable for Running upon Trespasser after Discovering Him.**<sup>50</sup>—There will, plainly, be no liability on the part of the railway company under the theory already considered,<sup>51</sup> where, after discovering the trespasser on the track, those in charge of the train do all that can be done within reasonable limits, to give him warning and to check or stop the train before reaching him. In such a case, if the engineer, being a competent and careful man, acts upon his *best judgment* and does what he thinks most likely to save the trespasser, his mere omission to do something else which *might possibly* have been done will not be imputed to the company as negligence,<sup>52</sup>—as where he sounds the danger signal and applies the air-brake but omits to reverse his engine.<sup>53</sup> Other courts, and especially those which proceed upon the rule already stated,<sup>54</sup> which exonerates the railroad company in the absence of gross or wanton negligence,—exonerate the company from liability where the trespasser is an adult person, or one apparently old enough to take care of himself, although everything which pos-

<sup>49</sup> *Purcell v. Chicago & C. R. Co.*, 109 Iowa 628; s. c. 80 N. W. Rep. 682. On the contrary, it has been held that a *fireman* was not guilty of negligence in failing to notify the engineer of the presence of one upon the track until the engine has approached to within twenty or twenty-five feet, when he warned the person to "look out," where the warning was given soon enough to enable him to get off the track if he had heeded it: *Vreeland v. Chicago & C. R. Co.*, 92 Iowa 279; s. c. 60 N. W. Rep. 542. Evidence of negligence has been discovered in the failure of the engineer to make any attempt to stop his train, running at the rate of fifty miles an hour, until it is within one hundred yards of a trespasser on the track, whom he had previously observed: *Louisville & C. R. Co. v. Tinkham*, 44 S. W. Rep. 439; s. c. 19 Ky. L. Rep. 1784 (not to be off. rep.). So, a mining company was held liable for an injury to a trespasser on its track, caused by the negligence of the engineer in charge of a coal train, in failing to stop it after discovering the trespasser, where he had time to do so: *Lexington & C. Min. Co. v. Huffman*, 17 Ky. L. Rep. 775; s. c. 32 S. W. Rep. 611 (not to be off.

rep.). So, where the engineer fails to give danger signals on first discovering a trespasser on the track, but waits until the train is so near him that he is in imminent danger, it becomes then the duty of the engineer to use all the means at hand, consistent with the safety of his passengers and trainmen, to stop the train and avert the injury, without waiting to see whether the signals are heeded or not: *Chamberlain v. Missouri & C. R. Co.*, 133 Mo. 587; s. c. 3 Am. & Eng. Rail. Cas. (N. S.) 401; 34 S. W. Rep. 842; aff'g 33 S. W. Rep. 437.

<sup>50</sup> This section is cited in §§ 1715, 1771, and 1780.

<sup>51</sup> *Ante*, § 1705, *et seq.*

<sup>52</sup> *Ante*, §§ 1381, 1669, 1715.

<sup>53</sup> *Bell v. Hannibal & C. R. Co.*, 72 Mo. 50. Where a trespasser was seen lying by the track in such a position that the train would not strike him, but while the train was passing he moved and was killed, it was held that the company was not imputable with negligence because of the failure of the engineer to stop the train when first seeing him: *McKenna v. New York & C. R. Co.*, 8 Daly (N. Y.) 304.

<sup>54</sup> *Ante*, § 1713, *et seq.*



sibly might have been done to prevent the catastrophe was not done. For instance, where the person who was killed was a bare licensee, walking along the track, and was first seen when the train, running nearly forty miles an hour, was within three hundred feet of him, and the engineer at once began to blow short whistles, the fact that he did not at once put on the brakes was not such gross negligence as would charge the company with liability, if it were negligence at all;<sup>55</sup> since he might rightfully presume, until the contrary appeared, that the person on the track would heed the signals and quit the track in time to save himself.

§ 1740. **Duty of the Engineer on Seeing an Object on the Track which may be a Human Being.**—We now come to a class of decisions, very questionable, and from many points of view very regrettable, which are to the effect that the engineer in charge of a railway train, upon discovering an object on the track, which may or may not be a human being, is under no duty, as matter of law, to slacken the speed of his train before the nature of the object is known.<sup>56</sup> According to the doctrine of these cases, he is not obliged to slacken the speed of his train merely because he has doubts as to the nature of the object, unless, for some reason, he has cause to believe that it will not leave the track;<sup>57</sup> but he is entitled to drive his train forward, although at a

<sup>55</sup> June v. Boston &c. R. Co., 153 Mass. 79; s. c. 26 N. E. Rep. 238. In like manner, it has been held that a railway company is not, as matter of law, liable for an injury to a person upon a *high trestle*, although the engineer might have stopped the train before reaching him after learning of his presence, where such person went out upon the cap sill projecting a foot and a half from the track, and the engineer entertained a reasonable belief that he was out of danger, induced by the fact that other persons in the same situation had not been injured by the passage of the train: Little v. Carolina &c. R. Co., 118 N. C. 1072; s. c. 24 S. E. Rep. 514. Another court has held that a railroad company is not chargeable with willfully killing a trespasser upon a *trestle* because of the engineer's failure to check the speed of the engine, which was going at the rate of twenty-five miles an hour at a point two thousand feet from the trestle, when he first saw the trespasser, who was attempting to retrace his steps for one hundred feet to a place of safety, in the absence of

any circumstances charging the engineer with notice that the trespasser would be unable to reach such place; since, under the conditions, he was only obliged to walk at the rate of one and one-fourth miles an hour in order to reach the place of safety before the engine would reach him: Ullrich v. Cleveland &c. R. Co., 151 Ind. 358; s. c. 4 Am. Neg. Rep. 474; 13 Am. & Eng. Rail. Cas. (N. S.) 783; 51 N. E. Rep. 95.

<sup>56</sup> Louisville &c. R. Co. v. Williams, 69 Miss. 631 (child asleep on track—engineer bound only to abstain from wanton injury); Murch v. Western &c. R. Co., 78 Hun (N. Y.) 601; s. c. 61 N. Y. St. Rep. 445; 29 N. Y. Supp. 490; Tucker v. Norfolk &c. R. Co., 92 Va. 549; s. c. 24 S. E. Rep. 229; Louisville &c. R. Co. v. Haynes, 47 Ark. 497. But see Keyser v. Chicago &c. R. Co., 56 Mich. 559; affirmed in 66 Mich. 390 (a decision supporting the view of the author). Compare Burg v. Chicago &c. R. Co., 90 Iowa 106.

<sup>57</sup> Burg v. Chicago &c. R. Co., 90 Iowa 106; s. c. 57 N. W. Rep. 680.



great rate of speed, until he has an opportunity of inspecting the object, and of discovering what it is,—after which it will generally be too late to avert injury to the object if it turns out to be a human being; and notwithstanding the further fact that by so doing, he may derail his train and kill or injure the passengers or other persons on board of it. It was so held where those who were driving a train saw an object dangerously near the track, which they mistook to be a man's coat, or a railway tie, and failing to stop the train ran over it, killing a trespasser;<sup>58</sup> and where the engineer in charge of a train saw a man lying on the track at some distance ahead, but honestly mistook him for some inanimate being, until he got near enough to him to inspect him, when it was too late to avoid running over him.<sup>59</sup> Decisions of this kind give some support to the popular accusation that the railroad companies, with the aid of the judges, ride roughshod over everybody and everything. It is possibly a subject of congratulation that a few courts have declined to take this view. In the view of one court, the failure of a locomotive engineer to perform his duty to maintain a reasonably vigilant lookout along the track in front of the train renders the railroad company liable for killing a human being lying on the track, apparently helpless from any cause, when the engineer could have seen him by the exercise of ordinary care.<sup>60</sup> The same court held that a railway company was liable for the death of one from being struck by its train while lying at the side of the track, where the engineer, by a reasonable and proper lookout, could have discovered him in time to have averted the accident.<sup>61</sup> Another court has made the concession in favor of humanity that where one goes upon a railroad track, and there becomes, *through no fault of his own*, insensible, and, while in full view, is run over and injured by a train, the company is liable for the neglect of its agents in failing to keep a reasonable lookout.<sup>62</sup>

§ 1741. **Duty to Give Warning Signals to Trespasser after Discovering Him.**—The most obvious suggestion of prudence and social duty requires that the engineer who is driving the train shall give warning signals to a trespasser, whom he sees on the track in front of the train with his back to it, in sufficient time to enable him, after hearing the signals, to quit the track in safety; and this is so, although

<sup>58</sup> *Tucker v. Norfolk &c. R. Co.*, 92 Va. 549; s. c. 24 S. E. Rep. 229.

<sup>59</sup> *Louisville &c. R. Co. v. Haynes*, 47 Ark. 497.

<sup>60</sup> *Pickett v. Wilmington &c. R.*

*Co.*, 117 N. C. 616; s. c. 30 L. R. A. 257; 23 S. E. Rep. 264.

<sup>61</sup> *Pharr v. Southern R. Co.*, 119 N. C. 751; s. c. 26 S. E. Rep. 149.

<sup>62</sup> *Houston &c. R. Co. v. Sympkins*, 54 Tex. 615.



the trespasser suddenly and unnecessarily assumes a place in dangerous proximity to the track.<sup>63</sup> So, where one was negligently attempting to pass between standing cars, by climbing over the drawheads or bumpers, and his dangerous position was known by the watchman, who, nevertheless, without giving him any warning, signaled for the train to start, and it started, injuring him, the railway company was liable, because of its failure to give him reasonable warning in time to allow him to escape injury.<sup>64</sup> Upon the question, what is a reasonable warning to a trespasser on a railway track in front of an advancing train, the company has been exonerated from negligence in failing to sound the steam whistle and check the speed of its train, where the trespasser was upon its track about 125 yards from a public crossing.<sup>65</sup> So, a danger signal given when the train was within 400 feet of the trespasser, who had not heard its approach, was held to be given in time, where he could have walked fifteen or twenty feet after hearing it, before the train reached him.<sup>66</sup> The usual danger signal, consisting of a sharp whistle, which can be heard for two or three miles, is a sufficient signal to be given by a locomotive engineer upon discovering a trespasser upon the track in front of his train, who has not previously observed its approach,<sup>67</sup>—provided, of course, it is given in time, having reference to the speed of the train.<sup>68</sup>

§ 1742. **Cases Exhibiting Negligence of this Kind.**<sup>69</sup>—Applying the foregoing principles, railway companies *have been held liable* under the following circumstances:—Where a person upon the track was struck and injured by a locomotive, which could have been easily stopped in time to avoid the catastrophe, after those in charge of it

<sup>63</sup> Texas &c. R. Co. v. Bredow, 90 Tex. 26; s. c. 35 S. W. Rep. 490.

<sup>64</sup> International &c. R. Co. v. Tabor, 12 Tex. Civ. App. 283; s. c. 33 S. W. Rep. 894.

<sup>65</sup> East Tennessee &c. R. Co. v. Smith, 94 Ga. 580; s. c. 20 S. E. Rep. 127.

<sup>66</sup> Sinclair v. Chicago &c. R. Co., 133 Mo. 233; s. c. 34 S. W. Rep. 76; 3 Am. & Eng. Rail. Cas. (N. S.) 269.

<sup>67</sup> Sinclair v. Chicago &c. R. Co., 133 Mo. 233; s. c. 34 S. W. Rep. 76; 3 Am. & Eng. Rail. Cas. (N. S.) 269.

<sup>68</sup> The failure to give such a signal is, of course, immaterial if the trespasser *sees the train* coming in time, by the exercise of reasonable care, to get out of its way: Rine

v. Chicago &c. R. Co., 88 Mo. 392; s. c. 3 West. Rep. 800. State of the evidence under which the question, whether the servants in charge of a train gave timely warning of the approach of a train after discovering the presence of a trespasser on the track, was properly left to the jury: Illinois &c. R. Co. v. Hocker (Ky.), 55 S. W. Rep. 438. A railway company does not owe a duty of giving the statutory signal to a trespasser on its track at a point between a crossing and a place where the signal should be given: St. Louis &c. R. Co. v. Bishop, 14 Tex. Civ. App. 504; s. c. 37 S. W. Rep. 764.

<sup>69</sup> This section is cited in § 1743.



discovered his peril;<sup>70</sup> where a boy caught his foot between the main and guard rail of the switch-track, and was run over, and the cars could have been stopped before reaching him by the use of due diligence on the part of the trainmen, after seeing his dangerous situation;<sup>71</sup> where the plaintiff, who was in the employ of the defendant, was going home from the shops of the defendant, along a path upon its track, which he had been accustomed to use with the knowledge and permission of the defendant, and was run over by a train not proceeding on schedule time, the approach of which he failed to notice, when the engineer of the train saw him on the track, which was straight and gave an uninterrupted view for a long distance, and the engineer rang the bell and blew the steam whistle, but failed to stop the train, as he might have done;<sup>72</sup> where the trainmen recklessly and wantonly gave speed to a moving train, knowing that a child of tender years was walking at the side of it, with his hands on the brake rod, and the child was thrown under the train.<sup>73</sup>

**§ 1743. Circumstances under which the Railroad Company was not Liable.**—On the other hand, the railroad company was not liable on the footing of gross negligence, or wanton conduct in the management of its train, toward a child trespassing upon its track, where the engineer used the emergency application of the air brake as soon as he discovered the child, but was unable to stop the train in time to prevent the accident.<sup>74</sup> Nor was the company liable where the employés in charge of the train saw a person on the track in front of the train, at a distance of from a quarter to half a mile, and failed to use ordinary care to ascertain whether he would quit the track in time to avoid in-

<sup>70</sup> *Houston &c. R. Co. v. Wallace*, 21 Tex. Civ. App. 394; s. c. 53 S. W. Rep. 77; *Houston &c. R. Co. v. Harvin* (Tex. Civ. App.), 54 S. W. Rep. 629. So, where the plaintiff, after looking, kept on the defendant's track, which was commonly used as a foot path, and which was the usual route for the plaintiff to take in going to and from his work, when he was struck by the defendant's switch engine, approaching from behind, which gave no signals, the engineer in charge of which did not see him, but a switchman riding on the tender of which saw him, hallooed to him, and attempted but without success to stop the engine, on account of its brakes being defective. The switchman also had given a signal to the engineer to stop, which the latter did not hear

until after the accident: *Houston &c. R. Co. v. Harvin* (Tex. Civ. App.), 54 S. W. Rep. 629.

<sup>71</sup> *Goodrich v. Burlington &c. R. Co.*, 103 Iowa 412; s. c. 72 N. W. Rep. 653.

<sup>72</sup> *Bouwmeester v. Grand Rapids &c. R. Co.*, 63 Mich. 557; s. c. 6 West. Rep. 362 (this case was stated in the opening statement to the jury, and the judge non-suited the plaintiff, and this was held error. See the same case on a subsequent appeal in the next section).

<sup>73</sup> *McVoy v. Oakes*, 91 Wis. 214; s. c. 64 N. W. Rep. 748 (held to be negligence, without reference to the question how the child got into such a situation).

<sup>74</sup> *Friend v. Chicago &c. R. Co.*, 104 Wis. 663; s. c. 80 N. W. Rep. 934.



jury, and did not discover his danger, when it arose, in time to avert it;<sup>75</sup> where a person, being intoxicated, undertook to walk home on a railway track at nightfall, and was overtaken by a train, but was not seen by the engineer until the train was within a short distance of him, when it was too late to stop it;<sup>76</sup> where an employé in a car shop, who, without permission from the company, was in the habit of using the railroad track as a footway in going to and from his work, stepped upon the track and failed to hear or heed the whistle of an advancing train, and the engineer, after discovering that he took no notice of the whistles, made every possible effort to stop the train, and at the same time continued the danger signals;<sup>77</sup> where the trainmen, observing a man walking along the side of the track, apparently in a state of intoxication, shut off the steam so as to decrease the speed, sounded the steam whistle, rang the bell, and, the man having actually stepped upon the track, reversed the engine and immediately applied the brake, but not in time to avert injury to him.<sup>78</sup>

§ 1744. **Care Due to Trespassers after the Injury.**—Although a trespasser upon a railway track has been run over and injured, even as the result of his own folly and unlawful act,—yet the railroad company thereafter, as a mere matter of social obligation which rests upon all men, owe him the duty of exercising in his behalf such reasonable care and attention as may be practicable under the circumstances, having regard to the necessity of prosecuting its public duties and the safety of others in its custody on board its train. This is well illustrated in a case where it appeared that the body of a person, who had been run down by an express train at night, was brought to a station near at hand, and was by the station-master placed upon some rubbish in a warehouse, on the supposition that life was extinct, without examination by a physician, although the propriety of such examination was

<sup>75</sup> *Texas &c. R. Co. v. Staggs*, 90 Tex. 458; s. c. 39 S. W. Rep. 295; aff'g s. c. 37 S. W. Rep. 609.

<sup>76</sup> *Memphis &c. R. Co. v. Womack*, 84 Ala. 149; s. c. 4 South. Rep. 618.

<sup>77</sup> *Bouwmeester v. Grand Rapids &c. R. Co.*, 67 Mich. 87; s. c. 10 West. Rep. 853; 34 N. W. Rep. 414. See this case on a former appeal in *ante*, § 1742.

<sup>78</sup> *Union &c. R. Co. v. Mertes*, 39 Neb. 448; s. c. 58 N. W. Rep. 105. And even where a trespasser upon a railway track, knowing that trains were continually passing over it, was killed by a train, although the trainmen failed to use proper efforts to stop the train after discovering

his peril, it appearing that he might have seen and heard the train, and might have got out of its way by a single step: *Kirtley v. Chicago &c. R. Co.*, 65 Fed. Rep. 386. This decision can be upheld only on the ground that the trainmen had the right to assume that the trespasser would get out of the way before running upon him. The rule is that if the engineer could see that the trespasser is not likely to get out of the way, but nevertheless fails to slacken speed, to the end of averting or diminishing injury to him, but strikes him at full speed, the company will be liable: *St. Louis &c. R. Co. v. Wilkerson*, 46 Ark. 513.



suggested to the company's agents. In the morning it appeared that the injured man had revived during the night, and dragged himself a considerable distance along the floor, where he was found dead, with his body yet warm, in a stooping posture, pressing his hand upon his leg, to stop the flow of blood from an artery which had been cut. There was no evidence of any serious injury to his brain, and he undoubtedly bled to death for lack of assistance. The court held that, even though the accident was caused by the negligence of the deceased, it was proper to submit to the jury whether his death did not result from the subsequent neglect of the defendant's servants. The court said: "It is the settled policy of the law to give such agents and servants a large and liberal discretion, and hold the companies liable for all their acts, within the most extensive range of their charter powers."<sup>79</sup>

<sup>79</sup> Northern &c. R. Co. v. State, 29 How. (U. S.) 468, 483; Whatman v. Md. 420, 442; citing 1 Redf. on Rys. Pearson, L. R. 3 C. P. 422.  
510; Phila. &c. R. Co. v. Derby, 14



## CHAPTER LVI.

### CONTRIBUTORY NEGLIGENCE OF TRESPASSERS, BARE LICENSEES, AND OTHERS, KILLED OR INJURED UPON RAILWAY TRACKS AT OTHER PLACES THAN HIGHWAY CROSSINGS.

ART. I. General Doctrines and Applications, §§ 1747-1763.

ART. II. Applications and Illustrations, §§ 1766-1800.

#### ARTICLE I. GENERAL DOCTRINES AND APPLICATIONS.

| SECTION   | SECTION  |
|---|--|
| 1747. Trespassers deemed guilty of negligence <i>per se</i> .   | 1755. Going lawfully to work upon the track in spite of obvious danger.                                |
| 1748. Further of the contributory negligence of trespassers.  | 1756. Contributory negligence of track-repairers, track-walkers, car-repairers, etc.                   |
| 1749. Contributory negligence of licensees.   | 1757. Further of the contributory negligence of such persons.  |
| 1750. Person injured must have been in the exercise of ordinary care.   | 1758. Care required of travellers at farm crossings.   |
| 1751. Rule where the railway company, by the exercise of ordinary care, could have avoided the consequences of the negligence of the person killed or injured on its track. | 1759. Contributory negligence of persons riding on hand-cars.  |
| 1752. No special duty to keep a lookout for trespassers.  | 1760. Contributory negligence of persons injured in railway yards.                                     |
| 1753. Contributory negligence of trespassers in the use of defective railway premises.  | 1761. Contributory negligence of persons loading and unloading cars.                                   |
| 1754. Injury from neglect of statutory precautions — When contributory negligence not a defense.  | 1762. Cases in which contributory negligence was ascribed to persons engaged in loading and unloading. |
|   | 1763. Various instances of contributory negligence of railway employés.                                |

§ 1747. **Trespassers Deemed Guilty of Negligence Per Se.**<sup>1</sup>—The attitude in law of an adult trespasser upon a railway track at a place other than the public highway, and under such circumstances as preclude a legal right in him to be there, is quite as unfavorable to him in case he is injured while so trespassing, as is the attitude of one who is guilty of contributory negligence as matter of law. He is where he

<sup>1</sup> This section is cited in §§ 1748, 1760, 1770, 1774, 1775, 1805, 1826, 1890, 1997, 2000, 2121.



has no legal right to be. He consequently assumes the risk of the dangers which attend the place where he is; the railway company is under no special duty to anticipate his unlawful trespass in order to avert injury to him; its duty to him begins at the moment when its servants discover him in a situation of danger, and not before. Speaking generally, the duty of the railway company is limited to refraining from inflicting injury upon him, *willfully, wantonly, or recklessly*;<sup>2</sup> and what this is has been frequently shown elsewhere.<sup>3</sup> These general rules may be extracted from many decisions collected elsewhere in this title, and from those cited in the marginal note here.<sup>4</sup> Some of the cases dealing with accidents of this kind do not make very nice distinctions between the question whether the person killed or injured was a *trespasser*, or whether the plaintiff is precluded from recovering damages on the ground of his *contributory negligence*; since the legal effect of his being a trespasser, and of his being guilty of contributory negligence *per se* is substantially the same.<sup>5</sup> It is plain that he may be precluded from recovering damages on both grounds: 1. He unlawfully places himself where he has no right to be, and consequently accepts the risks of the situation. 2. He is guilty of contributory negligence, that is, of want of ordinary care and prudence for his own safety, in placing himself in such a situation. On either ground, or on both grounds blended, he is precluded from recovering damages, since he can not make his own fault the ground of recovering damages against the railroad company.<sup>6</sup>

<sup>2</sup> *Coatney v. St. Louis & C. R. Co.*, 151 Mo. 35; s. c. 51 S. W. Rep. 1036; *Jelinski v. Belt R. Co.*, 86 Ill. App. 535 (trespasser injured while crossing railway yard).

<sup>3</sup> Vol. I, §§ 246, 948; *ante*, §§ 1713, 1714, 1715.

<sup>4</sup> *Railroad Company v. Houston*, 95 U. S. 697; s. c. 6 Cent. L. J. 132; *Bancroft v. Boston & C. R. Co.*, 97 Mass. 275; *Sutton v. New York & C. R. Co.*, 66 N. Y. 243; *Mulherrin v. Delaware & C. R. Co.*, 81 Pa. St. 366; *Illinois & C. R. Co. v. Hetherington*, 83 Ill. 510. The author in his original edition stated at very considerable length, the decision in the case of *Dublin & C. R. Co. v. Slattery* (in 3 App. Cas. 1155), which seems to have been decided without reference to the principle of the American law, that a railway company, in common with any other landowner, owes no special duty to trespassers upon its tracks, until their peril has been discovered. It turned upon the two questions: Whether the company was guilty of negligence,

and whether the person injured was guilty of contributory negligence. I do not intend to restate this doctrine here, because it was a case upon which the judges who participated in it were greatly divided,—except to say that the American doctrine tends to concur with the views of the dissenting judges, which opposed a right of recovery.

<sup>5</sup> *Savannah & C. R. Co. v. Meadors*, 95 Ala. 137; s. c. 10 South. Rep. 141.

<sup>6</sup> Therefore, a person who walked upon a railroad track on a dark night, at a place where he had no right to be, and where there was no necessity for him to walk, was guilty of contributory negligence, such as prevented a recovery of damages for an injury received by being run upon by an engine *without signals*: *Irving v. Minneapolis & C. R. Co.*, 71 Minn. 9; s. c. 73 N. W. Rep. 518. So, a railroad company was not liable for the death of one who, while walking upon its tracks or attempting to cross at a place other than a



## § 1748. Further of the Contributory Negligence of Trespassers.—

Some of the courts deal with the attitude of the trespasser on the theory of contributory negligence, rather than on the theory of his being guilty of an unlawful trespass. Upon whichever theory the court proceeds, the conclusion plainly is that the fault of the trespasser in exposing himself to injury by his trespass will bar any recovery for the injury, where the railway company did all it reasonably could, after discovering his exposed situation, to avoid injuring him;<sup>7</sup> or, under another theory, already considered, provided that, by the exercise of reasonable care, it might have discovered him in time, by the exercise of the like reasonable care, to avoid injuring him;<sup>8</sup> or, under another

highway crossing, got his foot caught in a cattle guard, and, seeing a train coming, and finding himself unable to extricate his foot, threw his body off the track into the cattle guard, so that the train cut his foot off,—there being no negligence on the part of those in charge of the train: *Louisville & C. R. Co. v. Kellem*, 14 Ky. L. Rep. 734; s. c. 21 S. W. Rep. 230 (no off. rep.). So, a railroad company was not liable for the death of one killed on its tracks who, for his own convenience, attempted to cross at a *highway crossing* when a train was in sight, and might have done so if his foot had not caught in the rail, although the engineer violated the statute requiring trains to stop before they get to a crossing, such statute not being intended for the protection of strangers and idlers on the tracks: *Gresham v. Louisville & C. R. Co.*, 15 Ky. L. Rep. 599; s. c. 24 S. W. Rep. 869 (no off. rep.). So, there can be no recovery against a railway company for killing a person, where the evidence merely shows that the deceased started to walk home on the railroad track; that, about ten minutes afterwards, the regular freight train came along, following him; that his body was found the next morning on the right of way, with such marks upon it as indicated that he had been killed by a passing train; and where the testimony of the employés in charge of the train, called as witnesses for the defendant, tended to negative any negligence on their part: *Louisville & C. R. Co. v. Terry* (Ky.), 20 Ky. L. Rep. 803; s. c. 47 S. W. Rep. 588 (not to be rep.). So, where a boy nine years old was killed on a railway track,

though not, so far as appeared, at a public crossing, and was last seen walking on the track with a sack of meal on his head, and a train was coming from the other direction, with a bright headlight, and making a loud noise, and no negligence on the part of the railway company appeared, except its *failure to give a signal on approaching a crossing*: *Missouri & C. R. Co. v. Porter*, 73 Tex. 304; s. c. 11 S. W. Rep. 324. In another case, which seems to be out of line with the current of authority, a woman walking along the company's right of way, and conceded to have been a trespasser, was not precluded from recovering damages, either on the theory of trespass or of contributory negligence, where she was *struck by a cow* thrown against her by a passing locomotive, if she made due use of her senses to discover the approaching train which hurt her, and to get out of its way: *Alabama & C. R. Co. v. Chapman*, 80 Ala. 615.

<sup>7</sup> *Phillips v. East Tennessee & C. R. Co.*, 87 Ga. 272; s. c. 13 S. E. Rep. 644.

<sup>8</sup> *Ante*, §§ 1711, 1712. For example, if a man, *partially intoxicated*, deliberately leaves a safe path, goes and walks upon a railroad where there are several tracks and moving trains, and then, after looking east, turns and walks west on the track, with his hands behind him and his head down, until he is struck by the tender of an engine which is backing, while the bell is ringing, and various parties see him and try to warn him, but without success,—he is guilty of *gross negligence* which will preclude any recovery on account of his death,



theory already considered,<sup>9</sup> unless the railway company, after discovering his exposed situation, was guilty of *gross, reckless, wanton, or willful* negligence,—provided that the trespasser, by the exercise of ordinary care, might have protected himself from injury.<sup>10</sup> Under this theory, stated in the abstract, no recovery can be had for the death or injury of the trespasser, if he could have avoided the accident by the exercise of ordinary care, even though the railway company may have been guilty of *some* negligence.<sup>11</sup> In the just application of the principles considered in the preceding chapter, it follows that, in an action against a railway company to recover damages for injuries due to its negligence after discovering the peril of the plaintiff, the only contributory negligence which will be available as a defense must be predicated upon some act or omission of the plaintiff *subsequently* to his discovery by the servants of the defendant in the situation of peril.<sup>12</sup>

§ 1749. **Contributory Negligence of Licensees.**—It has been well held that a license, such as has been already considered, to walk along the track of a railway, does not relieve the licensee from the duty of exercising ordinary care to protect himself from the obvious dangers of his situation, by giving him any higher right, as against the company, than that possessed by a traveller at a highway crossing.<sup>13</sup> It has been held a *question for the jury* whether one licensed to walk along a railroad track was guilty of negligence contributing to his injuries, by being run over by a train moving backwards, in failing to look for such train more frequently than he did, after he had passed it and supposed it to be going in the opposite direction, where it backed up at an unusual speed without any signals of its approach.<sup>14</sup> One court has held that for such a licensee, walking between railway tracks, to *jump the wrong way* upon being suddenly startled by the near approach of an engine behind her, without any signals of its approach, is not such contributory negligence as will prevent a recovery for personal injuries sustained by her by being struck by such engine.<sup>15</sup> But another court has exonerated the railway company where the licensee, upon hearing a train approach, stepped from its track and allowed the

where it is not shown that the parties in charge of the engine were guilty of negligence: *Norfolk & C. R. Co. v. Harman*, 83 Va. 553; s. c. 8 S. E. Rep. 251.

<sup>9</sup> Vol. I, §§ 246, 948; *ante*, §§ 1713, 1714, 1715, 1747.

<sup>10</sup> *Atlanta & C. R. Co. v. Leach*, 91 Ga. 419; s. c. 17 S. E. Rep. 619.

<sup>11</sup> *Dowdy v. Georgia R. & C. Co.*, 88 Ga. 726; s. c. 16 S. E. Rep. 62.

<sup>12</sup> *Alabama & C. R. Co. v. Burgess*, 116 Ala. 509; s. c. 22 South. Rep. 913.

<sup>13</sup> *Missouri & C. R. Co. v. Moseley*, 6 C. C. A. 641; s. c. 57 Fed. Rep. 921.

<sup>14</sup> *Johnson v. Lake Superior & C. R. Co.*, 86 Wis. 64; s. c. 56 N. W. Rep. 161.

<sup>15</sup> *Texas & C. R. Co. v. Watkins* (Tex. Civ. App.), 26 S. W. Rep. 760.



engine and train to pass him, and then stepped back upon the track, and was struck by the rear section of the train, which had broken apart without any fault of the trainmen, who were applying the brakes and did not observe his perilous position.<sup>16</sup>

§ 1750. **Person Injured must have been in the Exercise of Ordinary Care.**—Leaving out of view the question whether the person injured is a *trespasser*, or is *lawfully* upon the railroad track, and confining the inquiry merely to the care demanded of a person in a perilous situation, the conclusion of the courts is that it is not necessary, in order that the railway company may support the defense of contributory negligence, that the person injured should have gone upon the track *recklessly*, but that his failure to exercise ordinary care will bar a recovery;<sup>17</sup> and this was so, within limits elsewhere stated, although the railway company was guilty of negligence.<sup>18</sup> This doctrine is so applied that if the plaintiff or person killed could, by the exercise of ordinary care, have *avoided the consequences of the negligence of the railway company*,—assuming that the latter was negligent,—there can be no recovery.<sup>19</sup>

§ 1751. **Rule where the Railway Company, by the Exercise of Ordinary Care, could have Avoided the Consequences of the Negligence of the Person Killed or Injured on its Track.**—Turning around the doctrine which obtains under the code of Georgia, referred to in the note to the preceding section, we encounter another doctrine which, stated in the abstract, is equally unsound, which is that where the contributory negligence of the person killed or injured on the railroad track is

<sup>16</sup> *Louisville &c. R. Co. v. Schmetzer* (Ky.), 15 Ky. L. Rep. 194; s. c. 22 S. W. Rep. 603. See also *Hanks v. Boston &c. R. Co.*, 147 Mass. 498; s. c. 7 N. Eng. Rep. 139; 18 N. E. Rep. 218, where it was held that there was evidence that the traveller was exercising due care, the rule of the jurisdiction placing the burden of disproving contributory negligence upon the plaintiff.

<sup>17</sup> *Atlantic &c. R. Co. v. Reiger*, 95 Va. 418; s. c. 28 S. E. Rep. 590. Compare Vol. I, § 171, *et seq.*

<sup>18</sup> *Briscoe v. Southern R. Co.*, 103 Ga. 224; s. c. 28 S. E. Rep. 638; *Chicago &c. R. Co. v. Kelly*, 75 Ill. App. 490.

<sup>19</sup> *Fulcher v. Central &c. R. Co.*, 110 Ga. 327; s. c. 35 S. E. Rep. 280. The proposition extracted from a decision of an appellate court in Illi-

nois, that, since the abolition of the doctrine of comparative negligence in that State, in order to support a recovery of damages for the killing of a person by a railway train, the deceased must have been in the exercise of ordinary care at the time of the accident (*Chicago &c. R. Co. v. Kelly*, 75 Ill. App. 490), is sound as an abstract proposition of law; but the additional proposition that the injury must be attributable alone to the negligence of the company, is unsound; since the person killed may have been negligent in exposing himself to danger, and yet if the company, after discovering his exposed situation, could, by the exercise of reasonable care, have averted injury to him, the company will be liable: *Post*, § 1734.



admitted or established, it is proper to submit to the jury the issue whether, notwithstanding the negligence of such person, the railway company, by the exercise of reasonable care, could have prevented the catastrophe.<sup>20</sup> This proposition has already been discussed,<sup>21</sup> with the conclusion that it is unsound as a naked and unqualified proposition of law, but that it should be qualified by the proposition that the negligence of the railway company *must not have been concurrent* with that of the person killed or injured, *but must have been subsequent* to it, either through the failure to discover his exposed situation, and then to exercise reasonable care to avert injury to him, or (he being a trespasser) a failure to exercise reasonable care to avert injury to him, *after discovering* his peril.<sup>22</sup>

**§ 1752. No Special Duty to Keep a Lookout for Trespassers.**—This brings us back to the proposition stated at the beginning of this chapter, and concurred in by a great majority of the courts, that, although a railroad company, in propelling a train along its track, is driving an instrument of great danger to persons who may be in its way,—yet it has a right to a clear track, and is under no special duty to look out for trespassers, or to discover them in time to avoid injuring them; and consequently that its failure to discover a trespasser in time, by the

<sup>20</sup> Cox v. Norfolk &c. R. Co., 126 N. C. 103; s. c. 35 S. E. Rep. 237.

<sup>21</sup> Vol. I, § 231, *et seq.*

<sup>22</sup> Among the more or less inconsistent decisions which jostle each other on this question, many of which exhibit a want of understanding of the subject on the part of the judges, we find a Texas case, to the effect that if the trainmen could, by the exercise of ordinary care, have discovered the peril of a person standing on the track, and have avoided injuring him, this does not cancel the effect of his contributory negligence, or permit a recovery of damages for his death from being struck by the train; since the doctrine of comparative negligence does not obtain in Texas: International &c. R. Co. v. Eason (Tex. Civ. App.), 35 S. W. Rep. 208 (no off. rep.). The doctrine of comparative negligence would not have been revived if the question had been decided the other way. It has nothing to do with such a case. The doctrine of the Texas case is sound only on the assumption that the person killed was a trespasser on the track of the railway company, to whom

it owned no special duty of maintaining a lookout, or of exercising care, until it discovered his perilous situation. There was a time in Texas when they had a railroad-ridden statute imposing on railroad companies a liability for an injury resulting in death from the negligence of an employé, only when such negligence was *gross*,—in other words, making railroad companies liable for injuries resulting in death, only in case of *gross negligence*; and this in every case, since railroad corporations can only act through their employés, and kill and maim through their employés. While this statute was in force, an instruction in such an action was held erroneous which authorized the jury to find that the proximate cause of the injury was the gross negligence of the employés of the defendant, if such employés could, in connection with their other duties, by the exercise of proper care and attention, *have seen* the person injured, and have avoided injuring him: Missouri &c. R. Co. v. Brown, 75 Tex. 267; s. c. 12 S. W. Rep. 1117.



exercise of reasonable care, with the appliances at hand, to avert injury to him, is not such negligence as will support an action for damages in case he is killed or injured.<sup>23</sup>

§ 1753. **Contributory Negligence of Trespassers in the Use of Defective Railway Premises.**—Although there is undoubtedly a difference of judicial opinion as to the duty of railway companies toward trespassers on its tracks, who are injured by its locomotives or trains driven upon them without warning,<sup>24</sup>—yet, as to the static condition of railway premises, the rule would seem to be precisely the same as that applicable to injuries to trespassers upon the premises of any other land-owner: the land-owner is under no duty, subject to possible exceptions in cases of children, and these with reference to what are called “attractive nuisances,”—to prepare his premises in any particular way for their safety, convenience, or accommodation.<sup>25</sup> A qualified exception to this rule has been raised by the doctrine of some of the courts (denied by others) in cases where persons, by *habitually walking* upon a railway track or through a railway yard, without opposition on the part of the company, have acquired an *implied license* so to do, such as raises a duty on the part of the company of clearing that part of its premises of sources of unusual danger. For example, where the plaintiff, who was a stranger to the company, and other persons, had been accustomed to pass at night through a *switch yard* for years, his personal representative was not, as matter of law, precluded from recovering damages for his death, which happened to him in consequence of getting his foot caught in the *unblocked frog* of a switch.<sup>26</sup> But, although a person may have a lawful right to be upon the premises of a railway company, where he is injured in consequence of a defect in the premises, he can not make this injury the ground of recovering damages, if he himself could have avoided it by the exercise of ordinary care for his own safety,—as where a person, not being a passenger, voluntarily undertakes to cross a *railway platform*, slippery with ice, knowing its condition, when he might have gone through the station or along the ground, and thus avoided the danger;<sup>27</sup> or where

<sup>23</sup> *Blankenship v. Galveston &c. R. Co.*, 15 Tex. Civ. App. 82; s. c. 38 S. W. Rep. 216; *Smith v. Houston &c. R. Co.*, 17 Tex. Civ. App. 502; s. c. 43 S. W. Rep. 34; *Stearman v. Baltimore &c. R. Co.* (D. C. App.), 23 Wash. L. Rep. 216; *Evans v. Pittsburgh &c. R. Co.*, 142 Ind. 264; s. c. 41 N. E. Rep. 537; *Texas &c. R. Co. v. Staggs*, 37 S. W. Rep. 609 (no off. rep.); *aff'd* in 90 Tex. 458; s. c. 39 S. W. Rep. 295; *St. Louis*

*&c. R. Co. v. Taylor*, 64 Ark. 364; s. c. 42 S. W. Rep. 831. See also *ante*, § 1706.

<sup>24</sup> *Ante*, §§ 1706, 1711.

<sup>25</sup> Vol. I, § 945, *et seq.*

<sup>26</sup> *Lee v. International &c. R. Co.*, 89 Tex. 583; s. c. 5 Am. & Eng. Rail. Cas. (N. S.) 376; 36 S. W. Rep. 63.

<sup>27</sup> *Clark v. Howard*, 60 U. S. App. 32; s. c. 31 C. C. A. 454; 88 Fed. Rep. 199.



a person, familiar with the *platform* of a railway station, took no reasonable precaution to avoid stepping off from it, but fell off and was injured, although the railway company may have been guilty of negligence in not keeping the platform properly *lighted*.<sup>28</sup>

§ 1754. **Injury from Neglect of Statutory Precautions—When Contributory Negligence not a Defense.**—There are, however, judicial holdings construing such statutes in such a way that contributory negligence is not a complete defense to an action for injury due to the failure of the railway company to observe the statutory requirements,—such as the requirement of keeping a constant lookout upon its locomotive or train,<sup>29</sup>—but under which the contributory negligence of the person killed or injured is considered merely in *mitigation of damages*;<sup>30</sup> and there are other statutes prescribing duties or imposing prohibitions, which are so construed that the right of action for an injury proceeding from their violation is not barred by the contributory negligence of the person killed or injured, but only by his *willful, wanton or reckless* conduct.<sup>31</sup>

§ 1755. **Going Lawfully to Work upon the Track in Spite of Obvious Danger.**—Although, ordinarily, the person injured might be lawfully on the track, yet if he went upon the track to engage in work in spite of the obvious danger, the question will not be whether he was discreet and careful at his work while upon the track, but whether he was justified in going there at all, in view of such danger.<sup>32</sup>

§ 1756. **Contributory Negligence of Track-Repairers, Track-Walkers, Car-Repairers, etc.**—The position of track-walkers, track-repairers and especially that of car-repairers is materially different, in respect of the question of their contributory negligence, from that of ordinary travellers at highway crossings, and still more so from that of trespassers. They are not only lawfully upon the railway track and hence in a position of danger, but they are there under contract with the

<sup>28</sup> *Emery v. Chicago & C. R. Co.*, 77 Minn. 465; s. c. 80 N. W. Rep. 627.

<sup>29</sup> *Knoxville & C. R. Co. v. Acuff*, 92 Tenn. 26; s. c. 20 S. W. Rep. 348.

<sup>30</sup> *Artenberry v. Southern R. Co.*, 103 Tenn. 266; s. c. 52 S. W. Rep. 878.

<sup>31</sup> *Pulliam v. Illinois & C. R. Co.*, 75 Miss. 627; s. c. 1 Miss. Dec. (No. 19) 165; 23 South. Rep. 359. A statute of New Jersey (N. J. Rev. Stat., p. 920, § 67), providing that a person injured while standing on a railroad shall be deemed to have con-

tributed to the injury, is not limited to main tracks thereof, but applies as well to those in the drilling-yard of the company: *Deibold v. Pennsylvania R. Co.*, 50 N. J. L. 478; s. c. 12 Cent. Rep. 799; 14 Atl. Rep. 576.

<sup>32</sup> *Illinois & C. R. Co. v. Weldon*, 52 Ill. 290; *Chicago & C. R. Co. v. Clark*, 2 Ill. App. 116; s. c. 11 Ch. Leg. N. 111; *Fletcher v. Boston & C. R. Co.*, 1 Allen (Mass.) 9. But see *Newson v. New York & C. R. Co.*, 29 N. Y. 383.



railway company for the performance of certain duties which require, to a greater or less extent, the exercise of their faculties, in the performance of which their faculties may become so absorbed as not to enable them to take the same care for their safety which might reasonably be expected from travellers at crossings and from intruders upon railway tracks or in railway yards. These considerations impose upon the railway company, with peculiar force, the duty of giving them warning upon the approach of a train or engine, by the use of audible signals; and by checking or stopping the train or engine in time to avoid injuring them, if the engineer perceives that, for any reason, they are not paying attention to those signals. As a general rule, it is not contributory negligence, as matter of law, for a person so employed not to be on a constant lookout for approaching trains. This must be so if we are paying the slightest attention to the position of a man who is fastening a fish-plate, or who is oiling or repairing the wheel of a car in a passenger train which has stopped temporarily at a station for that purpose. Such a person can not keep his eyes on his work and, at the same time, keep them strained in both directions for approaching trains, or for ocular signals. Such persons are, therefore, not blameworthy, as matter of law, merely because they become so engrossed in their work as not to heed the approach of a train, or because they rely upon the reasonable expectation that the railway company will, through its trainmen, perform the duty of giving them the necessary and proper signals.<sup>33</sup> But it does not follow from these considerations that contributory negligence will be wholly excused, even in persons thus engaged. For example, the duties of a *track-walker* are manifestly not so absorbing as to relieve him from the obligation of exercising reasonable care for his own safety, by looking and listening for approaching trains.<sup>34</sup> On the other hand, if he is seen by those in charge of the train to be absorbed upon some object so that he does not heed the approaching train, and they run him down, the company will be liable.<sup>35</sup>

<sup>33</sup> *Goodfellow v. Boston & C. R. Co.*, 106 Mass. 461; *Schultz v. Chicago & C. R. Co.*, 44 Wis. 638. But compare with this case *Valtez v. Ohio & C. R. Co.*, 85 Ill. 500; *Besel v. New York & C. R. Co.*, 70 N. Y. 171; reversing s. c. 9 Hun (N. Y.) 457.

<sup>34</sup> *Pennsylvania Co. v. Meyers*, 136 Ind. 242; s. c. 36 N. E. Rep. 32.

<sup>35</sup> Thus, where there was evidence tending to show that the life of a *track-walker* could have been saved by the use of ordinary care on the

part of an engineer and fireman, and that they failed to exercise that care, and to give any signal after they saw him on the track, and saw that his attention was directed to a certain steam shovel and that they knew that men were working at that point,—it was not error for the court to refuse to instruct the jury that the railroad company was not liable: *Sullivan v. Missouri & C. R. Co.*, 97 Mo. 113; s. c. 10 S. W. Rep. 852.



§ 1757. Further of the Contributory Negligence of Such Persons.—

So, it has been reasoned that a *track-repairer* is relatively under the same obligation to use his faculties for his own protection, which the law puts upon all persons who are *sui juris* and who come upon a railway track, whether as travellers at crossings, or as trespassers, or as bare licensees; and it was said that “a fair statement of this rule is that, whenever it thus appears that the person so injured did not use his faculties, it is incumbent upon him to show a reasonable excuse for failing to do so.” When, therefore, the person injured was an experienced track-repairer, and he, knowing that a train was approaching but a short distance away, nevertheless turned his back to it, stooped down and continued his work, and while in this position was struck by the train and injured,—it was held that he was guilty of such contributory negligence as would prevent a recovery of damages, although the railway company was handling the car which caused the injury in a negligent manner, without maintaining a lookout and giving signals, as required by a city ordinance. The court took the view that this negligence of the company could not be deemed the proximate cause of the injury; because, without these precautions, the plaintiff knew that the train was coming and was near at hand. “Why should the defendant pay damages for neglecting to apprise the plaintiff of a fact which he already knew?”<sup>86</sup> On a subsequent trial and appeal in the same case, presenting, no doubt, a different state of evidence, a judgment was rendered against the railroad company and was affirmed: the Supreme Court of Missouri holding that, notwithstanding the contributory negligence of the plaintiff, yet if the observance, by the railway company, of the city ordinance requiring it to maintain a lookout on its car and to give audible signals would have enabled its servants to see the plaintiff in time to avoid the accident, the plaintiff ought to recover; and this seems a sound view, because the train was backing toward the plaintiff, and a lookout on the end of the train, such as the ordinance required, would have seen him in time to hail him and cause him to get out of the way.<sup>87</sup> The court proceeded upon the doctrine that, although the plaintiff is guilty of contributory negligence, the railway company is nevertheless liable if, by the exercise of ordinary care in discovering the danger in which the

<sup>86</sup> *Kelly v. Union R. &c. Co.*, 11 Mo. App. 1.

<sup>87</sup> *Kelly v. Union R. &c. Co.*, 95 Mo. 279; affirming s. c. 18 Mo. App. 151. See also *Mauerman v. St. Louis &c. R. Co.*, 41 Mo. App. 348, where this doctrine was applied in a case where an employé of an electric light com-

pany, engaged in attending to lights in a railway yard, was run over by an engine upon which the bell was not rung, as provided by a municipal ordinance, although such employé was himself guilty of contributory negligence.



plaintiff stood, the accident could have been prevented; or if the company failed to discover the danger through the recklessness or carelessness of its employes, when the exercise of ordinary care would have discovered the danger and averted the calamity or injury. In applying this doctrine, the Supreme Court adopted the following language from the opinion of the St. Louis Court of Appeals: "As said by the Court of Appeals, the above rule is humane, conservative of human life, and consonant with public policy. It is based upon the recognition of the fact that human beings may be, and frequently are, lawfully upon railroad tracks, not only at highway crossings, but at other places; that in such situations they may remain unmindful of an approaching train and thus lose their lives or sustain great bodily injury, if those in charge of the train do not give some warning of its approach. It also proceeds upon a recognition of the fact that a railway train or locomotive is an instrument of danger to those who may happen to be on the track when its wheels are in motion; that those in charge of this instrument of danger ought, not only for the safety of persons who may happen to be on the track, but also for the safety of persons who may be on the train, to keep a constant lookout in front of the train when in motion; that this is a constant and continuing duty of an imperative character, especially when it is imposed, as in this case it is, by an ordinance of the city; and that if a discharge of this duty would have prevented the injury to a person negligently on the track, the company is liable in damages for hurting such person, notwithstanding his negligence."<sup>38</sup>

**§ 1758. Care Required of Travellers at Farm Crossings.**—At private or farm crossings, railway companies are not, in general, required to exercise the same care as at public highway crossings, and this fact puts upon the persons using such private crossings, the duty of exercising a correspondingly greater degree of care. Or, to turn the proposition around, it has been reasoned that persons using a farm crossing must exercise a higher degree of care and caution than persons at public highway crossings; and that, for this reason, the railway company will be excused in exercising a correspondingly less degree of care at farm crossings, than at public highway crossings.<sup>39</sup>

<sup>38</sup> Kelly v. Union R. & Co., 95 Mo. 279, 285. On the other hand, it has been held that a conductor who, in the day-time, in a freight yard with which he is thoroughly familiar, steps from his moving train and walks along a parallel track without looking behind him, where he is injured by an engine coming from that direction, is guilty of contributory

negligence which will bar his recovery of damages, as matter of law, although he is at the time engaged in watching a brakeman throw a switch to conduct the train upon a siding: Redmond v. Rome & C. R. Co., 31 N. Y. St. Rep. 366; s. c. 10 N. Y. Supp. 330.

<sup>39</sup> Baltimore & C. R. Co. v. Keck, 84 Ill. App. 159. It has been held not



§ 1759. **Contributory Negligence of Persons Riding on Hand-Cars.**—The question of the contributory negligence of persons killed or injured while riding upon *hand-cars*, can not, of course, be disassociated from the question of the negligence of the railway company. On principles already considered,<sup>40</sup> it must, therefore, be concluded that where the engineer and trainmen, as soon as they discover a hand-car ahead of them on the track, use every effort to prevent a collision, there can be no recovery,<sup>41</sup> unless the railway company, through its other agents or servants, was guilty of negligence in sending the hand-car out, and in thus placing those upon it in the position of peril, without advising the engineer of the train, by telegraph or otherwise, of its presence on the track. Where a number of persons took a ride on a hand-car for their own pleasure, on a thick and foggy Sunday night, and were run down by an extra freight train, going at the rate of forty miles an hour, without any headlight, and giving no signal of its approach,—it was held that there could be no recovery of damages for the death of one of them, because the hand-car was not rightfully on the track, and those on board of it were *trespassers*, in favor of whom the railway company owed no affirmative duty of care; for which reason its failure to display a headlight was not negligence as to them, nor was a failure to give signals, in the absence of knowledge of their presence on the track.<sup>42</sup> But while there is, in general, no obligation to give signals to unauthorized persons riding on a hand-car, until their presence becomes known to those who are driving the engine,—yet it has been held, in the case of persons rightfully using the hand-car, that the failure to give the *statutory signals* on approaching a *crossing* may be considered by the jury, as evidence of negligence with reference to such persons.<sup>43</sup> Injuries have been fre-

negligence as matter of law for a boy fourteen years old to attempt to run across a railway track at a farm crossing, although when he gets within fifteen or twenty feet of the track, a train is coming one-quarter of a mile away: *Baltimore & C. R. Co. v. Keck*, *supra*.

<sup>40</sup> *Ante*, §§ 1734, 1738.

<sup>41</sup> *Chicago & C. R. Co. v. Peterson*, 32 Ill. App. 139.

<sup>42</sup> *Ream v. Pittsburgh & C. R. Co.*, 49 Ind. 93.

<sup>43</sup> The case was that the plaintiffs were on the hand-car by permission of the railway company. The car was making a trip by order of the

company. The train which caused the injury was behind time. It had just passed a highway crossing without sounding the whistle, and was approaching, at the rate of 20 miles an hour, a bridge, where the rules required it to moderate its speed to four miles an hour. It ran into a deep cut where the track made a sharp curve, and collided with the hand-car at a point where it had never before run at a rate of more than eight miles an hour. It was held that the hand-car was rightfully on the track; that the plaintiffs were lawfully on board of it; that the men in charge of the



quently visited upon the *employees of independent contractors* performing work for the railroad company under contracts with it, in using its hand-cars in going to and fro on the track and in conveying their materials, tools, etc., to and fro. Such persons, using the hand-cars by the license of the railway company, are lawfully upon the track, and, on principles already considered,<sup>44</sup> the railway company owes them the duty, through the men who are driving its trains, to *keep a lookout* for them and to exercise reasonable care to avoid running over them. On the other hand, such persons, riding on the hand-car, are under the obligation of exercising such care for their own safety as ordinarily prudent men would exercise under like circumstances, though not the highest degree of care that might be exercised under the circumstances.<sup>45</sup> Hence an employé of a contractor is not deprived of a right of recovery against the railway company, on the ground that, in running the hand-car, he failed to comply with the *rules* of the company established and promulgated for the government of hand-cars on its roads, unless he *knew*, or, under the circumstances, *ought to have known* of such rules.<sup>46</sup> On the other hand, the crew of the hand-car on approaching a *highway crossing*, are driving an instrument of danger to the ordinary travelling public, and stand under a similar duty—though not precisely the same—as that which the law imposes upon the men in charge of locomotives, cars, or trains, of taking care to avoid injury to persons lawfully using the crossing.<sup>47</sup>

train were chargeable with notice that it was likely to be there; that the failure to give the statutory signals at the crossing, and the excessive rate of speed at the time and place of the accident, were acts of negligence on the part of the railway company; that, in the absence of evidence showing that it was the imperative duty of the persons in charge of a hand-car of this character, under such circumstances, to *send out a flagman*, it was for the jury to judge of the meaning and effect of a general regulation requiring hand-cars to send out flagmen, taken in connection with the manner in which such regulation was enforced, as shown by the testimony of persons who were competent to speak upon the subject; that a regulation requiring those in charge of hand-cars to send out flagmen when they were in a dangerous position would not make a failure to send out a flagman in the particular instance negligence, if the danger was caused by the failure of the ap-

proaching train to slacken its speed and give the proper signals; that, whilst the statutory signals to be given at road crossings were intended as warnings to those crossing the track, and that while the failure to give such signals as to travellers at the crossing was negligence *per se*, such failure might be considered in solving the question of negligence on the part of the company as to other persons lawfully on the railway, and hence as to the persons on the hand-car in question: *International & C. R. Co. v. Gray*, 65 Tex. 32.

<sup>44</sup> Vol. I, § 979; *post*, § 1840.

<sup>45</sup> *Galveston & C. R. Co. v. Garteiser*, 9 Tex. Civ. App. 456; s. c. 29 S. W. Rep. 939.

<sup>46</sup> *Garteiser v. Galveston & C. R. Co.*, 2 Tex. Civ. App. 230; s. c. 21 S. W. Rep. 631.

<sup>47</sup> *Lake Erie & C. R. Co. v. Wills*, 39 Ill. App. 649; s. c. *aff'd* 31 N. E. Rep. 122. The crossing had been partially obstructed, and the view of the track from the crossing and



§ 1760. **Contributory Negligence of Persons Injured in Railway Yards.**<sup>48</sup>—A railway yard is a *dangerous place*, and people who go into it for purposes of their own take their chances of the attending dangers, and can not make their own trespass and folly the ground of charging the railroad company with damages, in case they are injured while there, unless the injury is properly ascribable to *willfulness*, *wantonness*,<sup>49</sup> or at least to gross negligence.<sup>50</sup> It is to be recalled that a railway company owes no duty, in moving its engines and cars in its own yard, to watch the movements of trespassers, or to take special precautions, or to give special warnings to the end of averting injury to them, until their presence, in a situation of danger, is discovered.<sup>51</sup> Aside from the question whether the person making a passageway of a railroad yard is doing so lawfully or unlawfully, it is clear that he is bound to exercise a measure of care for his own safety which is in proportion to the danger to be avoided.<sup>52</sup> Contributory negligence was therefore ascribed to persons injured in railway yards under the following circumstances:—Where the plaintiff in the night-time, without necessity, walked through a dark and dangerous railroad yard, and was injured by a passing engine;<sup>53</sup> where a person voluntarily walked on and along the track of a railroad laid in a public thoroughfare, which he knew was used as a switch yard, on which locomotives were passing to and fro, night and day, notwithstanding the fact that the walking on either side of the track was as good as upon the track, and in doing so was run over by a train and killed;<sup>54</sup> where a person de-

of the crossing from the track was cut off by a line of freight cars carelessly left standing on a siding. The plaintiff, standing up in his wagon, could see a freight train one-half mile off, and hurried to cross. He did not see or hear the hand-car, which was concealed by the standing freight cars, and was struck by it just as he came out from behind the freight cars. The court affirmed a judgment in his favor, on the ground that, as the defendant was guilty of negligence in rendering the crossing dangerous, it was under the duty of exercising the greater care at the crossing, and hence the hand-car should have been under such control as to prevent an accident of this kind: *Lake Erie &c. R. Co. v. Wills*, 39 Ill. App. 649.

<sup>48</sup> This section is cited in §§ 1770, 1774, 1775, 1805, 1826, 1846, 1890, 1997, 2000, 2121.

<sup>49</sup> Vol. I, §§ 246, 948.

<sup>50</sup> *Ante*, §§ 1713, 1747.

<sup>51</sup> *Ante*, § 1706. That there can be no recovery for an injury received by one while walking through a railroad yard where the employes of the company exercised due care for his safety, and he was guilty of contributory negligence, in stepping immediately in advance of a moving train,—see *Missouri &c. R. Co. v. McKernan*, 82 Tex. 204; s. c. 17 S. W. Rep. 1057.

<sup>52</sup> *Rome R. Co. v. Tolbert*, 85 Ga. 447; s. c. 11 S. E. Rep. 849. If he undertakes to pass through a railroad yard at night, when it is raining, misty and very dark, he must obviously exercise a higher degree of care than would be expected of him under ordinary circumstances: *Holmes v. Pennsylvania R. Co.*, 13 Ohio C. C. 397; s. c. 7 Ohio Dec. 165.

<sup>53</sup> *Western &c. R. Co. v. Bloomington*, 74 Ga. 604.

<sup>54</sup> *Louisville &c. R. Co. v. Yniestra*, 21 Fla. 701.



liberately walked along a railroad track in a freight yard for a distance of 300 feet, without once looking behind him, and was run over by an engine approaching from behind,—and this notwithstanding the fact that those in charge of the engine failed to give any signals, and that the noise of a passing train would have rendered his sense of hearing practically useless;<sup>55</sup> where a person employed by a shipper to take charge of stock shipped by him, who was perfectly familiar with the locality, nevertheless walked in a railroad yard, on or dangerously near the main track, when he could have passed safely between the tracks if he had walked carefully,—and was struck by a train upon the main track;<sup>56</sup> where a person, while standing between two tracks in a railroad yard, was struck by the buffer-beam of a shunting engine, where the statutory signals were given, and the approaching engine could be plainly seen,—and this, notwithstanding the fact that the buffer-beam of the engine was four inches longer than those on ordinary engines, and that the engine tank was peculiarly constructed, so as, in some degree, to interfere with the engineer's view of the track;<sup>57</sup> and where a person knew, or had ample opportunity to know, of the existence of a pit in a railroad yard, but nevertheless attempted to pass through the yard when it was so dark that he could not keep the path nor see the pit, and fell into it and was killed.<sup>58</sup>

**§ 1761. Contributory Negligence of Persons Loading and Unloading Cars.**—The legal *status* of the servants of shippers or consignees of goods who are injured while loading or unloading them, upon or from railway cars, closely resembles that of persons at work on the track.<sup>59</sup> They are not trespassers, but are lawfully there engaged, and are exposed to danger while in pursuit of their lawful employment. As in the case of track-repairers, they are liable to become absorbed in their work, so as not to watch for or heed the approach of engines or cars; and they can scarcely be expected to prosecute their work with diligence and fidelity to their employers, and at the same time maintain a lookout for dangers that ought to be averted by the care of the servants of the railway company. This consideration raises a strong duty on the part of those who are driving the instrument of danger, the employés of the railway company, to look out for them, to give them warning signals, and, if possible, to avoid injuring them. We accordingly find holdings to the effect that a person engaged in load-

<sup>55</sup> *Missouri &c. R. Co. v. Moseley*, 12 U. S. App. 601; s. c. 57 Fed. Rep. 921; 6 C. C. A. 641.      <sup>57</sup> *Jones v. Grand Trunk &c. R. Co.*, 16 Ont. App. 37; s. c. 39 Am. & Eng. Rail. Cas. 487.

<sup>56</sup> *Tucker v. Baltimore &c. R. Co.*, 8 U. S. App. 491; s. c. 59 Fed. Rep. 968; 8 C. C. A. 416.      <sup>58</sup> *Anderson v. Northern &c. R. Co.*, 19 Wash. 340; s. c. 53 Pac. Rep. 345.

<sup>59</sup> As to which, see *post*, § 1841.



ing or unloading freight is not imputable with contributory negligence because he occupies a position designated by the agent of the company, although it may seem hazardous, relying on the care of the company to protect him from injury while in such position;<sup>60</sup> that a person engaged in receiving mail and express packages from a west bound train, who knows of a custom of an east bound train, due at about the same time, to stop before reaching the station if the other train is in, is not, as matter of law, negligent in *failing to look* for it before stepping on the track of the east bound train;<sup>61</sup> that the agent of a consignee who has received cars near the scales on which they are to be placed, and has informed the brakeman in charge of the train of his intention to "spot" them, is not, as matter of law, bound to watch for trains backing up against the cars where he is at work, but that the question of his negligence in not anticipating the approach of a train by which he is injured, *is for the jury*;<sup>62</sup> that such a person has the right to assume that the railroad company will act toward him in accordance with its usual duties, although it has once failed to do so;<sup>63</sup> that a shipper of goods, for whom a car is set apart on a side track, and who is injured by being thrown from the car by the backing of a train against it while she is loading her goods in accordance with a direction of the company's agent, is not guilty of contributory negligence because she continues therein with knowledge that the train has arrived and passed the car on the main track, where she does not know that it will enter the side track, nor of the intention of the company to remove the car before she finishes loading it;<sup>64</sup> that one engaged in receiving packages of mail and ex-

<sup>60</sup> *Newson v. New York & C. R. Co.*, 29 N. Y. 383; *Allegheny Valley R. R. v. Findley (Pa.)*, 4 W. N. C. 438; s. c. 6 Cent. L. J. 236.

<sup>61</sup> *Tubbs v. Michigan & C. R. Co.*, 107 Mich. 108; s. c. 2 Det. L. N. 619; 28 Chicago Leg. News 118; 64 N. W. Rep. 1061.

<sup>62</sup> *Conlan v. New York & C. R. Co.*, 74 Hun (N. Y.) 115; s. c. 56 N. Y. St. Rep. 316; 26 N. Y. Supp. 659.

<sup>63</sup> *Newson v. New York & C. R. Co.*, 29 N. Y. 383. See *Chicago & C. R. Co. v. Clarke*, 70 Ill. 276.

<sup>64</sup> *Toledo & C. R. Co. v. Hauck*, 8 Ind. App. 367; s. c. 35 N. E. Rep. 573. Somewhat opposed to this is a holding to the effect that the driver of a wagon engaged in removing freight from a freight car, who backs his wagon into such close contact with the car, whether necessarily or not, that it must be overturned by the starting of the car, knowing at the same time that a

freight train on the track is liable to be coupled up, and that, when it is coupled up, the particular car is liable to be moved, is guilty of contributory negligence, such as will preclude a recovery of damages for injuries visited upon him by the starting of the car: *Hadley v. Lake Erie & C. R. Co.*, 21 Ind. App. 675; s. c. 1 Repr. 36; 51 N. E. Rep. 337; superseding 2 Am. Neg. Rep. 35; s. c. 46 N. E. Rep. 935. Somewhat on the same theory, it has been held that the servant of one who erects a *movable platform*, used in loading and unloading furniture from cars on a spur track, so near a railroad track that furniture cars of unusual width will hit it when moved along, can not recover damages for an injury caused by the platform being thrown down by a furniture car of unusual width, in the ordinary use of the track, the view being that the plaintiff was a



press from a train is not, as matter of law, guilty of negligence, in failing to wait until the train comes to a full stop before taking a position for receiving such matter;<sup>65</sup> that one who was fatally injured by a locomotive which jumped the track while he was engaged, in the employ of a contractor, in loading gravel into a wagon, the accident being caused by an accumulation of gravel on the track, which threw the locomotive down an embankment and upon the decedent, was not guilty of contributory negligence, as matter of law, where he was not familiar with the surroundings nor with the condition of the tracks, nor accustomed to work about railroads.<sup>66</sup>

**§ 1762. Cases in which Contributory Negligence was Ascribed to Persons Engaged in Loading and Unloading.**—Undoubtedly, persons engaged in loading or unloading cars are bound to inform the proper agent or servant of the railway company of their presence, and of the danger to which they are necessarily exposed; and if, without conveying this information to any one engaged in moving cars in the yard, they effectually conceal themselves from view, and are injured by the act of a switching crew in shunting cars upon them, having no knowledge of their being in a position of danger, their own contributory negligence will prevent them from recovering damages, especially if they are informed that other cars will soon arrive upon the side track, where the car is standing which they are engaged in

mere licensee to whom the railway company owed no active care: *McCabe v. Chicago & C. R. Co.*, 88 Wis. 531; s. c. 60 N. W. Rep. 260. This holding seems to be untenable.

<sup>65</sup> *Tubbs v. Michigan & C. R. Co.*, 107 Mich. 108; s. c. 2 Det. L. N. 619; 28 Chicago Leg. News 118; 64 N. W. Rep. 1061.

<sup>66</sup> *St. Louis & C. R. Co. v. Ridge*, 20 Ind. App. 547; s. c. 49 N. E. Rep. 428. In another case, the plaintiff had, by contract with a railroad company, the right to a certain portion of their track for loading his freight; and, while so engaged, the servants of another company, which, by the sufferance of the company owning the track, was allowed to run its cars on the track where plaintiff was, "*when nothing was in the way*,"—backed their cars against the car in which plaintiff was standing, and injured him. Under these circumstances, the court held that the plaintiff had a positive and exclusive right, as against the defendant company, to be on the track

where he was, and that, even though the servants of the defendant gave the usual signals that their train was about to move upon this side track, yet, as there was ample room for both, the plaintiff had a right to presume that their train would move no further up the track than it lawfully might: *New Orleans & C. R. Co. v. Bailey*, 40 Miss. 395. On the subject of the negligence of persons loading or unloading, see further *Cleveland & C. R. Co. v. Stephenson*, 139 Ind. 641 (person loading a car, a mere licensee to whom company owes no watchfulness); *Pennsylvania Co. v. Lynch*, 90 Ill. 333 (duty of master to servant and servant accepting risk); *Georgia & C. R. Co. v. Mapp*, 80 Ga. 631 (same); *Quibell v. Union & C. R. Co.*, 7 Utah 122 (same). Compare *Chadderdon v. Michigan & C. R. Co.*, 100 Mich. 293 (servant of consignor remained on car while it was being moved from a side track—contributory negligence a question for jury).



unloading.<sup>67</sup> So, an employé of a consignee of a freight car was deemed guilty of such contributory negligence as would preclude a recovery of damages from the railroad company for an injury received by him while moving a car which had been left standing on the side track for the purpose of unloading, to a point more convenient to his employer, where he stood with one foot on the bumper of the car and the other against the lumber with which it was loaded, and relied upon the brake to keep him in position, as well as to control the movement of the car on a down grade, although the brake was defective, and the car was moved with the assent of the railroad company.<sup>68</sup> One who unnecessarily climbed upon the projecting timbers at the end of a car, while engaged in unloading coal, for the purpose of ascertaining the quantity of coal remaining in the car, did so at his own risk, and could not recover damages for injuries caused by the collision of the car in question and other cars which were being moved on the same track.<sup>69</sup> An employé of the consignee of a carload of freight, who attempted to climb up a ladder at the side of the car, for the purpose of setting the brake while the car was being pushed along by hand, after having been directed by the station agent to set the brake as soon as possible, was deemed guilty of negligence precluding a recovery for injuries received by being crushed against a projecting roof, where he knew that the roof projected, and did not look to see how near it was, and there was no sudden emergency or danger likely to result from the brake not being set.<sup>70</sup>

<sup>67</sup> *Montague v. Chicago & C. R. Co.*, 82 Fed. Rep. 787; s. c. 49 U. S. App. 627; 22 C. C. A. 180.

<sup>68</sup> *Southern R. Co. v. Morrison*, 105 Ga. 543; s. c. 31 S. E. Rep. 564.

<sup>69</sup> *Murphy v. New York & C. R. Co.*, 62 Hun (N. Y.) 587; s. c. 42 N. Y. St. Rep. 580; 17 N. Y. Supp. 302.

<sup>70</sup> *Platt v. Chicago & C. R. Co.*, 84 Iowa 694; s. c. 51 N. W. Rep. 254. So, a railroad company was held not liable for the death of one who was superintending the unloading of a stone car, caused by his jumping from one car to another while they were being switched, just as a collision between the cars was imminent, and falling from the car upon which he jumped, where he was not engaged in the work at the time the switching was done, knew that it was about to take place, and could have superintended the work as well by standing on the ground as by getting on a car: *De Bolt v. Kansas City & C. R. Co.*, 123 Mo. 496; s. c. 27 S. W. Rep. 575. So, the fact

that the plaintiff had a contract with the defendant for the transportation of lumber did not justify him in going upon the track and carelessly pushing an empty car to the place of loading, whereby the defendant's servants backed other cars upon him. Such a person was deemed a trespasser, and had no other rights than as such: *Burns v. Boston & C. R. Co.*, 101 Mass. 50. A teamster unloading a car in the railroad yard, placed his team so that it would be in the way of cars moving upon an adjoining track. The fact that this would be more convenient to him did not make his occupation of the track by his team rightful, so as to make the railroad company liable for striking his team with a train: *Heiter v. East St. Louis & C. R. Co.*, 53 Mo. App. 331. One who ties his team to a car, and then stands upon his wagon in the act of unloading shingles from the car, while he sees a car switched on the same track, coming faster



§ 1763. **Various Instances of Contributory Negligence of Railway Employees.**—A railroad track repairer is at work upon the track. A train comes along; a “flying” switch is made, and several cars are detached from the train and shunted down the track on which he is at work. He negligently continues his work, although several workmen see the cars coming, and leave the track. While he is stooping down, with his back in the direction in which the cars are coming, they strike and injure him. He is guilty of contributory negligence which will preclude him from recovering damages.<sup>71</sup> An employé of a railway company rode on an engine, although several times forbidden to do so, and warned of the danger of doing so. While passing through a tunnel, the engine collided with some cars, and he was injured. No one was injured except himself and another man riding on the engine with him. It was held that he could not recover damages.<sup>72</sup> An employé of a railroad company voluntarily leaves his post, in violation of a rule of the company, and goes to another part of the train, where the exposure is greater, and is there injured. He can not recover damages of the company,<sup>73</sup> because of the fact that he was injured through the violation of a rule of his employer intended to promote his safety.<sup>74</sup> But if it is customary for a railroad brakeman to ride on the engine, and sometimes necessary for him to be there, and if such practice is acquiesced in by the conductor of the train, it will not be deemed negligence, as matter of law, for him to do so, although there are printed rules of the company forbidding it, he not having notice of such rules; but the jury are to judge whether, under all the facts of the case, it was negligence in him to be there at the time of the accident.<sup>75</sup> This conclusion is not in conflict with the doctrine that where an employé leaves his post of duty and goes to a place of danger, and there receives an injury, he will be barred from recovering damages of his master, on the ground of contributory negligence.<sup>76</sup> Nor is it negligence *per se* for an employé of a railway company to

than usual down grade, with increasing speed, is guilty of contributory negligence, such as will prevent him from recovering damages for injuries received by being thrown from the wagon: *Hicks v. Missouri &c. R. Co.*, 46 Mo. App. 304.

<sup>71</sup> *Haly v. New York &c. R. Co.*, 7 Hun (N. Y.) 84.

<sup>72</sup> *Railroad Co. v. Jones*, 95 U. S. 439; s. c. 6 Cent. L. J. 45. So ruled, on substantially the same facts, in *Doggett v. Illinois &c. R. Co.*, 34 Iowa 284.

<sup>73</sup> *O'Neill v. Des Moines &c. R. Co.*, 45 Iowa 546.

<sup>74</sup> For other illustrative cases, see *Lyon v. Detroit &c. R. Co.*, 31 Mich. 429; *Shannon v. Androscoggin Mills*, 66 Me. 420; *Memphis &c. R. Co. v. Thomas*, 51 Miss. 637.

<sup>75</sup> *Sprong v. Boston &c. R. Co.*, 58 N. Y. 56 (affirming s. c. 3 N. Y. S. C. (T. & C.) 54). Compare *Flike v. Boston &c. R. Co.*, 53 N. Y. 549; *Cayzer v. Taylor*, 10 Gray 274.

<sup>76</sup> *Sammon v. New York &c. R. Co.*, 6 Jones & Sp. (N. Y.) 414.



ride in a baggage-car on his way to and from his place of labor.<sup>77</sup> Some horses were seen on a railroad, ahead of a locomotive and train. The conductor, who was riding in the cab with the engineer, ordered the latter to put on steam and try to pass them before they reached a trestle towards which they were running. The train might have been stopped before the animals were reached. The engine did not strike the horses until they had reached the trestle. It was thrown from the track and the conductor killed. Under these facts, no damages could be recovered from the company on account of the death of the conductor, for his death was brought about by his own negligence.<sup>78</sup> A person who had obtained permission from a station-agent of a railroad corporation to come to the station for the purpose of learning telegraphy, was warned by the agent not to walk upon the railroad tracks. He left the station to go to a certain place, on an errand which he had volunteered to do for the station-agent. He was more or less familiar with the premises, and, knowing the danger, he walked upon the track with his back to a train and his head bent down. He did not look behind him to see whether the train was coming towards him, or was going to a switch upon another track. He could have stepped from the tracks after the whistle of the engine had sounded, but he did not look to see whether the train was coming upon the track upon which he was walking, because he evidently thought it was coming upon the other track. He was struck by it and was killed. It was held that his contributory negligence precluded the maintenance of an action for damages for his death.<sup>79</sup>

## ARTICLE II. APPLICATIONS AND ILLUSTRATIONS.

### SECTION

- 1766. Going upon the track without looking and listening.
- 1767. Further of going upon the track without looking and listening.
- 1768. Duty to look behind.
- 1769. Qualifications of the duty to look behind.
- 1770. Failing to look and listen after going on the track.

### SECTION

- 1771. Failure to get off the track after discovering the danger.
- 1772. Standing with team upon railroad track.
- 1773. Getting caught on trestles.
- 1774. Going upon the track and thereby exposing himself.
- 1775. Walking or driving along the track.

<sup>77</sup> O'Donnell v. Allegheny &c. R. Co., 59 Pa. St. 239.

<sup>78</sup> Dewey v. Chicago &c. R. Co., 31 Iowa 373.

<sup>79</sup> Barstow v. Old Colony R. Co., 143 Mass. 535. If the attitude of the deceased was that of a volunteer, performing services gratui-

tously for the defendant, then he could not recover, irrespective of the question of his own contributory negligence; for the negligence of the defendant, if any, was that of a *fellow servant*, engaged in the same general employment: Barstow v. Old Colony R. Co., *supra*.



SECTION

- 1776. Walking on a track where it is laid upon the surface of a public street.
- 1777. Circumstances under which walking on the track not contributory negligence.
- 1778. Going upon the track knowing that a train is due and failing to look and listen.
- 1779. Going upon the track with ears muffled, vision obstructed, etc.
- 1780. Going upon the track to rescue persons in danger.
- 1781. Going upon the track to rescue chattels.
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- 1788. Struck while standing or walking between two tracks.
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- 1796. Standing or walking too near the track.
- 1797. Injuries to loiterers from the derailment of trains.
- 1798. Other illustrative cases where contributory negligence has been imputed to the person injured.
- 1799. Other illustrative cases where contributory negligence was not conclusively imputed to the person injured.
- 1800. Other cases where contributory negligence was not imputed.

§ 1766. Going upon the Track Without Looking and Listening.—

In a previous chapter, we have examined a mass of authority to the effect that a traveller on a highway crossing, having a right to cross the railway track, who goes upon it without exercising his faculties by looking and listening for approaching trains,<sup>80</sup>—or, in some jurisdictions, by stopping, looking and listening,<sup>81</sup>—is precluded by his own negligence from recovering damages in case he is injured by an approaching train, although the train may be running at a prohibited rate of speed,<sup>82</sup> or although statutory or proper audible signals are not given by those in charge of it, or although the railroad company is otherwise negligent, in the absence of negligence on the part of the

<sup>80</sup> *Ante*, § 1637, *et seq.*

<sup>81</sup> *Ante*, § 1648, *et seq.*

<sup>82</sup> *Louisville & C. R. Co. v. Stephens*, 13 Ind. App. 145; s. c. 40 N. E. Rep. 148.



railway company *after discovering him*.<sup>83</sup> It may be conceded that this rule of contributory negligence will apply, for stronger reasons, in the case of one who enters upon a railway track as a mere trespasser, especially in those jurisdictions which refuse to charge the railway company with liability for his injury, in the absence of gross, reckless, wanton or willful negligence on its part. The qualification that the negligence of the railroad company which alone will give rise to a right of action must have taken place *after discovering* the presence of the person in a situation of danger, applies in strictness only in case of trespassers and bare licensees, to whom the railway company owes no duty of maintaining a special lookout, or of doing anything except abstaining from inflicting upon them willful or wanton injury. But, as already seen,<sup>84</sup> some of the courts qualify this rule so as to charge the railway company with the duty of *keeping a lookout*, and of giving warning signals at places where the public intrude upon the track in such numbers that their presence may be anticipated. Cases are found which state the rule, in substance, by saying that a person who remains upon a railway track where he has a full view of an approaching train until he is run over, is guilty of such negligence as will defeat a recovery of damages for his death, in the absence of such carelessness *in failing to discover his presence*, or in stopping the train after he is discovered, as amounts to wantonness or to an intention to inflict injury upon him.<sup>85</sup>

§ 1767. Further of Going upon the Track without Looking and Listening.<sup>86</sup>—Laying out of view these distinctions, we find that it has

<sup>83</sup> Moore v. New York &c. R. Co., 42 N. Y. St. Rep. 489; s. c. 17 N. Y. Supp. 205; Texas &c. R. Co. v. Hare, 4 Tex. Civ. App. 18; 23 S. W. Rep. 42 (at a public crossing); Cole v. New York &c. R. Co. (Mass.), 55 N. E. Rep. 1044; Candelaria v. Atchison &c. R. Co., 6 N. Mex. 266; s. c. 48 Am. & Eng. Rail. Cas. 565; 27 Pac. Rep. 497 (plaintiff a trespasser); Buelow v. Chicago &c. R. Co., 92 Iowa 240; s. c. 60 N. W. Rep. 617; Louisville &c. R. Co. v. Cronbach, 12 Ind. App. 666; s. c. 41 N. E. Rep. 15 (plaintiff a trespasser); Louisville &c. R. Co. v. Stephens, 13 Ind. App. 145; s. c. 40 N. E. Rep. 148; Elwood v. New York &c. R. Co., 4 Hun (N. Y.) 808; Gonzales v. New York &c. R. Co., 50 How. Pr. (N. Y.) 126; Green v. Erie R. Co., 11 Hun (N. Y.) 333 (plaintiff a trespasser); Poole v. North Carolina &c. R. Co., 8 Jones L. (N. C.) 340; Illinois &c. R. Co. v. Hall, 72 Ill. 222 (plaintiff a

trespasser); Illinois &c. R. Co. v. Hetherington, 83 Ill. 510; Harlan v. St. Louis &c. R. Co., 64 Mo. 480; East Tennessee &c. R. Co. v. Hartley, 73 Ga. 5; St. Louis &c. R. Co. v. Martin, 61 Ark. 549; s. c. 33 S. W. Rep. 1070; Illinois &c. R. Co. v. Lee, 71 Miss. 895; s. c. 16 South. Rep. 349; Barstow v. Old Colony R. Co., 143 Mass. 535; s. c. 3 N. E. Rep. 746; Southern R. Co. v. Smith, 52 U. S. App. 708; s. c. 40 L. R. A. 746; 30 C. C. A. 58; 86 Fed. Rep. 292; Young v. New York &c. R. Co., 107 N. Y. 500; s. c. 9 Cent. Rep. 879; 14 N. E. Rep. 434 (at highway crossing). In many of the above cases, the person killed or injured was a *trespasser*.

<sup>84</sup> *Ante*, § 1711.

<sup>85</sup> Nave v. Alabama &c. R. Co., 96 Ala. 264; s. c. 11 South. Rep. 391; 54 Am. & Eng. Rail. Cas. 151; Goodwin v. Central R. &c. Co., 96 Ala. 445; s. c. 11 South. Rep. 393.

<sup>86</sup> This section is cited in § 1775.



been held that going upon the track without taking the precaution of looking and listening will, under many circumstances, preclude a recovery of damages in case of an injury, without reference to the negligence of the railway company,—as where a man voluntarily gets upon a railroad track sixty feet in front of a moving train, where there is nothing to obstruct his view, or to prevent him from leaving the track before being struck by the train;<sup>87</sup> or where a man goes upon a railroad track in full view of an approaching train, which has given signals of its approach, without making any effort to get out of the way, but, walking toward the moving engine, is struck and killed,—the engineer, on the other hand, making every effort to stop the train on seeing his exposed position;<sup>88</sup> or where a man was struck and killed by an engine on one of two parallel “T” tracks connecting two intersecting railroads, which he knew was used for switching cars, although the engineer failed to sound the whistle or ring the bell, where he could have seen the engine at the time he left his house near by, or while passing from the house to the track,—and it was deemed immaterial that there was a passenger train on the further track, which he had not reached;<sup>89</sup> or where a man, while caring for cattle in a car, crossed three or four tracks, and, while standing on the fifth, turned to look around in response to a shout, and was struck by an engine which he might have seen for a considerable distance away if he had used his sight;<sup>90</sup> or where a man, with his ears muffled, stepped out from behind a train of cars standing on a side track, within the limits of a city, and crossed over to a parallel track seven feet distant, where, unseen by the engineer, he was run over by a locomotive running backward, which had no rope to its bell;<sup>91</sup> or where a person walked so close to a track in a switch yard as to be hit by a passing train, without looking for moving cars, where he would have seen the car which ran upon him if he had looked.<sup>92</sup> On a principle already considered,<sup>93</sup> where the testimony clearly shows that the person injured *must have seen* the approaching train, contributory negligence will be conclusively imputed to him, notwithstanding his testimony that he looked for the train and did not see it.<sup>94</sup>

<sup>87</sup> Mobile &c. R. Co. v. Stroud, 64 Miss. 784; s. c. 2 South. Rep. 171.

<sup>88</sup> Norfolk &c. R. Co. v. Carper, 88 Va. 556; s. c. 16 Va. L. J. 29; 14 S. E. Rep. 328.

<sup>89</sup> Ohio &c. R. Co. v. Hill, 117 Ind. 56; s. c. 18 N. E. Rep. 461.

<sup>90</sup> Rogstad v. St. Paul &c. R. Co., 31 Minn. 208.

<sup>91</sup> Harlan v. St. Louis &c. R. Co., 64 Mo. 480; s. c. 65 Mo. 22; 1 Thomp. Neg., 1st ed., 439. See also Moran

v. Nashville &c. R. Co., 58 Tenn. 379; Philadelphia &c. R. Co. v. Spearman, 47 Pa. St. 300.

<sup>92</sup> Yeager v. Atchison &c. R. Co., 94 Iowa 46; s. c. 62 N. W. Rep. 672.

<sup>93</sup> *Ante*, § 1655.

<sup>94</sup> Southern R. Co. v. Smith, 52 U. S. App. 708; s. c. 40 L. R. A. 746; 30 C. C. A. 58; 86 Fed. Rep. 292.



§ 1768. **Duty to Look Behind.**<sup>95</sup>—Persons who, for their own convenience, attempt to make a footway of a railroad track, are not such favorites of the law that it will excuse them from keeping a continuous lookout from behind them; and if, in default of this precaution, difficult as it may be, they received a *hinterschlag* from a pursuing train, there can be no recovery of damages.<sup>96</sup>

§ 1769. **Qualifications of the Duty to Look Behind.**—The rule of the preceding section is not applied in all cases so as to take the question of negligence from the jury; but, on the contrary, it has been held that the failure of a traveller to look before turning upon a railroad track, which is laid upon the surface of a public street, on which the public have a perfect right to travel, subject to the duty of merely making way for railway trains, will not prevent a recovery for the injuries sustained by him by being struck by a train coming at an *unlawful rate of speed*, if, by looking, he would not have discovered that it was imprudent to drive upon the track.<sup>97</sup> On the principle already applied with reference to railway crossings, contributory negligence will not be conclusively imputed to the traveller where the conformation of the ground, or other circumstances not due to his own fault, are such that by looking he could not see the approaching train.<sup>98</sup> One court has gone so far in favor of persons who use railway tracks as highways, as to hold that a person walking along a railway track at night is not imputable with contributory negligence, as matter of law, for failing to be on the lookout for danger from a car that is pushed in front of an engine, without any light or other signal.<sup>99</sup> In the view of another court, the mere fact that a person on horseback, engaged in driving cattle along a highway toward a railway crossing, did not ride forward as the cattle approached the crossing, and look for approaching trains, does not impute to him contributory negligence as matter of law, but leaves the question to the jury.<sup>100</sup> Another court has held that it is not contributory negligence, as matter of law, for one who is lawfully in a railway yard in the discharge of his duty, to walk from 45 to 60 feet upon a track without looking behind him, on a dark and

<sup>95</sup> This section is cited in § 1775.

<sup>96</sup> *Barstow v. Old Colony R. Co.*, 143 Mass. 535; s. c. 3 N. E. Rep. 746; *Illinois & C. R. Co. v. Lee*, 71 Miss. 895; s. c. 16 South. Rep. 349; *Louisville & C. R. Co. v. Cronbach*, 12 Ind. App. 666; s. c. 41 N. E. Rep. 15; *Candelaria v. Atchison & C. R. Co.*, 6 N. Mex. 266; s. c. 48 Am. & Eng. Rail. Cas. 565; 27 Pac. Rep. 497.

<sup>97</sup> *Kelly v. Missouri & C. R. Co.*,

101 Mo. 67; s. c. 8 L. R. A. 783; 43 Am. & Eng. Rail. Cas. 186; 13 S. W. Rep. 806.

<sup>98</sup> *Petty v. Hannibal & C. R. Co.*, 88 Mo. 306; s. c. 8 West. Rep. 297.

<sup>99</sup> *Stanley v. Durham & C. R. Co.*, 120 N. C. 514; s. c. 9 Am. & Eng. Rail. Cas. (N. S.) 208; 27 S. E. Rep. 27.

<sup>100</sup> *Tuthill v. Northern & C. R. Co.*, 50 Minn. 113; s. c. 52 N. W. Rep. 384.



foggy night, after having once looked in that direction, where the first section of a train, which he does not know has been divided into sections, has passed, and he has no reason to expect any other train upon the track.<sup>101</sup> It seems that in Illinois a court can not charge a jury as matter of law that it is contributory negligence for a person to go upon a railway track without looking and listening;<sup>102</sup> or to walk upon a railway track without looking or listening; since there may be various circumstances which will excuse him from doing so, and these will be for the consideration of the jury.<sup>103</sup>

### § 1770. Failing to Look and Listen after Going on the Track.—

For equal reasons the trespasser or other licensee making use of the railway track for his own purposes will, subject to qualifications already indicated,<sup>104</sup> be precluded from recovering damages by reason of his own contributory negligence where, *being upon the railway track*, he fails to make a constant use of his faculties by listening for the noise of trains, and by looking backward and forward to discover whether any are approaching.<sup>105</sup> Here, according to various theories already considered, there will be no recovery unless those in charge of the approaching train *saw him in time*, by the exercise of reasonable care, to avoid colliding with him;<sup>106</sup> or *might*, by the exercise of such reasonable care, *have seen him in time*, by the exercise of the same care, to avoid colliding with him;<sup>107</sup> or unless the engineer of the train colliding with him was guilty of *gross, reckless, wanton or willful* negligence, or of an *intention* to injure him.<sup>108</sup> In the application of this doctrine, contributory negligence has been imputed to a man who walked along a ridge of dirt between a sewer and a car track, so near that he was struck by the cars, when he could have gone with safety on the sidewalk, or could have got out of the way if he had looked back to discover the approaching train;<sup>109</sup> where a man, engaged in pushing a boat out from a wharf, failed to look and listen for an

<sup>101</sup> Hayes v. Northern &c. R. Co., 74 Fed. Rep. 279; s. c. 46 U. S. App. 41; 20 C. C. A. 52.

<sup>102</sup> Chicago &c. R. Co. v. Kelly, 182 Ill. 267; s. c. 54 N. E. Rep. 979; aff'g s. c. 80 Ill. App. 675.

<sup>103</sup> Kingma v. Chicago &c. R. Co., 85 Ill. App. 138.

<sup>104</sup> *Ante*, § 1737.

<sup>105</sup> Hughes v. Galveston &c. R. Co., 67 Tex. 595; s. c. 4 S. W. Rep. 219; Smith v. Minneapolis &c. R. Co., 26 Minn. 419; Baltimore &c. R. Co. v. State, 54 Md. 648; Richards v. Chicago &c. R. Co., 81 Iowa 426; s. c. 45 Am. & Eng. Rail. Cas. 54;

47 N. W. Rep. 63; Ferguson v. Philadelphia Traction Co., 9 Pa. Co. Ct. 147; McAdoo v. Richmond &c. R. Co., 105 N. C. 140; s. c. 11 S. E. Rep. 316; 41 Am. & Eng. Rail. Cas. 524; Dooley v. Mobile &c. R. Co., 69 Miss. 648; s. c. 12 South. Rep. 956.

<sup>106</sup> *Ante*, § 1709.

<sup>107</sup> *Ante*, § 1711.

<sup>108</sup> Vol. I, §§ 246, 948; *ante*, §§ 1713, 1747, 1760; Louisville &c. R. Co. v. Hairston, 97 Ala. 351; s. c. 12 South. Rep. 299; Johnson v. Truesdale, 40 Minn. 345; s. c. 48 N. W. Rep. 1134.

<sup>109</sup> Heffinger v. Minneapolis &c. R. Co., 43 Minn. 503; s. c. 45 N. W. Rep. 1131.



approaching train by reason of his mind being intently fixed upon the work which he had in hand, when he could easily have saved himself, had he discovered the approach of the train, by assuming a different position in the boat;<sup>110</sup> where a trespasser walked a considerable distance upon the main track, without looking behind him for an approaching train, and failed to hear or heed the steam whistle and locomotive bell, although sounded within one hundred and eighty feet of him,—there being no willful or wanton negligence on the part of the railway company;<sup>111</sup> or where a man, walking upon railroad tracks, after having looked in both directions before entering upon them, failed further to look or listen, although he knew a train was about due, but proceeded with his collar turned up about his ears so as to prevent him from hearing the noise of the approaching train which injured him.<sup>112</sup> It is but another way of stating this rule to recall the doctrine of a preceding section, that the engineer may rightfully assume, in the absence of evidence to the contrary, that the person on the track in front of him will make use of his faculties and leave the track in time to avoid being injured.<sup>113</sup> From which it follows that the rule obtaining in some jurisdictions, that contributory negligence in trespassing on a railway track will not prevent a recovery for personal injuries sustained by being struck by an engine, where the company could have avoided the accident by the use of reasonable care, does not apply to one who was apparently in the full possession of his senses, and who, the engineer reasonably supposed, would get off the track until it was too late for him to prevent the accident.<sup>114</sup>

**§ 1771. Failure to Get Off the Track after Discovering the Danger.**—The cases under this head present some extraordinary conditions of fact. Judges have been called upon to decide that there can be no recovery of damages for the death of a person killed on a railroad track while walking diagonally,<sup>115</sup> or directly<sup>116</sup> toward an approaching train,—refusing to excuse him, although his senses may be absorbed in an attempt to board another train;<sup>117</sup> or where a person went

<sup>110</sup> *Trouclair v. Pacific Coast Steamship Co.*, 80 Cal. 521; s. c. 39 Am. & Eng. Rail. Cas. 393; 22 Pac. Rep. 258.

<sup>111</sup> *Johnson v. Truesdale*, 46 Minn. 345; s. c. 48 N. W. Rep. 1136.

<sup>112</sup> *Scott v. Pennsylvania R. Co.*, 130 N. Y. 679; s. c. 41 N. Y. St. Rep. 712; 29 N. E. Rep. 289.

<sup>113</sup> *Ante*, §§ 1389, 1736, with which compare *ante*, § 1737; Vol. I, § 191.

<sup>114</sup> *St. Louis & C. R. Co. v. Herrin*, 6 Tex. Civ. App. 718; s. c. 26 S. W. Rep. 425.

<sup>115</sup> *Baltimore & C. R. Co. v. State*, 69 Md. 551; s. c. 18 Md. L. J. 824; 16 Atl. Rep. 212 (deceased walked diagonally towards approaching train, and continued on the ends of the cross-ties until struck).

<sup>116</sup> *Weeks v. New Orleans & C. R. Co.*, 40 La. An. 800; s. c. 8 Am. St. Rep. 560; 5 South. Rep. 72.

<sup>117</sup> *Weeks v. New Orleans & C. R. Co.*, 40 La. An. 800; s. c. 8 Am. St. Rep. 560; 5 South. Rep. 72.



on the track when a train was approaching, which he intended to board, and, stepping aside to allow it to pass, was struck by the front cross-beam of the locomotive, which projected eighteen inches outside the rail;<sup>118</sup> or where one, seeing a train approaching, while he is standing at a safe point, starts toward it in the expectation of reaching another safe point before meeting it, and is brought into collision with it, in consequence of miscalculating the distance;<sup>119</sup> or where a trespasser upon a railroad track, seeing a hand-car approaching him at a distance sufficient to enable him to leave the track, continues upon the track until he is run over, although the ground on both sides of the track is covered with water, where there would have been no danger, except that of getting wet, in stepping off the track into the water.<sup>120</sup> So, one who, while standing in an open and safe place at the side of a track upon which a train is approaching, grasps the hand-rail of a moving car and is thereby injured, is guilty of negligence which will prevent a recovery for the injury, although he claims to have been *so confused by his situation* that his act was involuntary, where his position was the result of the exercise of his own judgment and his own negligence.<sup>121</sup> Nor will the contributory negligence of a person who stands on a railroad track in front of an approaching engine, be excused by the fact that the fireman was looking in a different direction from that in which the engine was moving,—where the fireman was looking back to see if the end of the caboose had passed a switch, and for the switchman's signal to inform him when he had cleared it.<sup>122</sup> On the other hand, courts have *refused to impute contributory negligence* as matter of law, to a person who, finding himself in a perilous position by reason of the fact that the street was occupied by a railway track, attempted to escape by crossing the track into an alley thirty feet distant, when a train was coming around a curve 381 feet distant, and might have been stopped by a proper effort;<sup>123</sup> and where a person on a railroad track when an engine approached, might have saved himself by jumping into a ditch full of water, but hurried forward instead, and was overtaken and struck,—the evidence tending to show that the engine might have been stopped in time to avoid injuring him;<sup>124</sup> and where a person who, *caught upon a railroad trestle*

<sup>118</sup> *State v. Grand Trunk R. Co.*, 65 N. H. 663; s. c. 23 Atl. Rep. 525.

<sup>119</sup> *French v. Detroit & C. R. Co.*, 89 Mich. 537; s. c. 50 N. W. Rep. 914.

<sup>120</sup> *Green v. Louisville & C. R. Co.* (Miss.), 12 South. Rep. 326.

<sup>121</sup> *French v. Detroit & C. R. Co.*, 89 Mich. 537; s. c. 50 N. W. Rep. 914. Compare Vol. I, §§ 194, 195; *ante*, §§ 1616, 1624. As to acting on one's

*best judgment*, see *ante*, §§ 1381, 1410, 1450, 1669, 1715, 1739.

<sup>122</sup> *Eddy v. Sedgwick (Tex.)*, 18 S. W. Rep. 564.

<sup>123</sup> *Neier v. Missouri & C. R. Co.*, 12 Mo. App. 25; 6 S. W. Rep. 695; 13 West. Rep. 119.

<sup>124</sup> *Remer v. Long Island & C. R. Co.*, 36 Hun (N. Y.) 253.



by an approaching train, attempted to run ahead of the train to reach a place where he could escape, fearing to jump because the ground below him was covered with water and he was ignorant of its depth, and the danger of jumping was augmented by the presence of stubs of saplings which had been left in clearing off the right of way;<sup>125</sup> but in these last cases, the question has been held a *question for a jury*.

§ 1772. **Standing with Team upon Railroad Track.**—A., going to the warehouse of a railroad company after goods, stops his wagon on the track nearest the platform, and next to the main track over which the mail train passes, and so near there as to be in the way of the engine. The train comes along and damages A.'s wagon. A. has been guilty of contributory negligence of a gross character, and can not recover damages of the company.<sup>126</sup> On the other hand, in an action for the death of plaintiff's minor son, who was killed by a railroad train, there was evidence tending to show that he was engaged in unloading wood at a point close to a railroad track, under a contract between the plaintiff and the railroad company; that as soon as he knew of the approach of a train he endeavored to escape from the danger; that the train made but little noise and was an extra train, and that extra trains were unusual, most of the trains running over the road consisting of wood trains running at a very low rate of speed; that, to his knowledge, persons of mature years and judgment were accustomed to use the roadbed and track as he was using them, there being nothing tending to prove that he had, or reasonably ought to have had notice or knowledge that such extra train was due on or about that day. This evidence took the question of contributory negligence to the jury.<sup>127</sup>

§ 1773. **Getting Caught on Trestles.**—A trespasser on a railway track who is using the track as a highway and is caught on a trestle by an approaching train *rounding a curve*, so that he is not seen by the engineer in time to avoid running upon him, will be precluded from recovering damages on the ground that his own negligence is the cause of his injury, although the train approaches the trestle at its customary rate of speed and without sounding a whistle.<sup>128</sup> The same conclusion was clearer where the fast mail train of the defendant company, upon *rounding a curve* and seeing the trespasser on the

<sup>125</sup> *Christian v. Illinois &c. R. Co.*, 71 Miss. 237; s. c. 15 South. Rep. 71.

<sup>126</sup> *Murphy v. Wilmington &c. R. Co.*, 70 N. C. 437.

<sup>127</sup> *Felch v. Concord R. Co.*, 66 N. H. 318; s. c. 29 Atl. Rep. 557.

<sup>128</sup> *Tennenbrock v. South Pacific Coast R. Co.*, 59 Cal. 269; *May v. Central R. &c. Co.*, 80 Ga. 363; *Anderson v. Chicago &c. R. Co.*, 87 Wis. 195; s. c. 23 L. R. A. 203; *Texas &c. R. Co. v. Zachery* (Tex. Civ. App.) 27 S. W. Rep. 221 (no off. rep.).



trestle, blew the whistle and applied the air brakes, but could not stop the train in time to avoid injuring him, and he could have safely jumped from the trestle into a stream beneath, where the water was not more than four or five feet deep, and the banks were composed of soft sand.<sup>129</sup> The railway company was exonerated from liability to trespassers, intruders and others who were run over while endeavoring to make a footway of a trestle, under the following circumstances:—Where a trespasser went upon a trestle one hundred yards long and fifty feet high, in spite of a signboard, which he saw, notifying persons not to go thereon, and the trainmen used ordinary care to prevent injuring him after they discovered him;<sup>130</sup> where an intoxicated person walked out upon a trestle to a position of great peril, and was there killed by a train, the trainmen using reasonable care;<sup>131</sup> where one having a small boy in charge undertook to make a passageway of a railway trestle, and was run over and killed in the attempt, although he could have saved himself after discovering his danger if he had not been encumbered with the boy;<sup>132</sup> where one attempted to cross over a trestle more than 200 feet long, where the track was straight for a mile and a half, and the engineer of the train, after discovering her peril, did all he could to avoid injuring her;<sup>133</sup> where a man walking on the track, not seemingly drunk, though possibly so, after a train came in sight, instead of stepping off the track, continued on to a trestle bridge and was struck by the train, notwithstanding every effort on the part of the engineer to warn him and to stop the train;<sup>134</sup> where a person, after walking or running over a railway trestle constructed solely for the passage of trains, stopped at the end of the trestle and stood upon the track watching a train passing on a parallel track, until he was struck by an approaching engine which he failed to see, although he could have seen it if he had looked,—in the absence of any showing of gross or willful negligence on the part of the rail-

<sup>129</sup> *May v. Central R. & C. Co.*, 80 Ga. 363; s. c. 4 S. E. Rep. 330. Where a railroad company has constructed a trestle, not intended for a crossing, and which is composed of three spans, the center one of which is high enough to drive under, one who is hurt while attempting to drive under one of the side spans by reason of coming in contact with it, has no action for damages: *Gulf & C. R. Co. v. Montgomery*, 85 Tex. 64; s. c. 19 S. W. Rep. 1015.

<sup>130</sup> *Little v. Carolina & C. R. Co.*, 119 N. C. 771; s. c. 26 S. E. Rep. 106.

<sup>131</sup> *Anderson v. Chicago & C. R. Co.*, 87 Wis. 195; s. c. 23 L. R. A. 203; 58 N. W. Rep. 79. Compare *Clark v. Wilmington & C. R. Co.*, 109 N. C. 430; s. c. 14 L. R. A. 430 (track straight for a mile—defendant's negligence a question for the jury).

<sup>132</sup> *Atlanta & C. R. Co. v. Leach*, 91 Ga. 419; s. c. 17 S. E. Rep. 619.

<sup>133</sup> *Louisville & C. R. Co. v. Cooper*, 68 Miss. 368; s. c. 8 South. Rep. 747.

<sup>134</sup> *Savannah & C. R. Co. v. Stewart*, 71 Ga. 427 (verdict against railroad company set aside).



way company,<sup>135</sup> and under the facts of the other cases noted in the margin.<sup>136</sup>

§ 1774. **Going upon the Track and thereby Exposing Himself.**—There is a mass of cases holding that persons who make use of a railway track as a highway or footway can not, if they are struck by an approaching train, recover damages for the injury thus received, by reason either of their own *contributory negligence* or of their *voluntary trespass*,<sup>137</sup>—their voluntary trespass being, in theory of law, tantamount to contributory negligence.<sup>138</sup> These cases either concede in express terms, or leave it to be tacitly understood, that this rule applies in the absence of limitations elsewhere considered. Some of them expressly hold that the liability of the railway company is to be measured by the question whether, after discovering the peril of the trespasser, its servants exercised reasonable care to prevent the catastrophe.<sup>139</sup> Others adopt the qualification of some of the courts<sup>140</sup> that there can be no recovery in the absence of an injury inflicted recklessly, willfully or wantonly.<sup>141</sup> Others, no doubt intending to concede the last named qualification, hold that there can be no recovery, although the negligence of the servants of the railway company may also have combined with that of the trespasser to produce the injury to him,—holding distinctly that, in order to a recovery, the injury must be *solely* caused by the negligence of the defendant.<sup>142</sup> Others lay stress on the failure of the trespasser to take care of himself, and on

<sup>135</sup> *Wilson v. Fort Worth & C. R. Co.* (Tex. Civ. App.), 26 S. W. Rep. 753.

<sup>136</sup> *McIntyre v. Galveston & C. R. Co.* (Tex. Civ. App.), 26 S. W. Rep. 632 (no off. rep.) (trestle-walker unwarrantably frightened at approaching engine, took refuge on projecting timbers which broke, compelling him to jump); *Texas & C. R. Co. v. Zachery* (Tex. Civ. App.), 27 S. W. Rep. 221 (no off. rep.) (going upon trestle when an approaching train is visible for half a mile).

<sup>137</sup> *Ante*, § 1747; *Chicago & C. R. Co. v. Olson*, 12 Ill. App. 245; *Bresnahan v. Michigan & C. R. Co.*, 49 Mich. 410; *Tucker v. Baltimore & C. R. Co.*, 8 C. C. A. 416; s. c. 59 Fed. Rep. 968; *Hughes v. Galveston & C. R. Co.*, 67 Tex. 595; *St. Louis & C. R. Co. v. Herrin*, 6 Tex. Civ. App. 718; s. c. 26 S. W. Rep. 425; *Lenix v. Missouri & C. R. Co.*, 76 Mo. 86; *McNulty v. New Orleans City & C. R. Co.*, 52 La. An. 1034; s. c. 27 South. Rep. 569; *Sinclair v. Chicago & C. R. Co.*, 133

Mo. 233; s. c. 3 Am. & Eng. Rail. Cas. (N. S.) 269; 34 S. W. Rep. 76; *Jacobs v. Ohio & C. R. Co.*, 20 Ky. L. Rep. 189; s. c. 45 S. W. Rep. 509 (not to be rep.).

<sup>138</sup> *Ante*, § 1747; *Parker v. Pennsylvania Co.*, 134 Ind. 673; s. c. 34 N. E. Rep. 504. *Contra*, *Vicksburg & C. R. Co. v. McGowan*, 62 Miss. 682; s. c. 52 Am. Rep. 205.

<sup>139</sup> *St. Louis & C. R. Co. v. Monday*, 49 Ark. 257; s. c. 4 S. W. Rep. 782; *Galveston & C. R. Co. v. Ryon*, 70 Tex. 56; s. c. 7 S. W. Rep. 687; *McCarty v. Delaware & C. Canal Co.*, 17 Hun (N. Y.) 74.

<sup>140</sup> Vol. I, §§ 246, 948; *ante*, §§ 1713, 1747, 1760.

<sup>141</sup> *Blanchard v. Lake Shore & C. R. Co.*, 126 Ill. 416; s. c. 18 N. E. Rep. 799; *Pittsburgh & C. R. Co. v. Collins*, 87 Pa. St. 405; *Lake Shore & C. R. Co. v. Bodemer*, 139 Ill. 596; s. c. 29 N. E. Rep. 692.

<sup>142</sup> *Louisville & C. R. Co. v. Yniestra*, 21 Fla. 700.



the rule of law which relieves the railway company from any obligation to sound the whistle or ring the bell, or to restrain itself to any particular rate of speed, for the benefit of trespassers who may possibly be upon its tracks.<sup>143</sup> One of these cases proceeds upon the theory that a person, while grossly negligent himself, has no legal right to count on due diligence in others; he is bound to anticipate that others, as well as himself, may fail in diligence, and is therefore bound to guard, not only against negligence on their part which he might discover in time to avoid the consequences, but also against the ordinary danger of their being negligent, which he might not discover until too late.<sup>144</sup> One of them reasons, more questionably, that a person who knowingly and needlessly walks *at night* upon a railroad track can, by the use of ordinary diligence, avoid being run over by a train, unless it appears that, owing to some special fact or circumstance, the use of such diligence would prove ineffectual.<sup>145</sup> The rule is especially applicable where either the conformation of the ground,<sup>146</sup> or the voluntary act of the trespasser in shading his eyes, or muffling his ears, disables him from seeing or hearing the approaching train.<sup>147</sup> But where a person walking in the night-time along a public street, upon which several railroad tracks had been laid, stepped from one track to another to avoid an engine, and in so doing was struck by a car which was being backed toward him upon another track without light or warning, it was held that he was not guilty of contributory negligence as matter of law.<sup>148</sup>

§ 1775. **Walking or Driving along the Track.**—The general doctrine is that a person who makes a footway or a driveway of a railroad track not laid on the surface of a public street, so far takes the risk of the situation that, if he is killed or injured by an engine or train, no damages can be recovered of the railway company, unless the trainmen discovered his exposed situation in time, by the exercise of ordinary or reasonable care, to avert injury to him by giving him warning signals or by checking the speed of the train;<sup>149</sup> or, under another theory, unless the injury to him was wanton, willful or intentional,<sup>150</sup> or in one State, *gross*.<sup>151</sup> If a person who thus assumes

<sup>143</sup> *Enk v. Brooklyn &c. R. Co.*, 64 Hun (N. Y.) 634; s. c. 45 N. Y. St. Rep. 627; 19 N. Y. Supp. 130; *Pzolla v. Michigan &c. R. Co.*, 54 Mich. 273.

<sup>144</sup> *Central R. &c. Co. v. Smith*, 78 Ga. 694; s. c. 3 S. E. Rep. 397, per Bleckley, J.

<sup>145</sup> *Wilds v. Brunswick &c. R. Co.*, 82 Ga. 667; s. c. 9 S. E. Rep. 595.

<sup>146</sup> *Parker v. Pennsylvania Co.*, 134 Ind. 673; s. c. 34 N. E. Rep. 504.

<sup>147</sup> *John v. Louisville &c. R. Co.*

(Ky.), 10 Ky. L. Rep. 757; s. c. 10 S. W. Rep. 417.

<sup>148</sup> *McIlhaney v. Southern R. Co.*, 122 N. C. 995; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 100; 30 S. E. Rep. 127; rev'g on rehearing 120 N. C. 551; s. c. 26 S. E. Rep. 815; 6 Am. & Eng. Rail. Cas. (N. S.) 693.

<sup>149</sup> *Ante*, § 1734.

<sup>150</sup> Vol. I, §§ 246, 948; *ante*, §§ 1713, 1747, 1760.

<sup>151</sup> *Ante*, §§ 1488, 1713, note.



to make a footway of the railroad track is *drunk*, the applicatory rule is that the railroad company owes no greater duty to him than it owes to a sober person when it is without the means of determining whether he is drunk or sober. The trainmen may therefore, unless they see that he is drunk, rightfully assume that he will quit the track in time to avoid being run over, until they are admonished to the contrary.<sup>152</sup> The duty of people thus accommodating themselves by the use of railway tracks, of looking and listening, adverted to in another paragraph,<sup>153</sup> requires them to look to the rear as well as to the front.<sup>154</sup> When, therefore, a trespasser was passing through a railway yard, and was run over by an engine which passed him on one track, and then switched to the track on which he was walking, and then reversed its direction, and he did not look to the rear in order to discover it before he was overtaken by it, it was held that there could be no recovery.<sup>155</sup> The rule equally applies in a case where a person sees a locomotive with cars attached *standing at a station*, and knows that they will soon move, but nevertheless walks along the track in front of them without watching them, relying on the customary signal for starting, when he could have gone in the same direction without walking on the track.<sup>156</sup> Such a person may not lawfully assume that an engine which he hears approaching is upon a particular track, and put upon the railroad company the responsibility for a mistake in his guess, but he must take some measure to confirm his belief before acting.<sup>157</sup> It has been held not erroneous to *instruct the jury*, in an action for personal injuries inflicted upon the plaintiff while walking on a railway track *in a cut*, that if he chose a way of danger when a way of safety was open to him, of which he had knowledge, he must abide the consequences of his hardihood;<sup>158</sup> and further to *instruct* them that if he knew that the train was approaching and could have got away from

<sup>152</sup> *Columbus &c. R. Co. v. Wood*, 86 Ala. 164; s. c. 5 Rail. & Corp. L. J. 500; 5 South. Rep. 463: Thus, no recovery was allowed where a man was struck by a train, after having driven along in the night for two miles on the track, who may have been intoxicated, and although the railway company may have been negligent in failing to keep the crossing at which he drove upon the track in proper condition: *McDonald v. Chicago &c. R. Co.*, 75 Wis. 121; s. c. 43 N. W. Rep. 744.

<sup>153</sup> *Ante*, § 1767.

<sup>154</sup> *Ante*, § 1768.

<sup>155</sup> *Kansas City &c. R. Co. v. Cook*, 66 Fed. Rep. 115; s. c. 13 C. C. A. 364; 28 L. R. A. 181.

<sup>156</sup> *Baltimore &c. R. Co. v. Depew*, 40 Ohio St. 121. A subordinate court in Pennsylvania has held, in substance, that one who obliges himself by walking on a railway track must be vigilant in the extreme, and that it is not sufficient for him simply to stop, look and listen and then turn his back upon a probable danger and take his chances, putting the responsibility on the railway company: *Culp v. Delaware &c. R. Co.*, 9 Kulp (Pa.) 174.

<sup>157</sup> *Texas &c. R. Co. v. Breadow* (Tex. Civ. App.), 35 S. W. Rep. 490 (no off. rep.).

<sup>158</sup> *Beck v. Vancouver &c. R. Co.*, 25 Ore. 32; s. c. 34 Pac. Rep. 753.



it, and failed to use such means of self-preservation as were obvious and at hand, he was guilty of contributory negligence, where the evidence tended to show that he knew of the approach of the train, and that there was a means of escape obvious and available to him.<sup>159</sup>

§ 1776. **Walking on a Track where it is Laid upon the Surface of a Public Street.**—Where the railway track is laid upon the surface of a public street, the governing principles will be somewhat different. Pedestrians have, in such a case, the right to use every portion of the street from side to side, subject to what has been called the paramount right of the railroad company.<sup>160</sup> So far as the question of contributory negligence is concerned, it may be subject to modifications, being substantially the same as where a person walks on a track not laid on a public street. The modifying considerations are that those driving the engine or train are bound to anticipate the presence of persons upon their track in front of them, and are bound to take greater precautions. For example, they are bound to maintain a constant lookout ahead to discover the presence of such persons in situations of danger;<sup>161</sup> whereas, according to most theories, they are not bound to take any special precautions to discover the presence of mere trespassers.<sup>162</sup> Therefore, the public will naturally and rightfully expect, that those driving the engine or train will, before running upon them, discover them and give warning signals. Nevertheless, it has been well reasoned that the fact that a railroad company, as well as the public, is entitled to use a part of the street, calls for a high degree of care and caution on the part of members of the public so using it, to avoid danger from the proper use of its tracks by the railroad company.<sup>163</sup> Where a woman entered upon a railroad track laid in a public street, observing that a train standing thereon was headed in the other direction, and assumed, without warrant, that it was safe to walk down the track, and paid no further attention to the train, when by the exercise of the slightest care she could have known of its approach and prevented the accident which it visited upon her,—it was held that there could be no recovery of damages.<sup>164</sup> The propriety of such a

<sup>159</sup> *Beck v. Vancouver &c. R. Co.*, *supra*.

<sup>160</sup> *Ante*, § 1374, *et seq.* But the mere fact that, at the place where a person was injured on a railroad track, an *old highway* existed, was held not to entitle him to recover damages for his injuries, where he was not crossing, but was walking along the track at the time he was struck by the engine and train:

*Candelaria v. Atchison &c. R. Co.*, 6 N. Mex. 266; s. c. 27 Pac. Rep. 497; 48 Am. & Eng. Rail. Cas. 565.

<sup>161</sup> *Ante*, § 1382.

<sup>162</sup> *Ante*, § 1706.

<sup>163</sup> *Cincinnati &c. R. Co. v. Murphy*, 17 Ohio C. C. 223.

<sup>164</sup> *Bryson v. Chicago &c. R. Co.*, 89 Iowa 677; s. c. 57 N. W. Rep. 430.



decision would seem to depend upon the question whether the trainmen, by the exercise of that reasonable care in maintaining a lookout which is obligatory where a public street is used for the purposes of a railroad, might have discovered the person in the position of danger in time, by the exercise of the like care, to avert injury to him.<sup>165</sup> In a jurisdiction where contributory negligence is an affirmative defense, the burden of alleging and proving it being on the defendant, it has been held, in an action for damages against a railroad company for running over a person upon its track which was laid upon a public street, that the evidence of the contributory negligence of the deceased must be clear, definite and certain, before the court can properly take the question from the jury.<sup>166</sup> The practice of "kicking" or "shunting" cars along a track laid upon the surface of a public street, in making what is known as the "running" or "flying switch," has been already adverted to.<sup>167</sup> Where no person is on a car which is so thrust forward, to check its motion, or to give danger signals to persons on the street ahead of it, the practice is scarcely less than wicked. It has been justly characterized as willful within the meaning of the rule that contributory negligence is not a defense to a *willful* injury.<sup>168</sup>

§ 1777. **Circumstances under which Walking on the Track not Contributory Negligence.**—Notwithstanding the foregoing, there are holdings to the effect that the mere fact of walking upon a railway track otherwise than that at a public crossing is *not contributory negligence as matter of law*, although the person so using the track is guilty of a technical trespass. This was said in one case where the public had, for a long series of years, been in the habit of using a portion of the railway track for a crossing.<sup>169</sup> But here, as elsewhere seen, the persons so using the track are not treated by all the courts as trespassers, or as guilty of negligence in so doing; and some of the courts even raise the duty on the part of the railroad company of permitting the public so to cross, and of giving them audible warnings of the approach or the starting of trains.<sup>170</sup> Another court has reasoned that a *statute limiting the rate of speed* at which trains might be run within the limits of towns, cities or villages, was intended for the protection of those who might be on the railway track in consequence of their own imprudence,

<sup>165</sup> *Ante*, § 1382.

<sup>166</sup> *Drain v. St. Louis &c. R. Co.*, 86 Mo. 574; s. c. 2 West. Rep. 114; reversing s. c. 10 Mo. App. 531.

<sup>167</sup> *Ante*, § 1695.

<sup>168</sup> *Galveston &c. R. Co. v. Lewis*, 5 Tex. Civ. App. 638; s. c. 25 S. W. Rep. 293.

<sup>169</sup> *Troy v. Cape Fear &c. R. Co.*, 99

N. C. 298; s. c. 5 Am. St. Rep. 521; 6 S. E. Rep. 77.

<sup>170</sup> *Ante*, §§ 1711, 1712; *Nichols v. Washington &c. R. Co.*, 83 Va. 99; 5 Am. St. Rep. 257; 5 S. E. Rep. 171 (person crushed between two freight cars pushed suddenly together, without warning, over a private path—recovery allowed).



as well as for the protection of others; that the public may rightfully assume that the statute will be obeyed; and that a person who is on the railway track, and who is run down in consequence of the train running at a rate of speed prohibited by the statute, will not be debarred from recovering damages, as matter of law, by reason of his technical trespass or contributory negligence. In so holding, an eminent judge used the following language: "So, people are in the habit of crossing and going along railroads, oftentimes most imprudently. The statute prohibiting rapid running in cities, towns, and villages, was designed to protect life and property because of the known imprudence of many who need protection against themselves. Knowing that a train is prohibited from being run at a greater speed than six miles an hour in town, one may, in crossing or in walking on the track, assume that the law will not be violated; but as it may be, and often is, he who undertakes to make a perilous journey across or along a railroad is bound to be on the alert for coming trains, and can not hold the company responsible for what he might avoid by ordinary caution. He is not to be pronounced guilty of contributory negligence merely for being on the railroad, where he should not be; but inquiry is to be made as to the time, place, and circumstances, and as to his conduct, in view of the negligence complained of, in order to determine whether he was wanting in that care the absence of which constitutes contributory negligence preventing recovery. 'What is reasonable care in any case depends upon the particular circumstances of that case.'"<sup>171</sup>

**§ 1778. Going upon the Track Knowing that a Train is Due and Failing to Look and Listen.**—The negligence of the trespasser is aggravated where he goes upon the track knowing that a train is due, and that its arrival may be expected at any moment, and fails to make that use of his faculties which the law requires of travellers at public crossings, where they have the lawful right to be,<sup>172</sup> by looking and listening for the train, especially where this use of his faculties would have discovered its approach;<sup>173</sup> and this is so, although the approaching train is run at an excessive rate of speed, and gives no audible signal,<sup>174</sup> since, as already seen,<sup>175</sup> railway companies are not bound

<sup>171</sup> *Vicksburg &c. R. Co. v. McGowan*, 62 Miss. 682, 698; s. c. 52 Am. Rep. 205, opinion by Campbell, C. J.

<sup>172</sup> *Ante*, § 1637, *et seq.*

<sup>173</sup> *Barker v. Hannibal &c. R. Co.*, 98 Mo. 50; s. c. 11 S. W. Rep. 254; *Schilling v. Chicago &c. R. Co.*, 71

Wis. 255; s. c. 37 N. W. Rep. 414; *Smith v. Central R. &c. Co.*, 82 Ga. 801; s. c. 41 Am. & Eng. Rail. Cas. 490; 10 S. E. Rep. 11.

<sup>174</sup> *Schilling v. Chicago &c. R. Co.*, 71 Wis. 255; s. c. 37 N. W. Rep. 414.

<sup>175</sup> *Ante*, § 1707.



in law to give audible signals for the benefit of trespassers, until they are discovered on its track. The rule is of especial application where one assumes, *on a dark night*, to convert a railroad track into a highway, in which case he will, if run over, be precluded from recovering damages, although the engine which ran over him carried *no head-light*.<sup>176</sup> If such a person slips and falls while attempting to quit the track in front of a train, in consequence of which he is injured, he can not recover damages from the company.<sup>177</sup> So, if a person, knowing that a train is past due and may be immediately expected, attempts to cross a trestle seventy-five feet long and twenty-five feet high, in the neighborhood of his residence, and is killed, his own folly will prevent a recovery of damages therefor.<sup>178</sup>

§ 1779. **Going upon the Track with Ears Muffled, Vision Obstructed, etc.**—The contributory negligence of a person who goes upon a railroad track without right is not diminished by the fact that he has *voluntarily disabled himself* in some manner from hearing or seeing an approaching train, but in such a case he should be more vigilant.<sup>179</sup> It was so held, where a woman used a railway track as a footway, on a windy day, with a bonnet on her head which prevented her from hearing the train;<sup>180</sup> where a man walked along the ends of the ties, on a stormy night, with his hat drawn down over his eyes and looking straight down;<sup>181</sup> where one, knowing that a train was about due, assumed to walk upon the track with his collar turned up about his ears, so as to prevent him from hearing its approach, while it was distinctly heard by others, although he looked in both directions before going upon the track;<sup>182</sup> where the circumstances attending the death of a man were such as to raise the inference that he put up his umbrella, on a stormy night, and stepped heedlessly upon the track without looking, when, if he had looked, he could have seen the head-light of the locomotive,—and this, although the train was approaching at an unlawful rate of speed;<sup>183</sup> and where, the man who was killed walked in the daylight with an umbrella over his head in front of a moving car, without looking for it.<sup>184</sup>

<sup>176</sup> Houston &c. R. Co. v. Richards, 59 Tex. 373.

<sup>177</sup> Farve v. Louisville &c. R. Co., 42 Fed. Rep. 441.

<sup>178</sup> Bentley v. Georgia &c. R. Co., 86 Ala. 484; s. c. 6 South. Rep. 37.

<sup>179</sup> So at crossings: *Ante*, § 1659, *et seq.*

<sup>180</sup> High v. Carolina &c. R. Co., 112 N. C. 385; s. c. 17 S. E. Rep. 79.

<sup>181</sup> Gulf &c. R. Co. v. York, 74 Tex. 364; s. c. 12 S. W. Rep. 68.

<sup>182</sup> Scott v. Pennsylvania R. Co., 130 N. Y. 679; s. c. 41 N. Y. St. Rep. 712; 29 N. E. Rep. 289.

<sup>183</sup> Kwiotowski v. Grand Trunk R. Co., 70 Mich. 549; s. c. 14 West. Rep. 872; 38 N. W. Rep. 463. This was at a highway crossing, but the principle is the same: *Ante*, § 1659.

<sup>184</sup> Yancey v. Wabash &c. R. Co., 93 Mo. 433; s. c. 12 West. Rep. 250; 6 S. W. Rep. 272 (another case of injury at a highway crossing).



§ 1780. **Going upon the Track to Rescue Persons in Danger.**<sup>185</sup>—

So also, as we have elsewhere seen,<sup>186</sup> the law will not impute contributory negligence to the humane, though highly dangerous act, of going upon a railway track in front of an approaching train, to rescue children who are in a position of danger on the track; but if such a person is injured through the negligence of the railway company, he may recover damages.<sup>187</sup> In such cases, the sudden appearance of the rescuing party in front of the locomotive will demonstrate an absence of negligence on the part of the railway company, unless it was negligent in respect of the child or other person sought to be rescued, which negligence has brought about the necessity of attempting the rescue.<sup>188</sup> This does not, of course, exclude the conclusion that there may be circumstances under which the railway company will be negligent in respect of the rescuing party;<sup>189</sup> nor, on the other hand, that there may be circumstances under which contributory negligence will be imputed to him; as, for example, where a father, a bare licensee, walking along a railroad track, was killed in an effort to rescue his son, who accompanied him, from being run over by a train,—the ground of the decision being that the father brought the son into the situation of peril by his own voluntary act.<sup>190</sup> But the fact that a mother may have negligently allowed her child to stray upon the track will not convert her act in an attempt to rescue it from an approaching train into contributory negligence.<sup>191</sup>

§ 1781. **Going upon the Track to Rescue Chattels.**<sup>192</sup>—The rule as to the position of one who goes upon a railway track in front of an approaching train for the mere purpose of rescuing chattels from destruction, is manifestly different. For example, one who takes such a risk upon himself, in order to drive his horses from the track, assumes the consequences of contributory negligence, and can recover no

<sup>185</sup> This section is cited in § 1831.

<sup>186</sup> Vol. I, §§ 198, 199.

<sup>187</sup> *Spooner v. Delaware & C. R. Co.*, 115 N. Y. 22; s. c. 23 N. Y. St. Rep. 554; 21 N. E. Rep. 696; *Linnehan v. Sampson*, 126 Mass. 506; s. c. 8 Cent. L. J. 442 (deceased killed while endeavoring to rescue another person from the attacks of a bull); *Eckert v. Long Island & C. R. Co.*, 43 N. Y. 502; *Donahoe v. Wabash & C. R. Co.*, 83 Mo. 560; s. c. 53 Am. Rep. 594; *Peirce v. Walters*, 164 Ill. 560; s. c. 45 N. E. Rep. 1068; aff'g 63 Ill. App. 562 (trespasser endeavoring to rescue a child).

<sup>188</sup> *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102.

<sup>189</sup> *Donahoe v. Wabash & C. R. Co.*, 83 Mo. 560; s. c. 53 Am. Rep. 594.

<sup>190</sup> *Cleveland & C. R. Co. v. Tartt*, 64 Fed. Rep. 823; s. c. 12 C. C. A. 619.

<sup>191</sup> *Donahoe v. Wabash & C. R. Co.*, 83 Mo. 560; s. c. 53 Am. Rep. 594. No negligence will be imputable to the railway company where the child is of such an age that the engineer is entitled to act on the presumption that it will get off the track upon the sounding of his danger signals: *Burnes v. Staten Island & C. R. Co.*, 63 Hun (N. Y.) 628, *mem.*; s. c. 17 N. Y. Supp. 741; 44 N. Y. St. Rep. 271.

<sup>192</sup> This section is cited in §§ 1831, 1846.



damages resulting from his deliberate act, not proceeding from the subsequent negligence or wantonness of the railway company.<sup>193</sup> If a person puts himself in a position of danger in front of an approaching train in order to rescue property from injury or destruction, he is guilty of contributory negligence as matter of law, and if he is killed in the attempt, no damages can be recovered for his death.<sup>194</sup>

§ 1782. **Deaf Men, Blind Men and Idiots Going upon the Track.**<sup>195</sup>—It is manifestly negligence for a person whose sight and hearing are impaired to go upon a railway track when a train is known to be due;<sup>196</sup> and the same has been held with reference to a man of mature years, sound mind, perfect eyesight, and of unimpaired physical activity, but partially deaf, who voluntarily goes upon a railroad track, and is walking thereon in the day-time, when the roadbed for 900 feet behind him is in full view, and the whistle is blown six or seven times before the train reaches him.<sup>197</sup> It was so held where a deaf man, travelling upon a railroad track, in order to avoid danger from one train, passed over upon another track sixty feet in front of another engine which was in plain view.<sup>198</sup> As already seen,<sup>199</sup> deaf persons, having occasion to go upon railway tracks, are bound by the very fact of their deafness, to exercise greater caution in the use of their sense of sight.<sup>200</sup> When, therefore, a deaf man, without looking to avoid danger from an approaching train, stood upon a track until he was knocked off by the engine, it was held that he was guilty of such contributory negligence as would prevent a recovery of damages, although those in charge of the train had failed to keep a lookout.<sup>201</sup> So, a railway company was not liable for the killing of a *deaf mute* who presumed to use the railway track as a highway, when he might have used the public highway, and when the usual and customary signals were given at the crossing, so as to be heard by one not afflicted with deafness, there being ample time between the giving of the signals and the striking of the deaf mute for him to get out of the way if he

<sup>193</sup> *Deville v. Southern &c. R. Co.*, 50 Cal. 383.

<sup>194</sup> *Morris v. Lake Shore &c. R. Co.*, 148 N. Y. 182; s. c. 42 N. E. Rep. 579. But see Vol. I, § 230, *et seq.*

<sup>195</sup> This section is cited in §§ 1826, 1891, 1966, 2315.

<sup>196</sup> *Maloy v. Wabash &c. R. Co.*, 84 Mo. 270.

<sup>197</sup> *Kennedy v. Denver &c. R. Co.*, 10 Colo. 493; s. c. 16 Pac. Rep. 210.

<sup>198</sup> *Mobile &c. R. Co. v. Stroud*, 64 Miss. 784.

<sup>199</sup> Vol. I, §§ 336, 337.

<sup>200</sup> A case is found in which it was

held error to refuse to instruct the jury that the plaintiff, being a deaf mute, was under the duty of exercising greater care and caution in the use of his remaining senses to avoid injury from the train which ran upon him: *Louisville &c. R. Co. v. McCombs* (Ky.), 54 S. W. Rep. 179. Compare *Houston &c. R. Co. v. Harvin* (Tex. Civ. App.), 54 S. W. Rep. 629 (care required of a person partially deaf).

<sup>201</sup> *Galveston &c. R. Co. v. Ryon*, 80 Tex. 59; s. c. 15 S. W. Rep. 588.



had heard and heeded them.<sup>202</sup> In another case, a deaf person, after being specially warned of the danger of going upon a railway track, voluntarily went upon it at a time when he must have known that a train was approaching, without taking any precautions for his safety, and was run over by the train and killed, at a point upon the track where it was constantly used by the public as a pathway. It was held that he was guilty of contributory negligence as matter of law.<sup>203</sup> But where the persons who are driving the train *know* that the person on the track ahead of them is deaf, and can not hear the signals, and they nevertheless run him down, the company will be liable.<sup>204</sup> The degree of care to be exercised in such cases by the railway company has furnished a subject for separate consideration;<sup>205</sup> but, it may be stated as a general rule, that if those in charge of the train, not knowing that the trespasser is deaf, give the audible signals which ought to be given to a person possessing his sense of hearing, in ample time to allow him, upon hearing them, to quit the track, and if, on seeing that he does not attempt to quit the track, they do what they reasonably can to check or stop the train, his death or injury will not be ascribed to the negligence of the company, but will be ascribed to his own contributory negligence.<sup>206</sup> In other words, the engineer may rightfully presume, in the absence of knowledge that the man is deaf, as in the case of adult persons on the track, who are in the full possession of their faculties, that the deaf trespasser will quit the track in time to avoid injury; and the railway company is not answerable in damages because its servant acted upon this presumption until the contrary became apparent.<sup>207</sup> Contributory negligence can not, of course, be imputed to *idiots* any more than to children of tender years; and yet, if an adult idiot is allowed to make a footway of a railway track, and, in so doing, is run over by a train and injured, negligence will not be imputed to the engineer merely because he did not stop his train in time to avoid the injury, where it is not made to appear that the engineer knew that he was an idiot and incapable of taking care of himself.<sup>208</sup>

§ 1783. **Walking upon the Track at Night.**—For a person to make use of a railway track *at night* as a footpath, is manifestly more dan-

<sup>202</sup> Schexnaydre v. Texas & C. R. Co., 46 La. An. 248; s. c. 14 South. Rep. 513.

<sup>203</sup> McIver v. Georgia & C. R. Co., 108 Ga. 306; s. c. 33 S. E. Rep. 901.

<sup>204</sup> International & C. R. Co. v. Smith, 62 Tex. 252.

<sup>205</sup> *Ante*, §§ 1736, 1737.

<sup>206</sup> Schexnaydre v. Texas & C. R. Co., 46 La. An. 248; s. c. 14 South. Rep. 513.

<sup>207</sup> Vol. I, § 191; *ante*, §§ 1336, 1337, 1601.

<sup>208</sup> Daily v. Richmond & C. R. Co., 106 N. C. 301; s. c. 11 S. E. Rep. 320; 42 Am. & Eng. Rail Cas. 124.



gerous than to do so in the day-time. Such a person must know that unavoidable accidents may prevent an approaching train from carrying the usual *headlight*. In any event, the law does not oblige them to carry any sign of warning for mere trespassers, according to the generally prevailing rule.<sup>209</sup> Such a trespasser, therefore, takes his life and safety into his own hands to the extent that no damages can be recovered for his death or injury caused by an approaching train, in the absence of *willful* negligence, where that is the rule of the jurisdiction.<sup>210</sup> It is, of course, conceivable that there may be circumstances where a person walking upon a railway track, in the night-time, might not be imputable with contributory negligence as matter of law, but where the question would be properly put to the jury.<sup>211</sup>

**§ 1784. Stepping on One Track to Avoid a Train on Another.**<sup>212</sup>—This is a frequent source of injury to pedestrians. Undoubtedly the right of a person thus injured will, as in other cases, very greatly depend upon the solution of the inquiry whether he had a right to be upon the track at the place where he was first approached by a train, or whether he was a trespasser thereon. For example, if he was rightfully upon the track, as where he was attempting to cross it on a *street crossing*, then if, in stepping from one track to avoid being run over by one engine, he steps in front of another approaching on another track, which is giving no audible signals, a jury will be upheld in finding negligence on the part of the railway company operating the train on that track, and in excusing the negligence of the traveller.<sup>213</sup> Under such circumstances, the noise of one train is apt to drown the noise of the other and to prevent the traveller from hearing the audible signals given by the latter, if any are given. He is often required to act quickly in leaving one track in order to save himself from injury. This may, and often has, produced a confusion of his faculties, such as might be produced under similar circumstances in a person making fair use of his faculties and exercising ordinary care.<sup>214</sup>

<sup>209</sup> *Ante*, § 1707.

<sup>210</sup> *Louisville &c. R. Co. v. Howard*, 82 Ky. 212; *Western &c. R. Co. v. Bloomingdale*, 74 Ga. 604.

<sup>211</sup> It was put to the jury in *Craven v. Philadelphia &c. R. Co.*, 9 Pa. Co. Ct. 157. The language of the text will suggest the possible case where a passenger is wrongfully put off a train on a dark night, in an unknown country, where no highway is visible, and walks along the track, as the nearest probable outlet to a highway.

<sup>212</sup> This section is cited in § 1846.

<sup>213</sup> See, for an illustration, *Pennsylvania Co. v. Ellett*, 132 Ill. 654; s. c. 24 N. E. Rep. 559; 42 Am. & Eng. Rail. Cas. 64. Compare *ante*, §§ 1461, 1626, 1679, 1680.

<sup>214</sup> This will readily be proved by the experience of most persons. The writer has twice seen *dogs* killed while escaping from in front of one horse car and running in front of another approaching from the opposite direction on a parallel track.



It is, therefore, a sound view that a mere mistake of judgment, made by him under such circumstances, will not excuse the company if it is negligent in running upon him; though if it give him sufficient time for a man of ordinary intelligence, exercising ordinary care, to get out of the way before being struck, it will not be liable.<sup>215</sup>

§ 1785. **Cases of this Kind where Contributory Negligence was not Excused.**—Cases are not infrequent, however, where the courts refuse to excuse contributory negligence even under such circumstances:—As where a person, on approaching a crossing where two trains had met and were standing, attempted to cross the tracks without stopping to look and listen, and was injured by one of the engines moving slowly behind him and without giving audible signals;<sup>216</sup> or where a *trespasser* stepped off one track because a train was approaching behind, and, without looking around, walked along near to a side track, and was struck by a yard-engine, being well acquainted with the locality;<sup>217</sup> or where a *trespasser*, walking on a track, on seeing an engine approaching in front, stepped over on another track without looking behind him, and was struck by an engine coming from the rear;<sup>218</sup> or where a man employed in carrying posts across two railroad tracks, knowing the frequency of trains, unnecessarily stopped on one track while waiting for a train to go by on the other, and was struck by a train which he might easily have avoided by taking a single step backwards;<sup>219</sup> or where a man absent-mindedly walked across two tracks at a street crossing, and, on reaching the second track, saw a train coming, and, stepping back to avoid it, was struck by an engine backing upon the first track;<sup>220</sup> or where a person, walking along a railroad track at a point at which he knew that trains were constantly passing, stepped upon the track immediately after an engine had passed, without looking behind him, and was run over by cars which were following about 100 feet behind the engine;<sup>221</sup> or where an intelligent boy, thirteen years old, saw a train approaching upon a railroad track on which he was walking, and stepped over upon another track, upon which a train going in the opposite direction had recently passed,

<sup>215</sup> *Scott v. Pennsylvania R. Co.*, 30 N. Y. St. Rep. 843; s. c. 9 N. Y. Supp. 189.

<sup>216</sup> *East Tennessee &c. R. Co. v. Kornegay*, 92 Ala. 228; s. c. 9 South. Rep. 557.

<sup>217</sup> *Austin v. Chicago &c. R. Co.*, 91 Ill. 35.

<sup>218</sup> *Roden v. Chicago &c. R. Co.*, 133 Ill. 72; s. c. 24 N. E. Rep. 425; aff'g s. c. 30 Ill. App. 354.

<sup>219</sup> *Harris v. Missouri &c. R. Co.*, 40 Mo. App. 255; distinguishing *Gessley v. Missouri &c. R. Co.*, 32 Mo. App. 413.

<sup>220</sup> *McClary v. Chicago &c. R. Co.*, 46 Fed. Rep. 343.

<sup>221</sup> *Martin v. Georgia R. &c. Co.*, 95 Ga. 361; s. c. 22 S. E. Rep. 625. But see *ante*, §§ 1695, 1696, 1717.



without looking backward to see whether it continued to proceed in that direction, or was backing up, there being ample space for safety on either side of the tracks;<sup>222</sup> or where a person familiar with the locality, voluntarily and unnecessarily walked along a railroad track, and stopped between standing cars, in order to avoid a passing train, and then stepped out upon an adjoining track, without looking or listening to discover whether a train was approaching, although he knew that trains frequently passed, and was struck and killed by a train;<sup>223</sup> or where a person walking near a railway track, after a moving car, not attached to any engine, had passed him, and after he had heard the puff of a locomotive behind him, stepped so close to the track without looking backward, that he was struck by other cars following at a short distance behind the first one;<sup>224</sup> or where a man went at night across railroad tracks, which were in constant use by passing trains, for the purpose of leaving a letter in a mail car, which was standing on a side track, and, in endeavoring to avoid one train, was struck by another, approaching rapidly from a different direction.<sup>225</sup> And so, under the circumstances of the cases cited in the margin, except as noted.<sup>226</sup>

**§ 1786. Going upon the Track Immediately in Front of a Moving Train.**—Going upon a railway track immediately in front of a moving train, especially without using one's faculties to discover its approach, is an act of gross negligence which the law does not excuse at a public highway or street crossing,<sup>227</sup> and still less where there is no regular crossing, but where his position is that of a technical trespasser, bare

<sup>222</sup> *Meredith v. Richmond &c. R. Co.*, 108 N. C. 616; s. c. 13 S. E. Rep. 137.

<sup>223</sup> *Ryan v. New York &c. R. Co.*, 17 App. Div. 221; s. c. 45 N. Y. Supp. 542.

<sup>224</sup> *Smith v. Houston &c. R. Co.*, 17 Tex. Civ. App. 502; s. c. 43 S. W. Rep. 34.

<sup>225</sup> *Briscoe v. Southern R. Co.*, 103 Ga. 224; s. c. 28 S. E. Rep. 638.

<sup>226</sup> *Galveston &c. R. Co. v. Simon* (Tex. Civ. App.), 54 S. W. Rep. 309 (error to refuse an instruction on an hypothesis supported by the evidence that the plaintiff was guilty of contributory negligence); *Meyer v. Brooklyn &c. R. Co.*, 62 N. Y. Supp. 33; s. c. 47 App. Div. 286 (driver of a loaded truck, turning off a south bound street railroad track, struck by a car on the north

bound track—not guilty of contributory negligence as matter of law). In another case, evidence that the decedent was told that the train was standing in the depot, and would soon be along; that he continued to walk on one track until he met the train coming towards the depot, when he stepped over to the other track; that the bell of the train which caused his death was continuously rung, and the headlight burning; that the engineer sounded the whistle when but 50 feet from him; and that there was a good level walk along the side of the track,—required a judgment for the defendant: *Pennsylvania Co. v. Meyers*, 136 Ind. 242; s. c. 36 N. E. Rep. 32.

<sup>227</sup> *Ante*, § 1666.



licensee, or volunteer.<sup>228</sup> One court has held that it is negligence *per se* to go upon a railroad track immediately in front of an approaching train, no matter whether the person stops, looks or listens, or not.<sup>229</sup> This rule was applied so as to defeat a recovery where a person, knowing that two trains would soon follow him, started to walk along double tracks, having a sufficient space between them to enable him to walk in safety in case the two trains should pass simultaneously, but who, although warned of their approach, remained between the tracks until they had nearly reached him, and then attempted to cross one of the tracks, and in doing so was struck by one of the engines and killed.<sup>230</sup> It was applied so as to prevent a recovery of damages where a postmaster of a railway station, hearing a train approaching at the time when the mail train usually passed, started with his mail-bags to cross the track to the platform, relying on the assumption that the train would stop; but the train, being a freight train, under orders not to stop, passed by at a great rate of speed and struck and killed him.<sup>231</sup> It was so applied where a person stepped immediately in front of a locomotive coming at a speed of more than eighteen miles an hour, without looking, although he had looked a short time before and saw the locomotive standing still at a point about 200 feet distant.<sup>232</sup> But it does not follow from the preceding holdings that there can be no recovery of damages in any case of this kind. Here, as elsewhere, the rule applies that the contributory negligence of the person so exposing himself to danger does not preclude a recovery for his death or injury, where the employes in charge of the advancing engine or train discovered him in time to warn him, or to stop the engine or train, or to check its speed, but made no effort to do either.<sup>233</sup>

§ 1787. **Running in Front of Trains about to Start.**—A person who attempts to reach a railway station across a railroad track in front of

<sup>228</sup> Atchison &c. R. Co. v. Priest, 50 Kan. 16; s. c. 31 Pac. Rep. 674 (in a railway yard); Dell v. Phillips Glass Co., 169 Pa. St. 549; s. c. 36 W. N. C. 467; 32 Atl. Rep. 601 (deceased, who was employed to carry mails to and from the station, stood upon a sidetrack talking until a freight car, that had been standing upon the sidetrack and had been negligently loosened, ran upon and killed him).

<sup>229</sup> Sheehan v. Philadelphia &c. R. Co., 166 Pa. St. 354; s. c. 31 Atl. Rep. 120; Dell v. Phillips Glass Co., 169 Pa. St. 549; s. c. 36 W. N. C. 467; 32 Atl. Rep. 601. See also Cincinnati

&c. R. Co. v. Lally, 14 Ohio C. C. 333; Chicago &c. R. Co. v. Argo, 82 Ill. App. 667 (volunteer, attempting to deliver a message from a telegraph operator to an employé in charge of a train).

<sup>230</sup> Noyes v. Southern &c. R. Co. (Cal.), 24 Pac. Rep. 927.

<sup>231</sup> Moody v. Pacific R. Co., 68 Mo. 470.

<sup>232</sup> Nolan v. Milwaukee &c. R. Co., 91 Wis. 16; s. c. 64 N. W. Rep. 319.

<sup>233</sup> Texas &c. R. Co. v. Brown, 14 Tex. Civ. App. 697; s. c. 39 S. W. Rep. 140.



a train which he knows is about to start at any moment, and who persists in his attempt after he knows that the train has started, is guilty of such contributory negligence as will bar a right of action for damages in case he is killed or injured, unless some of the qualifying circumstances, elsewhere stated,<sup>234</sup> are found to exist.<sup>235</sup>

**1788. Struck while Standing or Walking between Two Tracks.**—The Supreme Court of Pennsylvania have held that it is negligence as matter of law for a person to stand between two railway tracks while a train passes.<sup>236</sup> But that there can be no absolute rule of law upon this subject, will at once be perceived when it is considered that the question depends upon the distance of the tracks from each other, the speed of the approaching trains, and other circumstances which would ordinarily take it to the jury.<sup>237</sup> The Court of Appeals of Maryland hold that the question of contributory negligence in a person struck by a train while standing between two tracks, which were in close proximity with each other, at a point where two trains, going in opposite directions, passed each other, is properly withdrawn from the jury, where he could not have failed to see and hear the trains if he had made proper use of his faculties, rendering it certain either that he did not look and listen, or that he did not heed what he saw or heard.<sup>238</sup> Another court has held that a recovery can not be had for the death of one who voluntarily walked on a cinder path between railroad tracks, where a less dangerous route was available to him, and his death was due to the risk incident to the route which he selected.<sup>239</sup> But it is apparent that negligence can not, as matter of law, be imputed to a person merely because he walks between two railway tracks which have been laid upon the surface of a *public street*,—for here the public have a right of passage in common with the railway company, though necessarily in subordination to *its* right.<sup>240</sup>

**§ 1789. Sitting Down upon Railway Track.**—It may be, and doubtless is, more comfortable to sit down on a railway track than to

<sup>234</sup> *Ante*, §§ 1472, 1677.

<sup>235</sup> *French v. Detroit & C. R. Co.*, 89 Mich. 537; s. c. 50 N. W. Rep. 914.

<sup>236</sup> *Moore v. Philadelphia & C. R. Co.*, 108 Pa. St. 349.

<sup>237</sup> See, for example, *East St. Louis & C. R. Co. v. Reames*, 173 Ill. 582; s. c. 51 N. E. Rep. 68; *aff'g* s. c. 75 Ill. App. 28.

<sup>238</sup> *Reidel v. Philadelphia & C. R. Co.*, 87 Md. 153; s. c. 10 Am. & Eng.

Rail. Cas. (N. S.) 91; 39 Atl. Rep. 507.

<sup>239</sup> *Settoon v. Texas & C. R. Co.*, 48 La. An. 807; s. c. 19 South Rep. 759.

<sup>240</sup> *Ante*, § 1375; *McIlhane v. Southern R. Co.*, 122 N. C. 995; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 100; 30 S. E. Rep. 127; *rev'g* on rehearing s. c. 120 N. C. 551; 26 S. E. Rep. 815; 6 Am. & Eng. Rail. Cas. (N. S.) 693.



stand up; but one who accommodates himself in this way, especially at night, is guilty of contributory negligence, as matter of law, and can not make his own folly a ground of recovering damages from the railway company, if he is hurt in consequence of it.<sup>241</sup>

§ 1790. **Lying Down on Railway Track.**<sup>242</sup>—Subject to the qualifications already stated,<sup>243</sup> a person who tries to make a bed of a railway track, by lying down upon it, is guilty of contributory negligence, and no damages can be recovered from the company if he is run over and killed or injured,<sup>244</sup> unless *after discovering* his peril they might, by the exercise of reasonable care, have avoided the catastrophe,<sup>245</sup> or unless the circumstances were such as to ascribe the accident to *wantonness* or *willfulness* on the part of the trainmen.<sup>246</sup> But in a jurisdiction where the independence of juries is strictly upheld, the mere fact that a person was injured by being struck by a locomotive while lying on the track outside the limits of any street, did not, as matter of law, constitute such contributory negligence as would prevent a recovery; but it was a question for the jury, whether the fact of his being there was to be deemed negligence, or whether it resulted from some cause not inconsistent with the exercise of reasonable care on his part.<sup>247</sup>

§ 1791. **Going to Sleep on Railway Track.**<sup>248</sup>—A person who lies down and goes to sleep upon a railway track, although no train is in sight at the time, expecting any train that may approach to stop until he wakes up, or to get off the track and go around him, or in some way to climb over him without hurting him,—generally receives even less favor from the courts. This is contributory negligence *per se*; and if he is killed, not willfully, wantonly or intentionally, his misconduct will not be allowed to be made the ground of recovering

<sup>241</sup> Parish v. Western &c. R. Co., 102 Ga. 285; s. c. 29 S. E. Rep. 715; 10 Am. & Eng. Rail. Cas. (N. S.) 374; 40 L. R. A. 364. A case of contributory negligence of this kind was shown where a boy sixteen years old, after being warned of the danger, sat down on a railway track behind a curve on a high "fill," which prevented his being seen by the engineer of an approaching train in time to stop the train: Roseberry v. Newport News &c. R. Co., 19 Ky. L. Rep. 194; s. c. 39 S. W. Rep. 407 (no off. rep.).

<sup>242</sup> This section is cited in § 1815.

<sup>243</sup> *Ante*, § 1734, *et seq.*

<sup>244</sup> Parish v. Western &c. R. Co., 102 Ga. 285; s. c. 29 S. E. Rep. 715; 10 Am. & Eng. Rail. Cas. (N. S.) 374; 40 L. R. A. 364.

<sup>245</sup> Louisiana &c. R. Co. v. McDonald (Tex.), 52 S. W. Rep. 649.

<sup>246</sup> Houston &c. R. Co. v. Smith, 77 Tex. 179; s. c. 13 S. W. Rep. 972; Rozwadosfskie v. International &c. R. Co., 1 Tex. Civ. App. 487; s. c. 20 S. W. Rep. 872; Virginia &c. R. Co. v. Boswell, 82 Va. 932; s. c. 7 S. E. Rep. 383.

<sup>247</sup> East St. Louis &c. R. Co. v. O'Hara, 150 Ill. 480; s. c. 37 N. E. Rep. 917; *aff'g* s. c. 49 Ill. App. 282.

<sup>248</sup> This section is cited in § 1815.



damages from the railway company.<sup>249</sup> This is especially true where the trainmen, after discovering him, do all that they reasonably can to stop the train before running over him,<sup>250</sup> although they might have discovered him sooner, if they had been on the lookout.<sup>251</sup> One court has gone so far as to hold that, for a person to go to sleep upon a railroad crossing, is such recklessness as will prevent a recovery of damages for his death, without regard to any negligence on the part of the employés of the railway company in charge of the train which runs over him;<sup>252</sup> but this can not possibly be affirmed as sound law. Another court takes the opposite oscillation of the pendulum, and holds that where a person lying on a railroad track could have been seen by the trainmen for three-quarters of a mile, it should be left to the jury to decide whether the engineer was negligent in not discovering him and stopping the train in time to avoid running over him.<sup>253</sup> It will be perceived that, assuming that the person lying on the track is in law a trespasser, this decision is a departure from the general doctrine<sup>254</sup> that a railroad company is under no affirmative duty to maintain a lookout, or to take precautions for the protection of persons that may unlawfully trespass or intrude upon its track.

§ 1792. **Drunk and Asleep on Railway Track.**<sup>255</sup>—The fact that the sleeping beauty who is killed on the railway track, happens to be lying there in a stupor produced by his own *voluntary intoxication*, does not put him or his personal representative in a more favorable position in the eye of the law. The rule of law, to which the author has often alluded, which protected the ass of Davies;<sup>256</sup> the hogs of Kerwhaker,<sup>257</sup> and the oysters of the borough of Colchester,<sup>258</sup> will not be sufficient to protect him, or his personal representative, claiming damages for his death. The dumb animals in the cases just referred to were not capable of exercising care for their own protection, and were, hence, not imputable with contributory negligence; and the negligence of their owners, in allowing them to go into a position of ex-

<sup>249</sup> Blankenship v. Galveston &c. R. Co., 15 Tex. Civ. App. 82; s. c. 38 S. W. Rep. 216; Gregory v. Southern &c. R. Co., 2 Tex. Civ. App. 279; s. c. 21 S. W. Rep. 417; Gulf &c. R. Co. v. Bolton (I. T.), 51 S. W. Rep. 1085.

<sup>250</sup> Gregory v. Southern &c. R. Co., 2 Tex. Civ. App. 279; s. c. 21 S. W. Rep. 417.

<sup>251</sup> Gulf &c. R. Co. v. Bolton (I. T.), 51 S. W. Rep. 1085.

<sup>252</sup> Raden v. Georgia R. Co., 78 Ga. 47.

<sup>253</sup> Deans v. Wilmington &c. R. Co., 107 N. C. 686; s. c. 12 S. E. Rep. 77; 45 Am. & Eng. Rail. Cas. 45. For other North Carolina cases, see last note to next section.

<sup>254</sup> *Ante*, § 1705, *et seq.* Compare *ante*, §§ 1711, 1712.

<sup>255</sup> This section is cited in § 1815.

<sup>256</sup> Vol. I, § 235.

<sup>257</sup> Kerwhaker v. Cleveland &c. R. Co., 3 Ohio St. 172; s. c. 1 Thomp. Neg., 1st ed., 472.

<sup>258</sup> Colchester v. Brooke, 7 Ad. & El. (N. S.) 339.



posure, was not of the same quality as the negligence of a man who soaks himself with liquor and then endeavors to make a railway company, which represents the rights of the public to rapid transit, conform its operations to his convenience. The sound law is that there is no special duty to maintain a lookout with the view of promoting the safety of such persons, but that the railway company discharges its duty when its employes, after discovering them lying upon the track in front of the advancing engine or train, exercise reasonable care to avert injury to them.<sup>259</sup> The mere fact that the engineer saw the person drunk and asleep on the track in time to have stopped the train and averted the catastrophe was held not sufficient to make the railroad company liable where the engineer supposed that it was a *coat*, and proceeded at full speed until it was too late to avoid the injury.<sup>260</sup> It would seem that the value of this excuse, and whether the engineer was to be believed in preferring it, presented questions peculiarly for the jury. It is, of course, wholly immaterial whether the person lying on the track unconscious is in that condition in consequence of voluntary intoxication, or of sickness, or of some circumstance beyond his control, if there is an entire absence of negligence on the part of those operating the train. His innocence does not imply negligence on their part.<sup>261</sup>

<sup>259</sup> *Sullivan v. St. Louis &c. R. Co.* (Tex. Civ. App.), 36 S. W. Rep. 1020 (no off. rep.); *Murch v. Western &c. R. Co.*, 78 Hun (N. Y.) 601; s. c. 29 N. Y. Supp. 490; 61 N. Y. St. Rep. 445; *Smith v. Fordyce* (Tex.), 18 S. W. Rep. 663 (no off. rep.); *Columbus &c. R. Co. v. Wood*, 86 Ala. 164; s. c. 5 Rail. & Corp. L. J. 600; 5 South. Rep. 463; *Illinois &c. R. Co. v. Hutchinson*, 47 Ill. 408; *Felder v. Louisville &c. R. Co.*, 2 McMull. (S. C.) 403; *Richardson v. Wilmington R. Co.*, 8 Rich. L. (S. C.) 120; *Rozwadoskie v. International &c. R. Co.*, 1 Tex. Civ. App. 487; s. c. 20 S. W. Rep. 872; *Missouri &c. R. Co. v. Brown*, 75 Tex. 267; s. c. 18 S. W. Rep. 670; *New York &c. R. Co. v. Kelly*, 93 Fed. Rep. 745. The Supreme Court of Georgia, dealing with the question of a person who is run over while lying on a railroad track, appears to have taken a nice distinction between *drinking* and *drunk*.—by holding that, although the evidence tended to show that he had been *drinking*, yet a non-suit ought to be set aside where the evidence did not prove positively that he was *drunk*, but where his

loss of consciousness might have been due to some sudden attack of disease: *Hankerson v. Southwestern R. Co.*, 59 Ga. 593: On a subsequent appeal in the same case, it was held that, under a statute of Georgia (Ga. Civ. Code, § 2972), if one rendered helpless by a voluntary intoxication, exposes himself on a railroad track, and is run over, he can not recover damages for the injury, *whether the railroad company has been negligent or not*: *Southwestern R. Co. v. Hankerson*, 61 Ga. 114. The reader will discern without much reflection that where a person is lying asleep on a railway track, a distinction, grounded on the question whether he was drunk or sober, is untenable; though a different question will be presented if his being there was due to some infirmity, such as a paralytic stroke, an apoplectic fit, or the like.

<sup>260</sup> *New York &c. R. Co. v. Kelly*, 93 Fed. Rep. 745.

<sup>261</sup> *Missouri &c. R. Co. v. Brown*, 75 Tex. 267; s. c. 18 S. W. Rep. 670. Similarly, see *Columbus &c. R. Co. v. Wood*, 86 Ala. 164; s. c. 5 Rail. & Corp. L. J. 600; 5 South. Rep.



§ 1793. **Attempting to Cross Railway Tracks where there is no Crossing.**—Except in cases where railway tracks are laid in the public streets, so that the public have a right of passage in common with the railway company, they are subordinate to the latter. It is hence a sound view that one who undertakes to cross railway tracks, where there is no sidewalk, or highway, or other public crossing, real or *de facto*, assumes all the risks incident thereto, although it may be the usual way employed by himself and others in going to the railway station or elsewhere.<sup>262</sup> In such a case, his position is technically that of a *trespasser* or *bare licensee*, and he exercises the privilege of crossing the railway tracks as he finds them, and the railway company owes no duty to him except to refrain from willfully or wantonly injuring him. Accordingly, it has been held that a person who is injured by a train while crossing the tracks of a railroad corporation at a place not a highway, and where no inducement is held out to him by the corporation to cross, can not maintain an action against the corporation.<sup>263</sup> In the same jurisdiction, no recovery can be had against a railroad company for the death of a person who is killed while crossing its tracks where he had no right to cross, under a statute giving a right of action for damages for injuries resulting in death;<sup>264</sup> although when he was killed he was lying upon the track unconscious and helpless in an epileptic fit, where he went there in an attempt to cross the track at that place.<sup>265</sup> The humane law of that State is such that the

463. Where the person who had lain down on the track and in that condition had been run over by a train, was an *intoxicated passenger* who had alighted from another train at a regular station in a town near his home, and had arranged for his baggage, and had left the station, but had returned, and had afterwards attempted to make a bed of the track, where he was killed by a passing freight train,—the mere fact that the station agent had required two of his sons, who had been sent by their mother to look after him, to leave the depot, made no difference, at least in the absence of evidence tending to show that he knew that the boys had been sent to assist their father in getting home: *Rozwadosfskie v. International & C. R. Co.*, 1 Tex. Civ. App. 487; s. c. 20 S. W. Rep. 872. Contrary to the doctrine of the text, the Supreme Court of North Carolina have recently taken up the view that the railway company may

be put in the wrong by the fact that the engineer might, by the exercise of ordinary care in keeping a lookout, discover the drunken person on the track in time, by the exercise of reasonable care and without peril to persons on the train, to stop the train so as to avert injury to him: *Norwood v. Raleigh & C. R. Co.*, 111 N. C. 236; s. c. 16 S. E. Rep. 4. See also *Deans v. Wilmington & C. R. Co.*, 107 N. C. 686; s. c. 12 S. E. Rep. 77; 45 Am. & Eng. Rail. Cas. 45; and compare *Manly v. Wilmington & C. R. Co.*, 74 N. C. 655; *Herring v. Wilmington & C. R. Co.*, 10 Ired. L. (N. C.) 402.

<sup>262</sup> *Adams v. New York & C. R. Co.*, 49 N. Y. St. Rep. 854; s. c. 21 N. Y. Supp. 681.

<sup>263</sup> *Wright v. Boston & C. R. Co.*, 129 Mass. 440.

<sup>264</sup> Mass. Pub. Stat., ch. 112, §§ 195, 212.

<sup>265</sup> *McCreary v. Boston & C. R. Co.*, 156 Mass. 316; s. c. 31 N. E. Rep. 126.



fact that a person attempts to cross a railway track at a place other than a public crossing, gives a license to the railway company to kill him.<sup>266</sup> On the other hand, evidence that a person was acquainted with a rule of the railway company, requiring trains approaching stations at which passenger trains were standing, to stop before reaching such stations, and that the person was killed in attempting to cross a track between the depot and a passenger train, by a freight train which approached at high speed without stopping in accordance with the rule,—was held sufficient to justify a finding that the deceased was exercising ordinary care when the freight train ran upon him.<sup>267</sup> So, a person going by a direct route to an exhibition train in a railroad yard, in compliance with an invitation of the company to the public to inspect such train, was not deemed guilty of contributory negligence in crossing a track at a place other than a highway crossing, which would prevent his recovery of damages for injuries received from a train which was running through at a reckless rate of speed.<sup>268</sup> Again, the fact that a pedestrian who was injured while crossing a railway track at a public crossing, intended, after crossing the track there, to go through the private yards of the company, did not alter his legal relation to the company at the time when he was injured, nor change the measure of the duty which the company owed him. He was not a trespasser, but was lawfully at the place where he received the injury.<sup>269</sup>

§ 1794. **Surprised upon the Track by Sudden Danger.**<sup>270</sup>—Persons surprised upon a railway track by sudden danger are not expected to choose with promptness the safest mode of escaping such danger; therefore, if they are in the situation of danger without their own fault,—if they are lawfully upon the track,—they, or in case they are killed, their personal representatives, will not be defeated in an action for damages, because they did not make the same use of their faculties which a person might make under ordinary circumstances.<sup>271</sup> It is, however, possible, even under such circumstances, to be so utterly reckless and oblivious of danger, that contributory negligence will be imputed to the person killed or injured, as matter of law.<sup>272</sup>

<sup>266</sup> There was a statute providing that there should be no liability "for the loss of life by a person while walking or being upon its road contrary to law": Pub. Stat. Mass., ch. 112, § 212.

<sup>267</sup> *Chicago & C. R. Co. v. Kelly*, 182 Ill. 267; s. c. 54 N. E. Rep. 979; aff'g s. c. 80 Ill. App. 675.

<sup>268</sup> *Chicago & C. R. Co. v. Johnson*, 53 Ill. App. 478.

<sup>269</sup> *Stevens v. Missouri & C. R. Co.*, 67 Mo. App. 356.

<sup>270</sup> This section is cited in §§ 1935, 1947.

<sup>271</sup> *Schultz v. Chicago & C. R. Co.*, 44 Wis. 638; *Chicago & C. R. Co. v. Dignan*, 56 Ill. 487; *Toledo & C. R. Co. v. O'Connor*, 77 Ill. 391; *Indianapolis & C. R. Co. v. Carr*, 35 Ind. 510; Vol. I., § 195; *ante*, §§ 1616, 1624.

<sup>272</sup> *Carroll v. Minnesota & C. R. Co.*, 13 Minn. 30; *Chicago & C. R. Co. v. Sweeney*, 52 Ill. 325; *Carlin v. Chicago & C. R. Co.*, 37 Iowa 316; *Illinois & C. R. Co. v. Modglin*, 85 Ill.



§ 1795. **Driving so Close to Train that Horse Takes Fright.**—A traveller who negligently fails to discover the approach of a railway train, and who consequently drives into such close proximity to it that his horse takes fright thereat, can not, according to one holding, recover damages from the railway company, although it was also guilty of negligence.<sup>273</sup> If, however, the negligence of the company consisted in failing to give warning signals of the approach of the train, the conclusion will be clearly different. On the other hand, where a person was injured by a railway train which was being driven at an unlawful rate of speed, within the limits of a city, at the sight and sound of which his mule took fright, and became unmanageable, and ran upon the track with him, so that he was struck by the train, he was not chargeable with contributory negligence merely because he *rode a mule*, without knowing whether or not he was afraid of cars, near the track,—it appearing that he tried to get at a safe distance when he saw the train approaching.<sup>274</sup>

§ 1796. **Standing or Walking too Near the Track.**—Standing or walking so near the railway track as to be struck by a passing engine or train, or as to be drawn under the wheels by the atmospherical suction made by the train when in full motion, is an act of folly of pretty much the same nature as standing or walking upon the track itself, and the courts, with great uniformity, characterize it as contributory negligence, such as will prevent a recovery of damages by the person so injured, or by his personal representative if he is killed.<sup>275</sup> In such cases there is little ground for imputing negligence to the railway company, because the engineer in charge of the locomotive or train may justly expect that the person thus exposing himself will take the single step which will land him in a place of safety. Contributory negligence, barring a recovery of damages, has therefore been imputed to such persons under the following circumstances:—

481; *Burling v. Illinois &c. R. Co.*, 85 Ill. 18. The doctrine of the text has no application to the case where a person, in attempting to escape impending peril from drays and wagons on a public street, throws himself in front of a moving street car and receives a hurt from the car, where there is no negligence on the part of the servants of the street railway company in moving it or controlling it: *Trowbridge v. Danville Street R. Co. (Va.)*, 19 S. E. Rep. 780 (no off. rep.).

<sup>273</sup> *Gulf &c. R. Co. v. Younger (Tex. Civ. App.)*, 40 S. W. Rep. 423 (no

off. rep.) (box cars obstructed the view, but plaintiff failed to look as soon as she reached a point where the view was unobstructed).

<sup>274</sup> *Prewitt v. Missouri &c. R. Co.*, 134 Mo. 615; s. c. 36 S. W. Rep. 667. Compare *ante*, § 1417, *et seq.*; *post*, § 1908, *et seq.*

<sup>275</sup> *Esrey v. Southern &c. R. Co.*, 88 Cal. 399; *Rigg v. Boston &c. R. Co.*, 158 Mass. 309; *Farmer v. Michigan &c. R. Co.*, 99 Mich. 131; *Schmidt v. Philadelphia &c. R. Co.*, 149 Pa. St. 357. See also *Chicago &c. R. Co. v. Reichert*, 69 Ill. App. 91.



Where a person stood by the side of a railroad track with his shoulder and arm extended over it in the way of a passing train, without any excuse for being there,—and this, although the railway company may have been guilty of negligence;<sup>276</sup> where a person stood so near a passing train as to be drawn under the cars by the current of air created by the motion of the train, although he was not so near as to be struck by the train if he had remained standing;<sup>277</sup> where a person walked on a path near a railroad track, and, on discovering a train close behind him, turned toward the train and was struck by it,—and this although the engineer gave him no notice of its approach;<sup>278</sup> where a *milkman* went upon a railroad platform for the purpose of receiving from a train milk which had been consigned to him, with the knowledge that the platform projected somewhat over the roadway, along which the train ran, and placed himself, with his back to the track, in such a position that he was struck by a passing engine;<sup>279</sup> where a person walked so near a switch track, without looking behind him, as to be struck by a passing car, while crossing a portion of a highway not used as a crossing, although he noticed that the engine, with the main portion of the train, from which the car had been switched by a “drop switch,” a mode of switching with which he was familiar, had passed upon another track,—and was struck by the car coming up from behind him;<sup>280</sup> where a person was struck by a train while carelessly walking in close proximity to the left hand track, notwithstanding the fact that it was customary with other double track roads to run trains on the right hand track, it nevertheless appearing that the defendant railway company had run its trains on the left hand track for two years, and notwithstanding the fact that the deceased may not have had knowledge of that fact;<sup>281</sup> where the defendant railroad company had extended a walk towards its track with a railing on each side so as impliedly to inhibit persons from using the track, and a person, while unnecessarily standing near the track, and outside the place marked by the railing, was struck by a train which he knew to be approaching at full speed;<sup>282</sup> where a switchman in the employ of a railroad company, for the purpose of getting upon a mov-

<sup>276</sup> *Brennan v. Delaware &c. R. Co.*, 55 U. S. App. 51; s. c. 83 Fed. Rep. 124; 27 C. C. A. 418.

<sup>277</sup> *Graney v. St. Louis &c. R. Co.*, 140 Mo. 89; s. c. 38 L. R. A. 633; 41 S. W. Rep. 246; 8 Am. & Eng. Rail. Cas. (N. S.) 187; aff'g on rehearing 38 S. W. Rep. 969.

<sup>278</sup> *Matthews v. Atlantic &c. R. Co.*, 117 N. C. 640; s. c. 23 S. E. Rep. 177.

<sup>279</sup> *Chicago &c. R. Co. v. Reichert*, 69 Ill. App. 91.

<sup>280</sup> *Gulf &c. R. Co. v. Wilkins* (Tex. Civ. App.), 32 S. W. Rep. 351 (no off. rep.).

<sup>281</sup> *Holmes v. South &c. R. Co.*, 97 Cal. 161; s. c. 31 Pac. Rep. 834.

<sup>282</sup> *Rigg v. Boston &c. R. Co.*, 158 Mass. 309; s. c. 33 N. E. Rep. 512.



ing engine, voluntarily and unnecessarily placed himself near the track, on which the engine of another company had just passed, and the return of which he ought to have anticipated, and was there struck by the engine on its return, while paying no attention to it,—the place in which he stood being necessarily a dangerous place, and he being familiar with railroads and their methods;<sup>283</sup> where a person voluntarily and unnecessarily stood between a railroad track and a station platform several feet high, and but three feet from the track, upon which a train was moving, and was injured by the train,—and this although the employes saw him there, provided they did not act willfully or wantonly.<sup>284</sup> A railroad company was held liable for the death of a woman who left her place of employment after dark, passed along a track of the defendant company used for switching purposes, which track was laid in a place commonly used by the public as a footway, when a car was shunted or kicked over it, without a light and unattended by a brakeman to control its movements or give signals, from a train running several miles an hour, and the open door of the car struck the woman, after she had stepped off the track next to the platform, and killed her.<sup>285</sup> A person who stands by the side of a railway track, at a place where the track is defective, while a train is approaching at a rate of from twenty-five to thirty-five miles an hour, is guilty of contributory negligence preventing recovery for his death, caused by the *derailment of the train*, where he knows of the condition of the track and the speed at which the engine is approaching.<sup>286</sup>

§ 1797. **Injuries to Loiterers from the Derailment of Trains.**—Contributory negligence was ascribed to a person who stood by the side of a railway track at a place where the track was, to his knowledge, defective, while a train was approaching, to his knowledge, at the rate of from twenty-five to thirty miles an hour, and was killed by the *derailment* of the train.<sup>287</sup> But the Supreme Court of Missouri, whose rulings on questions of law govern those of the Appellate Courts of that State, have held that the act of standing near a railroad track while a train is passing, is not, as matter of law, such contributory negligence as will defeat a recovery for an injury caused by a *derailment* of the train, although the person so going in the vicinity of the track has knowledge of its defective condition.<sup>288</sup>

<sup>283</sup> *Farmer v. Michigan &c. R. Co.*, 99 Mich. 131; s. c. 58 N. W. Rep. 45.

<sup>284</sup> *Esrey v. Southern &c. R. Co.*, 88 Cal. 399; s. c. 26 Pac. Rep. 211.

<sup>285</sup> *Chicago &c. R. Co. v. O'Neil*, 172 Ill. 527; s. c. 50 N. E. Rep. 216; aff'g 64 Ill. App. 623.

<sup>286</sup> *McKenna v. Missouri &c. R. Co.*, 54 Mo. App. 161.

<sup>287</sup> *McKenna v. Missouri &c. R. Co.*, 54 Mo. App. 161.

<sup>288</sup> *Swadley v. Missouri &c. R. Co.*, 118 Mo. 268; s. c. 24 S. W. Rep. 140.



§ 1798. **Other Illustrative Cases where Contributory Negligence has been Imputed to the Person Injured.**—A woman standing on a track between two cars, talking to a person in one of them, where she could not be seen by the train hands, was injured by the other car being pushed against her.<sup>289</sup> A portable wood-sawing machine, belonging to a railway company, was, by direction of its station agent, fastened upon the rails of its track. A man was placed there at work. Trains did not pass frequently, and the person operating the machine depended upon his knowledge of the running of trains to remove it out of the way. Nevertheless, a train, belonging to a company having a right of way over the track, collided with the machine, injuring the plaintiff.<sup>290</sup> A yard foreman in a lumber yard voluntarily and unnecessarily placed himself in front of a car which was moving down a spur track, in an effort to stop it, its brakes being defective. He could have stopped it from the side as well as from the front. He knew that it was moving toward him, and that it would strike a movable tramway which it was approaching. It struck the tramway, causing a plank thereon to hit and kill him.<sup>291</sup> A complaint in an action for damages for a personal injury showed that the defendant railway company left a narrow passageway between its depot and a canal, without any railing; that such passageway was the only means of access for teams carrying freight to or from the depot; that it was so narrow as to leave scarcely room for two wagons to pass each other; that the plaintiff attempted to drive his wagon, loaded with goods, along the passageway, and past another team, and, in so doing, his horse became frightened and backed into the canal.<sup>292</sup> A person having business with the freight department of a railroad company was struck by a car, while standing on the track in the freight yard, with his back toward the only direction from which danger was to be apprehended.<sup>293</sup> A person stepped directly in front of a moving engine, believing but not knowing that it would come to a full stop before reaching him.<sup>294</sup> In all these cases it was held that there could be no recovery, on the ground of contributory negligence.

§ 1799. **Other Illustrative Cases where Contributory Negligence was not Conclusively Imputed to the Person Injured.**—A person hav-

<sup>289</sup> *East Tennessee &c. R. Co. v. King*, 81 Ala. 177.

<sup>290</sup> *Railroad Company v. Norton*, 24 Pa. St. 465.

<sup>291</sup> *Culbertson v. Milwaukee &c. R. Co.*, 88 Wis. 567; s. c. 60 N. W. Rep. 998.

<sup>292</sup> *Goldstein v. Chicago &c. R. Co.*, 46 Wis. 404 (complaint did not state a cause of action).

<sup>293</sup> *Diebold v. Pennsylvania R. Co.*, 50 N. J. L. 478; s. c. 12 Cent. Rep. 799; 14 Atl. Rep. 576.

<sup>294</sup> *Ryan v. New York &c. R. Co.*, 30 App. Div. 153; s. c. 51 N. Y. Supp. 894 (his belief did not relieve him from the imputation of contributory negligence).



ing business at a railroad depot passed out by the usual way and was struck between the walls of the depot and a passenger platform on the other side of the track, by a train which was shut from his view by a car on a side track, and which he did not hear, although he listened for it. There was evidence, on the one hand, that the noise was great about the place of exit, and, on the other hand, that he ran from the depot carelessly.<sup>295</sup> A man was carrying dinner to a fireman employed in a railway yard. In going between the tracks, in order to perform his errand, he was struck by a switch engine carrying employés to their dinner. There was a paved sidewalk free from the tracks on one side of the yard, which he might have taken.<sup>296</sup> A *deaf mute* crawled under a freight train, which was standing on a side track at a point between two street crossings, and was struck by a moving train. At each of the crossings the train had been cut in two, so that persons could cross. There was a curve in the track which prevented him from seeing but a short distance. He could have seen the light of the approaching train, but may have mistaken it for the light of the freight train. There was testimony tending to show that the train by which he was struck was moving at a rate of speed prohibited by law.<sup>297</sup> An old lady went to a railroad station to assist her friends to get to the station, and to get upon a train about to depart, and, after bidding them good-bye, and after they had got upon the train, stayed for about five minutes upon the station platform to see the train start, and to bid them a last farewell. She was injured by the carelessness of train hands in sliding a trunk along the ice-coated platform to the baggage car.<sup>298</sup> An employé in a packing house near a railroad was hurt while using a passageway through a railroad yard, when, by going half a block and using two flights of stairs, he might have crossed by a viaduct over the track.<sup>299</sup> The owner of a coal yard went upon a railroad embankment, which lay in a public thoroughfare, on which the public had a right to go, for the purpose of inspecting coal cars, standing on a coal track, by the side of the embankment, and was killed. He might have inspected the cars in some other manner. The cars might have been inspected from the embankment without any considerable risk, provided ordinary care were used, and provided the trains passing over the embankment were operated with due

<sup>295</sup> *Jones v. East Tenn. & C. R. Co.*, 128 U. S. 443; s. c. 32 L. ed. 478; 9 Sup. Ct. Rep. 118 (contributory negligence was a question for the jury).

<sup>296</sup> *East St. Louis & C. R. Co. v. Reames*, 173 Ill. 582; s. c. 51 N. E. Rep. 68; aff'g 75 Ill. App. 28 (question for the jury).

<sup>297</sup> *Louisville & C. R. Co. v. McCombs* (Ky.), 54 S. W. Rep. 179.

<sup>298</sup> *Atchison & C. R. Co. v. Johns*, 36

Kan. 769 (contributory negligence was a question for the jury).

<sup>299</sup> *Pittsburgh & C. R. Co. v. Callaghan*, 157 Ill. 406; s. c. 41 N. E. Rep. 909 (view shut off by standing cars; traveller stopped and listened; violently struck by switch engine, which could not be seen by reason of curvature of track, and which approached without warning).



regard for the safety of the persons thereon.<sup>300</sup> A pedestrian on a public street, on the surface of which a railway track had been laid, was struck by the detached portion of a train in the operation of making a "flying switch."<sup>301</sup> In none of these cases was contributory negligence imputed as matter of law, but at most it was held to be a *question for the jury*.

§ 1800. **Other Cases where Contributory Negligence was not Imputed.**—A man was last seen between the rails of a track waiting for a train on another track to move on. He was a sober, industrious man, in the full possession of his faculties. He was killed by an approaching train.<sup>302</sup> A man stood upon an unused railway track in a position which was ordinarily a position of safety. Through the negligence of the railway company, the cart of a third person was struck by a train on another track and thrown upon him, killing him.<sup>303</sup> A pedestrian walking upon the track of a railroad, left the track to allow a train to overtake and pass him, and then returned to it in front of a section of it, which had become detached, and which was following the first section by the force of gravitation. He failed to discover the detached section, because the noise of an adjacent waterfall prevented him from hearing it.<sup>304</sup> An emigrant showed his ticket to a brakeman, and was told that he was in the right train. After riding a few hundred yards, he was put off by the conductor. It was night. In attempting to walk back on the track to the station, he fell through a trestle and was injured.<sup>305</sup> In all of these, and in the other cases cited in the marginal note, contributory negligence was not imputed as matter of law to the person killed or injured, but at most it was held to present a question for the jury.<sup>306</sup>

<sup>300</sup> Toledo &c. R. Co. v. Chisholm, 83 Fed. Rep. 652; s. c. 49 U. S. App. 700; 28 C. C. A. 663.

<sup>301</sup> Alabama &c. R. Co. v. Summers, 68 Miss. 566; s. c. 10 South. Rep. 63 (contributory negligence a question for the jury).

<sup>302</sup> Illinois &c. R. Co. v. Nowicki, 148 Ill. 29; s. c. 35 N. E. Rep. 358; aff'g s. c. 46 Ill. App. 566 (question of contributory negligence was for the jury).

<sup>303</sup> Quill v. New York &c. R. Co., 32 N. Y. St. Rep. 612; s. c. 11 N. Y. Supp. 80; s. c. aff'd in 126 N. Y. 629, *mem.* (question of contributory negligence was for the jury).

<sup>304</sup> Patton v. East Tennessee &c. R. Co., 89 Tenn. 370; s. c. 15 S. W. Rep. 919; 12 L. R. A. 184 (contributory negligence was a question for the jury).

<sup>305</sup> Houston &c. R. Co. v. Devainy, 63 Tex. 172.

<sup>306</sup> Balser v. Chicago &c. R. Co., 9 Ohio S. & C. P. Dec. 523 (plaintiff drove his team along a highway, after dark, which ran nearly parallel with the railroad track; the horse left the highway and travelled along the railroad with the wheels on one side of the wagon on the track); Marion City R. Co. v. Buboio, 23 Ind. App. 342; s. c. 55 N. E. Rep. 266 (man, wife and daughter drove through a covered bridge crossed by a street railway, horses took fright, throwing wife from the buggy); International &c. R. Co. v. Eason (Tex. Civ. App.), 35 S. W. Rep. 208 (no off. rep.) (car inspector stepped upon a track used by another company, without using his faculties to ascertain whether a train was approaching).



## CHAPTER LVII.

### INJURIES TO CHILDREN TRESPASSING UPON RAILWAY TRACKS OR PREMISES.

#### SECTION

1805. Doctrine that railway company owes no duty to trespassing children except to abstain from injuring them wantonly, willfully, or intentionally.
1806. Measure of care required toward trespassing children.
1807. Whether under a duty to erect fences to keep away trespassing children.
1808. No duty to keep a lookout for trespassing children.
1809. Doctrine that there is a duty to keep a lookout for trespassing children.
1810. Nature and extent of this duty.
1811. Duty of the railway company after discovering the child on the track.
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1813. Illustrative cases exhibiting the extent of this duty.
1814. Contributory negligence of the child in these cases.
1815. Various acts of children trespassing upon railway tracks, to which contributory negligence was ascribed.
1816. Cases where contributory negligence was not ascribed to the child as matter of law.
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#### SECTION

1819. Injuries to children through "kicking" or "shunting" cars, making the "flying switch," etc.
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1821. Duty of care toward children residing near the track.
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1824. Assuming that child will leave the track in time to avoid injury.
1825. Extent of duty to children climbing upon engines or cars, "stealing rides," etc.
1826. What does and what does not constitute reckless, wanton, willful, or intentional negligence in case of trespassing children.
1827. Injuries to children from defective railway turntables.
1828. Injuries to children from defective cattle chutes.
1829. Right to kill and injure children by starting, without warning, cars which have been standing still.
1830. Instances under the foregoing rules.
1831. Injuries received while attempting to rescue trespassing children upon railway tracks.
1832. Burden of proof in case of the death of a child upon a railway track.



§ 1805. **Doctrine that Railway Company Owes no Duty to Trespassing Children except to Abstain from Injuring them Wantonly, Willfully, or Intentionally.**<sup>1</sup>—The doctrine now about to be considered forms a very disgraceful chapter in American jurisprudence. It puts a railway company, which, under a franchise or license received from the State, drives an instrument of great danger across unfenced commons in the open country, upon the same footing with regard to trespassers as that occupied by a private land-owner, upon whose premises there may be no special source of danger to persons coming upon them. It puts children, who, acting under their childish impulses or in accordance with their childish instincts, come upon railway tracks, substantially on the same footing with adults who know and appreciate the danger. Although the railway may traverse a populous district where children are numerous, and whose presence upon the track is therefore to be anticipated, yet it is under no duty to erect fences or barriers to keep them off its track;<sup>2</sup> and statutes imposing the duty of erecting fences are construed to be intended for the protection of *animals*, and not for the protection of *children*.<sup>3</sup> Although its track is thus allowed to lie open as a part of the public common, and although the presence of children upon it may reasonably be anticipated, the railway company is under no duty of keeping a special *lookout* for them, as it drives forward its instrument of danger and death.<sup>4</sup> It owes them no duty whatever, unless it *happens to see them* exposed on the track.<sup>5</sup> If it runs over them and kills them without happening to see them, it incurs no liability.<sup>6</sup> If its engineer sees a child lying on the track in front of its advancing train, it is under no duty to check the speed of the train until the engine gets so near the child that the engineer is able to discover that it is a child instead of some inanimate object; and then it will, of course, be too late to check the train in time to avoid running over the child.<sup>7</sup> It is scarcely necessary to add that, under this conception of the duty of railway companies toward trespassing children, those statutory precautions which limit the rate of speed, or require the giving of danger signals, or the keeping of a lookout on the rear end of the tender, perform no office in the protec-

<sup>1</sup> This section is cited in §§ 1806, 1814, 1820, 1823, 1825, 2106, 2325.

<sup>2</sup> *Post*, § 1807.

<sup>3</sup> *Post*, § 1807.

<sup>4</sup> *Post*, § 1808.

<sup>5</sup> *Post*, § 1808; *Matson v. Port Townsend &c. R. Co.*, 9 Wash. 449, 529; s. c. 37 Pac. Rep. 705, 707.

<sup>6</sup> *Post*, § 1808.

<sup>7</sup> *Norfolk &c. R. Co. v. Dunnaway*, 93 Va. 29; s. c. 24 S. E. Rep. 698;

*Missouri &c. R. Co. v. Prewitt*, 59 Kan. 734; s. c. 5 Am. Neg. Rep. 29; 13 Am. & Eng. Rail. Cas. (N. S.) 807; 54 Pac. Rep. 1067; rev'g 7 Kan. App. 556; s. c. 51 Pac. Rep. 923; citing *Chrystal v. Troy &c. R. Co.*, 105 N. Y. 164; s. c. 11 N. E. Rep. 380; *Louisville &c. R. Co. v. Williams*, 69 Miss. 631; s. c. 12 South. Rep. 957.



tion of infantile helplessness.<sup>8</sup> In short, the railway company owes no greater duty to children, incapable of caring for themselves, who may be trespassing upon its tracks, before discovering their presence, than it owes to adults.<sup>9</sup> The cold and cruel doctrine is that it is not bound to take any extra precautions in anticipation of the intrusion of trespassers upon its tracks or premises, even though such trespassers be children.<sup>10</sup> And, stating the doctrine of the courts in general terms, it is not liable for killing a child while trespassing upon its track or in its yards, unless the injury was *wantonly, willfully, or intentionally* inflicted.<sup>11</sup>

§ 1806. **Measure of Care Required toward Trespassing Children.**—The better opinion is that when the trespasser upon a railway track is a child of tender years, the railway company is bound to exercise a higher degree of care and caution to avoid injuring it than in case of an adult.<sup>12</sup> According to the view taken by several enlightened courts, malice, willfulness, or recklessness, or a positive intent to kill or injure a trespassing child, need not be shown in order to render the railway company liable; but it is sufficient to render it liable that it fails to exercise reasonable or ordinary care, either in discovering the perilous situation of the trespassing child, or in avoiding injury to it after such discovery.<sup>13</sup> In some jurisdictions, as already seen,<sup>14</sup> the doctrine is qualified with the condition that the trainmen *see* the imperiled situation of the child in time to avoid injuring it by the exercise of reasonable or ordinary care;<sup>15</sup> and in other jurisdictions, with the qualifica-

<sup>8</sup> *Cleveland &c. R. Co. v. Adair*, 12 Ind. App. 569; s. c. 39 N. E. Rep. 672; rehearing denied in 40 N. E. Rep. 822.

<sup>9</sup> *Thomas v. Chicago &c. R. Co.*, 93 Iowa 248; s. c. 61 N. W. Rep. 967.

<sup>10</sup> *Biddle v. Hestonville &c. R. Co.*, 112 Pa. St. 551; s. c. 3 Cent. Rep. 405; *Hestonville &c. R. Co. v. Connell*, 88 Pa. St. 520; s. c. 6 W. N. C. (Pa.) 514; 8 Cent. L. J. 306.

<sup>11</sup> *Meehan v. Chicago &c. R. Co.*, 67 Ill. App. 39. Compare Vol. I, §§ 246, 948; *ante*, §§ 1713, 1747, 1760. Carrying out this doctrine, a subordinate court has held that the rule which, in some jurisdictions, makes owners of premises liable for leaving, exposed and unguarded, upon their premises, *nuisances attractive to children*,—such as unguarded and unfastened *turntables*,—has no application to railway tracks and railway trains: *Steele v. Pittsburgh &c. R. Co.*, 4 Ohio Dec. 350.

<sup>12</sup> *Indianapolis &c. R. Co. v. Pitzer*, 109 Ind. 179; s. c. 4 West. Rep. 256; *ante*, §§ 1424, 1428.

<sup>13</sup> *Baltimore &c. R. Co. v. Hellenthal*, 40 Ohio L. J. 248; s. c. 60 U. S. App. 156; 88 Fed. Rep. 116; 31 C. C. A. 414. See also *Patton v. East Tennessee &c. R. Co.*, 89 Tenn. 370; *Inland &c. Coasting Co. v. Tolson*, 139 U. S. 551; s. c. 35 L. ed. 270; *Washington &c. R. Co. v. Harmon*, 147 U. S. 571; s. c. 37 L. ed. 284; *Cincinnati &c. R. Co. v. Kassen*, 49 Ohio St. 230; s. c. 16 L. R. A. 674; *Baltimore &c. R. Co. v. Mackey*, 157 U. S. 72; s. c. 39 L. ed. 624; *Bottoms v. Seaboard &c. R. Co.*, 114 N. C. 699, and note to same in 25 L. R. A. 784. Compare *Grand Trunk &c. R. Co. v. Ives*, 144 U. S. 408; s. c. 36 L. ed. 493 (injury to an old man 75 years old).

<sup>14</sup> *Ante*, § 1805; *post*, § 1808.

<sup>15</sup> *Johnston v. Atchison &c. R. Co.*, 56 Kan. 263; s. c. 43 Pac. Rep. 228.



tion that those in charge of it were not guilty of contributory negligence in allowing it to go upon the track.<sup>16</sup> But the clear law is that the negligence of those in charge of a child of tender years, in allowing it to get into the situation of danger, will not exonerate the railway company from liability *to the child* for running upon it and injuring it; nor, in case of its death, to one not guilty of negligence in allowing it to escape and get upon the track.<sup>17</sup>

§ 1807. **Whether under a Duty to Erect Fences to Keep Away Trespassing Children.**<sup>18</sup>—Under the severe doctrine just considered, a railway company is under no obligation to do anything, or to refrain from doing anything,—to locate its tracks, to construct fences, or to adjust the running of its trains, so as to make it safe for children unlawfully to trespass upon its tracks.<sup>19</sup> In the absence of a statute imposing the duty, its failure to fence its track to prevent children from trespassing thereon, will not be imputed to it as negligence.<sup>20</sup> A declaration alleging that the defendant railway company neglected its duty to fence its right of way, whereby the plaintiff, a child of tender years, was enabled to stray upon its tracks, where he was injured by moving cars, states no cause of action; since the statute requiring railway companies to fence their tracks was enacted for the benefit of the owners and occupants of the adjoining lands, and not for the benefit of trespassing children.<sup>21</sup> Undoubtedly, the general conception is that statutes imposing upon railroad companies the obligation of fencing their tracks are primarily intended for the protection of *domestic animals* which might otherwise stray upon them,—yet there are courts which regard the lives of children of tender years, who are as little capable of caring for their own safety as dumb brutes are, as being entitled to at least as much solicitude at the hands of the law as that which it extends to mere chattels. One of these courts has held that where a child, to whom negligence is not imputable by reason of its tender years and lack of discretion, goes upon a railway track in consequence of the failure of the railway company to fence the same as required by statute, and is there killed by a passing engine, and the parents of the child are, at the time, exercising ordinary care in view of the circumstances, the railway company will be liable.<sup>22</sup> Another.

<sup>16</sup> *San Antonio &c. R. Co. v. Morrissey v. Providence &c. R. Co., Vaughn*, 5 Tex. Civ. App. 195; s. c. 15 R. I. 271; s. c. 1 N. E. Rep. 806.  
<sup>23</sup> S. W. Rep. 745.

<sup>17</sup> *Ante*, § 1432, *et seq.*; Vol. I, § 293.

<sup>18</sup> This section is cited in §§ 1805, 1808, 2050.

<sup>19</sup> *Nolan v. New York &c. R. Co.*, 53 Conn. 461; s. c. 1 N. E. Rep. 826;

<sup>20</sup> *Western &c. R. Co. v. Rogers*, 104 Ga. 224; s. c. 4 Am. Neg. Rep. 606; 30 S. E. Rep. 804.

<sup>21</sup> *Casista v. Boston &c. Railroad (N. H.)*, 45 Atl. Rep. 712.

<sup>22</sup> *Chicago &c. R. Co. v. Grablin*, 38 Neb. 90; s. c. 56 N. W. Rep. 796, and 57 N. W. Rep. 522.



court has gone so far in the same direction as to hold that the failure of a railway company to fence its track is a circumstance which may be considered by the jury as bearing upon its liability for an injury done to a child which gets upon its track in consequence of the absence of such a fence.<sup>23</sup> Another court has given an implied assent to the same doctrine, by holding that where the failure to fence is made the ground of imputing negligence to the company in case of an injury to a child on its track, the plaintiff must show affirmatively, in conformity with the statute requiring the railway company to fence,<sup>24</sup> that at the particular place a fence would not have obstructed the convenient use of the road.<sup>25</sup> A statute in terms requiring railway companies to protect their tracks with fences suitable to prevent "*cattle \* \* \** and other *stock*" from getting thereon, and making them liable for all damages done to such cattle or other stock in case of a failure so to fence, does not, of course, extend to the protection of *children* straying upon a railway track.<sup>26</sup>

§ 1808. **No Duty to Keep a Lookout for Trespassing Children.**<sup>27</sup>—Although the railway company is under no duty to fence its tracks against the incursions of trespassing children,<sup>28</sup> but may leave it open as a part of the public common, so that it may reasonably expect their presence on the track in front of its moving trains at any time or place,—yet, under this doctrine, it is under no duty of keeping a special lookout to discover their presence, or to give audible signals such as may warn them in case they should be exposed to danger on its track, or to take any other special precautions in anticipation of danger to them, unless it should happen, by chance or design, to discover them in a dangerous situation in front of its engine or train.<sup>29</sup>

<sup>23</sup> *Keyser v. Chicago & C. R. Co.*, 56 Mich. 559; s. c. 56 Am. Rep. 405. There was a general statute requiring railroad companies to fence their tracks with a fence four-and-a-half feet high. The court held that the injury to the child arose from the failure of the defendant to build such a fence. See also *Marcott v. Marquette & C. R. Co.*, 47 Mich. 1, 9.

<sup>24</sup> Here, Pub. Stat. Mass., ch. 112, § 115.

<sup>25</sup> *McCarty v. Fitchburg R. Co.*, 154 Mass. 17; s. c. 27 N. E. Rep. 773.

<sup>26</sup> *Baltimore & C. R. Co. v. Bradford*, 20 Ind. App. 348; s. c. 67 Am. St. Rep. 252; 49 N. E. Rep. 388. See also *Gorris v. Scott*, L. R. 9 Exch. 125; *Hall v. Brown*, 54 N. H. 495.

<sup>27</sup> This section is cited in §§ 1805, 1806, 1820, 2106.

<sup>28</sup> *Ante*, § 1807.

<sup>29</sup> *Burg v. Chicago & C. R. Co.*, 90 Iowa 106; s. c. 57 N. W. Rep. 680; *Lake Shore & C. R. Co. v. Clark*, 41 Ill. App. 343; *Louisville & C. R. Co. v. Williams*, 69 Miss. 631; s. c. 12 South. Rep. 957; *Chicago & C. R. Co. v. Roath*, 35 Ill. App. 349; *Woodruff v. Northern & C. R. Co.*, 47 Fed. Rep. 689; *McMullen v. Pennsylvania R. Co.*, 132 Pa. St. 107; s. c. 47 Phila. Leg. Int. 269; 25 W. N. C. 308; 19 Atl. Rep. 27; 41 Am. & Eng. Rail. Cas. 505; *Mitchell v. Philadelphia & C. R. Co.*, 132 Pa. St. 226; s. c. 19 Atl. Rep. 28; *Philadelphia & C. R. Co. v. Hummell*, 44 Pa. St. 375; *Flower v. Pennsylvania & C. R. Co.*, 69 Pa. St. 210; *Duff v. Allegheny & C. R. Co.*, 91 Pa. St. 458; *Cauley v. Pittsburgh & C. R. Co.*, 95 Pa. St. 398, and 98



§ 1809. **Doctrine that there is a Duty to Keep a Lookout for Trespassing Children.**—The foregoing decisions, though undoubtedly rendered by conscientious and well-meaning judges, are cruel and draconic. They lay down a doctrine which makes an infant responsible for following its childish instincts and for not exercising a degree of care for its safety of which it is incapable; and they balance its life against its error in coming upon a railway track at a place where it has, in the technical theory of the law, no right to be. It is to the credit of American jurisprudence that the courts have, as a general rule, refused to place the infantile trespasser upon a railway track, under the same disadvantage at which they have placed the adult trespasser in the same situation. The general rule is believed to be that

Pa. St. 498; Hestonville Pass. R. Co. v. Connell, 88 Pa. St. 520; Baltimore &c. R. Co. v. Schwindling, 101 Pa. St. 258; Moore v. Pennsylvania &c. R. Co., 99 Pa. St. 301; s. c. 44 Am. Rep. 106; Chrystal v. Troy &c. R. Co., 105 N. Y. 164; s. c. 31 Am. & Eng. Rail. Cas. 411; Mobile &c. R. Co. v. Watly, 69 Miss. 145; s. c. 9 South. Rep. 445 (no duty to maintain lookout); Bell v. Hannibal &c. R. Co., 86 Mo. 599; s. c. 4 West. Rep. 391. The case of Houston &c. R. Co. v. Smith, 77 Tex. 179; s. c. 13 S. W. Rep. 972, has sometimes been cited to this doctrine; but it is inapplicable, because the boy who was run over was sixteen years old, and was quite as capable of caring for his own safety as if of full age. This decision can not, it is assumed, be accepted as overruling the doctrine so pointedly laid down by the same court in Texas &c. R. Co. v. O'Donnell, 58 Tex. 27, 43, that a railway company owes to infant trespassers the duty of exercising ordinary care to the end of discovering them in front of its trains. In Mexican Nat. R. Co. v. Crum, 6 Tex. Civ. App. 702; s. c. 25 S. W. Rep. 1126, the doctrine announced is that a child seven years of age upon a railroad car without the invitation of the company or by its permission, is an intruder, and can recover damages only for an injury which is knowingly or willfully inflicted. In Morrissey v. Eastern R. Co., 126 Mass. 377, the same doctrine is announced, to the effect that a railway company owes no duty to an infant trespasser, except the negative one not

maliciously or with gross and reckless carelessness to run over him. It is said in a case in Indiana, by Elliott, C. J., that "intruders, infants or adults, can not, as a general rule, impose any duty upon the person on whose property they intrude." Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179, 182. To this proposition the learned and careful judge cites the following cases: Lary v. Cleveland &c. R. Co., 78 Ind. 323; s. c. 41 Am. Rep. 572; Everhart v. Terre Haute &c. R. Co., 78 Ind. 292; s. c. 41 Am. Rep. 567; State v. Harris, 89 Ind. 363; s. c. 46 Am. Rep. 169; Nave v. Flack, 90 Ind. 205; s. c. 46 Am. Rep. 205, see p. 206; Evansville &c. R. Co. v. Griffin, 100 Ind. 221; s. c. 50 Am. Rep. 783; Hestonville &c. R. Co. v. Connell, 88 Pa. St. 520; s. c. 32 Am. Rep. 472; Morrissey v. Eastern R. Co., 126 Mass. 377; s. c. 30 Am. Rep. 686; Gavin v. City of Chicago, 97 Ill. 66; s. c. 37 Am. Rep. 99; McAlpin v. Powell, 70 N. Y. 126; s. c. 26 Am. Rep. 555; Snyder v. Hannibal &c. R. Co., 60 Mo. 413; Zoebisch v. Tarbell, 10 Allen (Mass.) 385; Brown v. European &c. R. Co., 58 Me. 384; Baltimore &c. R. Co. v. Schwindling, 101 Pa. St. 258; s. c. 47 Am. Rep. 706; Atchison &c. R. Co. v. Flinn, 24 Kan. 627. The learned judge distinguishes those cases which have been classed under the head of "*attractive nuisances*" (Vol. I, § 1031), where the owners or occupiers of property place dangerous agencies thereon likely to attract the childish instincts of children, and leave such dangerous agencies unguarded.



children who are sufficiently advanced in years and in intelligence to care for their own safety, and to know that they have no right to be upon a railway track, except where it crosses or is laid upon a public street or highway, occupy, in respect of the degree of care which ought to be exercised toward them by the railway company, substantially the same position as adults; but that the total or partial inability of a child to appreciate the danger and to understand the wrong of going upon a railway track at an improper place, shields it from responsibility for such conduct on the one hand, and imposes a duty of greater care on the part of the railway company, on the other hand, with reference to it.<sup>30</sup> In the exercise of this care, the best judicial opinion is to the effect that the railway company, in running its trains, is bound through its servants to *keep a reasonable lookout* along its track, to the end of making timely discoveries of any children who may be exposing themselves to danger there, so as, by the exercise of like care in giving them audible danger signals, or in arresting the speed of the train, to save them from death or injury.<sup>31</sup>

§ 1810. **Nature and Extent of this Duty.**—This duty to keep a vigilant lookout has been regarded as not of such an imperative and absolute nature as to impose a liability on the company for running over a child lying upon its track, where the rules of the company required the engineer to *look backward* for other trains, as well as *forward*. In such a state of evidence, it was said: "It was not negligence for the employés of defendant not to look constantly in front of the engine at a place where there was no crossing, and where they had no reason to expect that persons would be on or along the track."<sup>32</sup>

<sup>30</sup> Philadelphia &c. R. Co. v. Spear-en, 47 Pa. St. 300; Pennsylvania R. Co. v. Lewis, 79 Pa. St. 33; Isabel v. Hannibal &c. R. Co., 60 Mo. 475; 2 Cent. L. J. 590; Kay v. Pennsylvania R. Co., 65 Pa. St. 269; Pennsylvania R. Co. v. Morgan, 82 Pa. St. 134; Kenyon v. New York &c. R. Co., 5 Hun (N. Y.) 479; Barley v. Chicago &c. R. Co., 4 Biss. (U. S.) 430; Frick v. St. Louis &c. R. Co., 6 Cent. L. J. 317.

<sup>31</sup> Gunn v. Ohio River R. Co., 36 W. Va. 165, 178; s. c. 14 S. E. Rep. 465; Battishill v. Humphreys, 64 Mich. 514; s. c. 38 N. W. Rep. 581; 14 West. Rep. 863; Hansen v. Southern &c. R. Co., 105 Cal. 379; s. c. 38 Pac. Rep. 957; St. Louis &c. R. Co. v. Denty, 63 Ark. 177; s. c. 37 S. W. Rep. 719; Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179; s. c. 58 Am.

Rep. 387; Texas &c. R. Co. v. O'Donnell, 58 Tex. 27; Chicago &c. R. Co. v. Grablin, 38 Neb. 90, 101; s. c. 56 N. W. Rep. 796, and 57 N. W. Rep. 522; Smith v. Atchison &c. R. Co., 25 Kan. 738; Atchison &c. R. Co. v. Smith, 28 Kan. 541, 557; Meeks v. Southern &c. R. Co., 56 Cal. 513; s. c. 38 Am. Rep. 67; Bottoms v. Seaboard &c. R. Co., 114 N. C. 699; s. c. 19 S. E. Rep. 730; Douglas v. Central Texas &c. R. Co. (Tex. Civ. App.), 26 S. W. Rep. 892. In Missouri, this is the rule as to infant trespassers: Frick v. St. Louis &c. R. Co., 75 Mo. 595; Frick v. St. Louis &c. R. Co., 5 Mo. App. 435; Scoville v. Hannibal &c. R. Co., 81 Mo. 434.

<sup>32</sup> Houston &c. R. Co. v. Smith, 77 Tex. 179, 181; s. c. 13 S. W. Rep. 973.



Nor was the company liable where, although the engineer kept a lookout ahead, he failed to discover a boy on the track in time to avoid running over him, by reason of the fact that the boy was concealed from view by another train until his own train was but a few feet from him.<sup>33</sup> But they are under the general duty of exercising ordinary or reasonable care, to the end of discovering children who may be exposed to danger upon the track in front of the train which they are driving forward. The formula of legal doctrine applicable to such a situation therefore is that the failure of a railway company, through its proper employes, to exercise ordinary care and diligence to prevent injury to a child, whom they know, or by the exercise of reasonable or ordinary care might know, is in a situation of danger, or about to place itself in a position of danger in front of their advancing train, is actionable negligence, in case the child is killed or injured thereby.<sup>34</sup>

**§ 1811. Duty of the Railway Company after Discovering the Child on the Track.**—All judicial authority is to the effect that if, *after discovering the child* exposed to danger on the track in front of the engine, the engineer in charge of it fails to use reasonable care to avert an injury to it;<sup>35</sup> or, under another theory, fails to use that degree of

<sup>33</sup> *Wickham v. Chicago &c. R. Co.*, 95 Wis. 23; s. c. 69 N. W. Rep. 982. Not culpable negligence to fail to watch a child two years old whom they see standing on a porch of the house where it resides, at the time of stopping a train on a switch about 50 feet from the house, or to look under the cars before starting them again, after they have stopped fifteen or twenty minutes: *Central Texas &c. R. Co. v. Douglass* (Tex. Civ. App.), 36 S. W. Rep. 120 (no off. rep.); *aff'd* in 37 S. W. Rep. 1132.

<sup>34</sup> *Thompson v. Missouri &c. R. Co.*, 11 Tex. Civ. App. 307; s. c. 32 S. W. Rep. 191. Substantially to the same effect, see *Louisville &c. R. Co. v. Popp*, 27 S. W. Rep. 992; s. c. 16 Ky. L. Rep. 369; 10 Am. Rail. & Corp. Rep. 280 (no off. rep.). This rule was applied where a child, though lying down on the track, could have been seen from the advancing engine for a distance of from 150 to 200 yards, and where the train could have been stopped within a distance of 100 yards; but where the engineer and fireman did not know that

they had struck anything until they reached the next station, and saw blood and pieces of clothing on the front of the engine. Here, according to the draconic rule of some of the courts, already considered (*ante*, § 1808), that the railway company owes no duty to the trespassing infant unless its servants happen to see him, there would have been no liability; but the Texas Court of Civil Appeals very justly held that the failure of the persons driving the train to discover the presence of the child on the track,—it being too young to be chargeable with the consequences of contributory negligence,—was the *proximate cause* of its death, and that the railway company must pay damages: *St. Louis &c. R. Co. v. Shifflet* (Tex. Civ. App.), 56 S. W. Rep. 697.

<sup>35</sup> *Louisville &c. R. Co. v. Lohges*, 6 Ind. App. 288; s. c. 33 N. E. Rep. 449 (where a careful distinction is drawn in this respect between infant and adult trespasser); *Jamison v. Illinois &c. R. Co.*, 63 Miss. 33; *Thompson v. Missouri &c. R. Co.*, 11



care which is the antithesis of recklessness, wantonness or willfulness, whereby the child is killed or injured, the company will be liable. Under either theory, the company will be liable where, after discovering the child exposed upon the track, those in charge of the train drive it recklessly or wantonly upon him.<sup>36</sup> Here, as elsewhere, the standard of liability is *reasonable care*, and they must make such efforts to prevent injury as are reasonable, in the light of the circumstances as they appear to them.<sup>37</sup> The failure to exercise this reasonable care after discovering the endangered child, may well be regarded as willful or wanton,—a view which was taken where a child was *seen*, by the engineer of an advancing train, asleep on the track, but was nevertheless run over.<sup>38</sup> Under either rule, the railway company will not be liable, it seems, for a *mere error of judgment* on the part of the engineer as to the speed of his train, or as to his ability to stop it in time to avoid the injury, provided he exercises reasonable diligence to that end.<sup>39</sup>

§ 1812. **Further of this Duty.**<sup>40</sup>—Here, as elsewhere,<sup>41</sup> the reasonable care which the law obliges the railway company to take after discovering the exposed situation of the child, is a *care and exertion in proportion to the danger to the child*. It has been held error, in such a case, to instruct the jury that the servants of the company in charge of the train should “*do everything in their power to prevent injury*.”<sup>42</sup> But such casuistry involves a mere trifling with human life. No conscientious man—no railroad engineer even—will say that a railroad engineer, upon discovering a child exposed upon the track in front of his advancing train, ought not to do all in his power to avoid injuring the child, unless the child is apparently of sufficient size to be able to understand the danger signal and get off the track before being run

Tex. Civ. App. 307; s. c. 32 S. W. Rep. 191. Compare *ante*, § 1734, *et seq.*

<sup>36</sup> Kansas &c. R. Co. v. Whipple, 39 Kan. 531; s. c. 18 Pac. Rep. 730.

<sup>37</sup> Mobile &c. R. Co. v. Watly, 69 Miss. 145; s. c. 9 South. Rep. 445.

<sup>38</sup> Louisville &c. R. Co. v. Williams, 69 Miss. 631; s. c. 12 South. Rep. 957.

<sup>39</sup> Chrystal v. Troy &c. R. Co., 105 N. Y. 164; s. c. 11 N. E. Rep. 380; 7 Cent. Rep. 245. The rule in Alabama seems to be that something more than simple negligence on the part of the railway company is required in case of running over a child to charge it with liability, but that, as in case of adult trespassers, the injury must have been inflicted

*recklessly, wantonly or intentionally*. But, in the application of this rule, there is no difference between it and the rule which makes the railway company liable for failing to exercise ordinary care after discovering the child in its exposed position; because it is held competent for the jury to determine, upon the evidence, whether the engineer did all that he might or ought to have done to prevent the accident after discovering the peril of the child: Alabama &c. R. Co. v. Dobbs, 101 Ala. 219; s. c. 12 South. Rep. 770.

<sup>40</sup> This section is cited in § 2233.

<sup>41</sup> Vol. I, § 25.

<sup>42</sup> Mobile &c. R. Co. v. Watly, 69 Miss. 145; s. c. 9 South. Rep. 445.



over.<sup>43</sup> Accordingly, we find that other authoritative courts have laid down the doctrine that where the men in charge of an advancing railroad train discover a child upon the track in a situation in which it is liable to be run over by the train, it is their duty *to use all the means in their power* to prevent injury to the child, and a failure so to do is negligence for which the company will be liable.<sup>44</sup> Plainly, nothing less than this is reasonable care under such circumstances. In pursuance of the same just and sound view, it has been held that if the engineer in charge of an advancing train sees a child of tender years in dangerous proximity on the track, in time to stop the train and avoid injury to it *by the immediate use of the appliances at his command*, and fails to do so, but runs over and kills the child,—the railway company will be liable in damages.<sup>45</sup> It is perhaps a better statement of the law to say that, under such circumstances, it is the duty of the engineer to do all he can, consistently with his own safety and the safety of others upon the train, to avoid injuring a child whom he discovers dangerously exposed upon the track in front of his advancing train.<sup>46</sup> Properly understood and applied, one can not quarrel with the general statement of law that a railroad engineer is not bound to use the highest possible care under the circumstances to avoid injury to a child seen upon or near the track at a passageway, but only to exercise ordinary care and watchfulness in looking out for people upon the track at such place, in giving them timely warning of the engine's approach, and in taking every reasonable precaution to avoid injuring them.<sup>47</sup> It should be added that the question what care and exertion an ordinarily prudent person, in the situation of a railway engineer, would exercise upon discovering a child in peril upon the track in front of his advancing train, will generally present a *question for a jury*.<sup>48</sup>

### § 1813. Illustrative Cases Exhibiting the Extent of this Duty.—

The company will also be liable where the child is *seen approaching the track* in dangerous proximity to the engine, and no effort is made to take precautions to avoid injuring it.<sup>49</sup> In the application of this rule, evidence of negligence on the part of the railway company has

<sup>43</sup> *Ante*, § 1736; *post*, § 1824.

<sup>44</sup> *Payne v. Humeston & Co.*, 70 Iowa 584; *Indianapolis & Co. v. Pitzer*, 109 Ind. 179; s. c. 7 West. Rep. 396.

<sup>45</sup> *Union & Co. v. Ure*, 56 Kan. 473; s. c. 43 Pac. Rep. 776.

<sup>46</sup> *Blankenship v. Chesapeake & Co.*, 94 Va. 449; s. c. 27 S. E.

*Rep.* 20; *Texas & Co. v. Harby*, 94 Fed. Rep. 303.

<sup>47</sup> *Chicago & Co. v. Caulfield*, 63 Fed. Rep. 396; s. c. 11 C. C. A. 552.

<sup>48</sup> *Texas & Co. v. Harby*, 94 Fed. Rep. 303.

<sup>49</sup> *Little Rock & Co. v. Barker*, 39 Ark. 491; *Schwier v. New York & Co.*, 90 N. Y. 558.



been discovered in the following circumstances, so as to charge it with liability, notwithstanding the contributory negligence of the child or its parents:—Where the engineer, seeing nothing on the track, though he saw children near it and a woman running toward the train and waving her hands, made no effort to stop the train until he saw a child but a few feet ahead, but too late to prevent running over it, as he might have done had he slackened speed when he saw the woman;<sup>50</sup> where a child *four years old*, approached an engine which was backing down the track at the rate of two or three miles an hour, in a diagonal direction, evidently racing with it, and the engineer saw the child and might have stopped his engine before striking it, but failed to do so;<sup>51</sup> where an engine was 140 feet from a child when it came upon the track, and it could have been stopped within 100 feet by using all possible means, but was not stopped in time, and ran over the child;<sup>52</sup> where, although the engineer or fireman saw a child lying upon the track in time to avoid injuring it by slackening speed, he failed to do so because he supposed it to be a *bunch of leaves or weeds*,<sup>53</sup> or, in another such case, a piece of *cloth or paper*.<sup>54</sup> For stronger reasons, there can be no recovery where everything possible is done to avoid injuring the child, after discovering it on the track.<sup>55</sup>

<sup>50</sup> Donahoe v. Wabash &c. R. Co., 83 Mo. 543.

<sup>51</sup> Schwier v. New York &c. R. Co., 90 N. Y. 558.

<sup>52</sup> Little Rock &c. R. Co. v. Barker, 39 Ark. 491.

<sup>53</sup> Meeks v. Southern &c. R. Co., 56 Cal. 513; s. c. 38 Am. Rep. 67.

<sup>54</sup> Hyde v. Union &c. R. Co., 7 Utah 356; s. c. 26 Pac. Rep. 979. On the contrary, where the engineer, seeing a child asleep on the track ahead of his engine, failed to take immediate steps to arrest the speed of the train, because he supposed that it was a *dog* or a *bundle*, but discovered that it was a child when too late to avoid running over it, the company was exonerated,—the theory of the court being that the company was liable only in case of a *wanton injury*: Louisville &c. R. Co. v. Williams, 69 Miss. 631; s. c. 12 South. Rep. 957. So, a railroad company was held not liable for the death of a child who was run over by its train at a point some distance from any public highway crossing, and at which it was unreasonable to suspect the presence of small children, where there was nothing in its appearance to indicate to the engineers that it was a human creature, or any living thing which could

be injured or do injury to the train or passengers, until it was too late to avoid running over it; and as soon as the object was discovered to be a child they did everything in their power to stop the train and save its life: Missouri &c. R. Co. v. Prewitt, 59 Kan. 734; s. c. 5 Am. Neg. Rep. 29; 13 Am. & Eng. Rail. Cas. (N. S.) 807; 54 Pac. Rep. 1067; rev'g 7 Kan. App. 556; s. c. 51 Pac. Rep. 923; citing Chrystal v. Troy &c. R. Co., 105 N. Y. 164; s. c. 11 N. E. Rep. 380.

<sup>55</sup> Ex parte Stell, 4 Hughes (U. S.) 157. For example, a railroad company is not liable for the killing of a child six years of age whom an adult had attempted to take, with his wife and another child, across a long, high, and dangerous *trestle* at a time when he knew a train was due, when the engineer did not discover their presence upon the trestle until too late to stop the train, and, upon discovering them blew his whistle and used all possible efforts to stop the train in time: Shaw v. Missouri &c. R. Co., 104 Mo. 648; s. c. 16 S. W. Rep. 832. And see, much to the same effect on similar facts, Mobile &c. R. Co. v. Watly, 69 Miss. 145; s. c. 13 South. Rep. 825.



§ 1814. **Contributory Negligence of the Child in these Cases.**—If the doctrine stated at the outset of this chapter<sup>56</sup> is to be regarded as sound law, it is difficult to say in what respect the contributory negligence of the child who is killed or injured on the railway track, can cut much figure in the case; for he is a trespasser, and the railway company owes no special duty, any more than in the case of an adult, to discover his presence or to take care for his safety, but is licensed to kill or maim him, provided it does so before happening to discover him; so that, in order to exercise this license, it is only necessary for its servants conveniently to fail to discover him until after they have done the deed. After discovering him in a situation of peril, they owe him the same duty which they owe trespassing adults under like circumstances, and no more,—the duty of exercising reasonable or ordinary care to the end of avoiding killing or injuring him. This ordinary or reasonable care, however, is a care proportionate to the danger to be avoided;<sup>57</sup> so that this theoretical measure of care may require greater promptness and exertion in the case of an infant, presumably incapable of caring for itself, than in the case of an adult, presumably capable of understanding the danger signals and getting out of the way;<sup>58</sup> and for the failure to exercise this measure of care the railway company may be liable, although the child is a trespasser upon its tracks, and has voluntarily placed itself in the situation of peril in consequence of its inability to appreciate the danger.<sup>59</sup> Whether a child thus killed or injured is of sufficient age and discretion to be imputable with contributory negligence depends upon the principles already considered. Between certain limits of age and discretion it becomes a *question for a jury*,—as in the case of a boy eleven years old;<sup>60</sup> or, in case of a boy ten years old who attempts to cross railway tracks which are much used for switching, at a grade crossing, although he is familiar with the place;<sup>61</sup> or in case of a boy nine or ten years old who understands the danger of going about railway trains and crossing railway tracks, but who walks along a city street between the tracks of a railroad for some distance without looking back, until just before starting to cross the main track on discovering a train close upon him, and is injured in attempting to get out of the way of it;<sup>62</sup> or in case of a girl killed by a railway train driven along a city street

<sup>56</sup> *Ante*, § 1805.

<sup>57</sup> Vol. I, § 25.

<sup>58</sup> Vol. I, § 26, and cases cited.

<sup>59</sup> *Thompson v. Missouri &c. R. Co.*, 11 Tex. Civ. App. 307; s. c. 32 S. W. Rep. 191.

<sup>60</sup> *St. Louis &c. R. Co. v. Shifflet* (Tex. Civ. App.), 56 S. W. Rep. 697.

<sup>61</sup> *Illinois &c. R. Co. v. Jones*, 95 Fed. Rep. 370.

<sup>62</sup> *Anderson v. Union &c. R. Co.*, 81 Mo. App. 116; s. c. 2 Mo. App. Rep. 688.



at an unlawful rate of speed, and without giving the statutory signals.<sup>63</sup>

§ 1815. **Various Acts of Children Trespassing upon Railway Tracks, to which Contributory Negligence was Ascribed.**—Contributory negligence was ascribed to children trespassing upon railway premises in the following cases:—Where a bright and intelligent girl nine years of age saw a train coming, and then, of her own volition, abandoned a place of safety, ran down a hill toward the railroad track, and slipped and fell on the track in front of the train;<sup>64</sup> where a boy thirteen years old, familiar with the methods of operating trains at the place of the accident, went upon the track when there was sufficient light to enable him to see the cars, and, seeing that they were standing still, allowed his attention to be diverted by a passing engine, taking no notice of the cars, and the train backed upon him,—the conclusion being that there was a strong inference of contributory negligence which was properly submitted to the jury;<sup>65</sup> where a boy seven and a half years old, ordinarily intelligent, knew that trains were likely to pass over the track, and understood the probable consequences of being struck by a train, but nevertheless lay down and went to sleep with his legs across the rails;<sup>66</sup> where a boy fifteen years of age concluded that it was more convenient to walk upon a railroad track than to take the wagon road near by, and saw a train approaching at a distance of nearly a quarter of a mile, and waited until it was very near, and then stepped slightly to one side, and there, while looking at the wheels, was struck; as he claimed, by a plank projecting from a car;<sup>67</sup> and in the other cases noted in the margin.<sup>68</sup>

<sup>63</sup> *Missouri &c. R. Co. v. Cardena*, 22 Tex. Civ. App. 300; s. c. 54 S. W. Rep. 312. In an action brought against a railroad company under Alabama Code of 1886, § 2589, for negligent homicide of a child, neither the contributory negligence of the infant, nor that of the parents, is available as a defense to the action: *Alabama &c. R. Co. v. Burgess*, 116 Ala. 509; s. c. South. Rep. 913. The statute is one of the usual statutes giving a right of action for damages resulting in death.

<sup>64</sup> *Robertson v. New York*, 149 N. Y. 609; aff'g s. c. 7 Misc. (N. Y.) 645; 58 N. Y. St. Rep. 391; 28 N. Y. Supp. 13.

<sup>65</sup> *Whalen v. Chicago &c. R. Co.*, 75 Wis. 654; s. c. 44 N. W. Rep. 849; 41 Am. & Eng. Rail. Cas. 558.

<sup>66</sup> *Krenzer v. Pittsburgh &c. R. Co.*,

151 Ind. 587; s. c. 43 N. E. Rep. 649; rehearing denied in 151 Ind. 592; s. c. 12 Am. & Eng. Rail. Cas. (N. S.) 343; 5 Am. Neg. Rep. 137. Compare *ante*, §§ 1790, 1791, 1792.

<sup>67</sup> *Central &c. R. Co. v. Brinson*, 70 Ga. 207.

<sup>68</sup> Where a female child, who fully understood the danger incident to standing upon a railroad track, upon which trains were constantly passing every two or three minutes, took such a position without taking any precaution for her safety, and was run over and killed: *Dull v. Cleveland &c. R. Co.*, 21 Ind. App. 571; s. c. 52 N. E. Rep. 1013. Where an exceptionally bright boy of twelve years was so bright as to use a railway track as a playground, when an engine was standing but a short distance away, which he could have



§ 1816. **Cases where Contributory Negligence was not Ascribed to the Child as Matter of Law.**—It was held that contributory negligence ought not to be ascribed to children as matter of law under the following circumstances:—Where a child *seven years old*, went with its mother and nurse upon a railway trestle and was there struck by an engine and injured,—the evidence tending to show that the child did not possess sufficient discretion to realize the danger;<sup>69</sup> where a child *two years old* got upon a railway track and was run over,—no negligence being imputed either to the *child* or to its *parents*;<sup>70</sup> where a boy *thirteen years old* saw a man lying down under a car in a Y track, and concluded that he would lie down there at the same time, in consequence of which he got hurt;<sup>71</sup> where a boy *nine years old*, who had been sent by his mother on an errand, was injured while walking on a railroad track, usually travelled by people in the locality, by a train running at an unlawful speed, and without signals,—the question of his negligence being *for the jury*;<sup>72</sup> where a boy *fourteen years old* was run upon while attempting to cross a track to get water from a hydrant, the evidence being to the effect that, at a point where the track was elevated fourteen feet above the street, the engineer saw him 100 feet away approaching a plank beside the track intended for the use of railroad men only, but saw no more of him until after the injury,—the question of his contributory negligence being *for the jury*;<sup>73</sup> where a boy *thirteen years old*, finding that the highway was blocked at a crossing by a railway train, waited twenty-five minutes for the opportunity to pass, and then attempted to pass around the end of the train upon the right of way of the company,—a course which the public were accustomed, under special circumstances, to pursue,—when the train backed upon him suddenly and without warning, killing him;<sup>74</sup> where a boy *fourteen years old* allowed his attention to become diverted by a moving train, as he was

easily seen if he had looked in its direction, and was familiar with the use of the tracks and grounds by the railroad company; but, notwithstanding his brightness and his familiarity with the situation, was run over by the engine and killed,—it being a case of contributory negligence as matter of law: *Cleveland &c. R. Co. v. Heiman*, 16 Ohio C. C. 487. Consult further the following cases: *Engelmann v. Lake Shore &c. R. Co.*, 8 Ohio C. D. 593; *Wendell v. New York &c. R. Co.*, 91 N. Y. 420; *Lofdahl v. Minneapolis &c. R. Co.*, 88 Wis. 421; s. c. 60 N. W. Rep. 795; *Hayes v. Norcross*, 162 Mass. 546;

*Collins v. South Boston R. Co.*, 142 Mass. 301; s. c. 56 Am. Rep. 675.

<sup>69</sup> *Texas &c. R. Co. v. Fletcher*, 6 Tex. Civ. App. 736; s. c. 26 S. W. Rep. 446.

<sup>70</sup> *Frick v. St. Louis &c. R. Co.*, 75 Mo. 595.

<sup>71</sup> *Garza v. Texas &c. R. Co.* (Tex. Civ. App.), 41 S. W. Rep. 172 (no off. rep.).

<sup>72</sup> *Illinois &c. R. Co. v. Varnadore* (Miss.), 15 South. Rep. 933.

<sup>73</sup> *Corcoran v. New York Elevated R. Co.*, 19 Hun (N. Y.) 368.

<sup>74</sup> *Atchison &c. R. Co. v. Cross*, 58 Kan. 424; s. c. 49 Pac. Rep. 599. For similar injuries, see *ante*, § 1674.



crossing a railroad track which ran laterally through a city street, in consequence of which his foot got caught between the main rail and the guard rail of the track, which accident could have been easily avoided if he had noticed the condition of the track, of which condition he was unaware, and, while so caught and held, was struck and injured by moving cars.<sup>75</sup>

§ 1817. **Contributory Negligence of Parents in Case of Injuries to Trespassing Children.**—The principles which govern this subject have already been gone over.<sup>76</sup> It is necessary to consider, at the outset, whether the parent is suing for the killing or injuring of the child, or whether the action is brought in behalf of the child. If the parent is suing, then the negligence of the parent in allowing the child to escape and get upon the railway track will in some cases preclude a recovery, and in others not.<sup>77</sup> If the action is brought on behalf of the child, the general, though not uniform, rule will be that the child will not be precluded from recovering damages inflicted upon it by the negligence of the railroad company, merely because of the negligence of its own parents in allowing it to get into the place of danger.<sup>78</sup> As already seen,<sup>79</sup> the tendency of the courts is to exonerate parents from the imputation of negligence, merely because they allow their children to play upon the streets, or upon the public commons, except in the case of children of very tender years. It was so held in the following cases:—Where a child two years of age strayed upon a railroad track without the knowledge or consent of its parents and was there injured, the father being away from home at the time, and the mother having an infant to take care of, and having no servant,—the holding being that the father was not chargeable with contributory negligence, such as would preclude him from recovering damages for loss of service, expense of medical treatment, etc.;<sup>80</sup> where the mother of a child *two*

<sup>75</sup> *Goodrich v. Burlington &c. R. Co.*, 103 Iowa 412; s. c. 72 N. W. Rep. 653. In this case the court distinguished the following decisions: *O'Laughlin v. Dubuque*, 42 Iowa 539; *Cosner v. Centerville*, 90 Iowa 33; *Thomas v. Chicago &c. R. Co.*, 93 Iowa 248; *Merryman v. Chicago &c. R. Co.*, 85 Iowa 634; *Masser v. Chicago &c. R. Co.*, 68 Iowa 602; *Richards v. Chicago &c. R. Co.*, 81 Iowa 426. That a child five years old is not, as matter of law, guilty of contributory negligence in running upon a railroad track, in front of a car which gives no warning of its

approach,—see *Ficker v. Cleveland &c. R. Co.*, 6 Ohio N. P. 36.

<sup>76</sup> Vol. I, § 289, *et seq.*; § 321, *et seq.*; *ante*, §§ 1432, 1433.

<sup>77</sup> That parents who permit their children of tender years to wander upon a railroad track can not recover damages for their death caused by the negligence of the servants of the railroad company, was held in *Westerberg v. Kinzua Creek &c. R. Co.*, 142 Pa. St. 471; s. c. 21 Atl. Rep. 878.

<sup>78</sup> Vol. I, § 289, *et seq.*

<sup>79</sup> Vol. I, § 324, *et seq.*

<sup>80</sup> *Frick v. St. Louis &c. R. Co.*, 75 Mo. 542.



*years old* allowed it out of her sight for a minute in the company of other children, during which time it wandered upon a railroad track and was killed by a passing train;<sup>81</sup> where the parents of a girl six years old allowed her to go visiting, although they knew that she would have to pass the railroad track where she was killed, the train being over-due and liable to arrive at any moment, and the child not being attended by any one, nor specially cautioned;<sup>82</sup> where the father of a boy only eight years old allowed him to walk unattended upon a railway track;<sup>83</sup> where the parents of a child *two years and eleven months old* allowed it to go upon a city street in charge of a boy fourteen years old, who was a member of the family, and who had frequently aided in taking care of the child,—so as to prevent a recovery by the father for loss of service, medical attendance, etc., consequent upon the child being struck by a street car;<sup>84</sup> and where the father of a child seven years and one month old, bright and intelligent, and accustomed to be out on the street, left the child unattended for a moment on the street, as he and the child were about to cross a street car track, after looking along the track, and seeing no car within 150 feet, when he was called away to assist his wife in alighting from a car.<sup>85</sup> From these and many cases already gone over<sup>86</sup> it must be concluded that, in most cases, the question whether the parents of a child are negligent in permitting it to escape from their custody and go upon a railway track will present a *question of fact* to be answered by the jury, in view of all the surrounding circumstances, and will not be a question of law for the court.<sup>87</sup> To enable the jury to answer the question intelligently it is a material question to be submitted to them, whether the parent was or was not negligent in committing the child to a temporary custodian, and whether the custodian was of proper age and discretion to care for the child suitably.<sup>88</sup>

§ 1818. Whether Children of Tender Years can be Treated as Trespassers.—A rule of law, founded upon custom in many American States, makes it lawful for *cattle* to run at large upon *unfenced*

<sup>81</sup> Green v. Chicago &c. R. Co., 110 Mich. 648; s. c. 3 Det. L. N. 544; 6 Am. & Eng. Rail. Cas. (N. S.) 317; 68 N. W. Rep. 988.

<sup>82</sup> St. Louis &c. R. Co. v. Dawson (Ark.), 56 S. W. Rep. 46.

<sup>83</sup> St. Louis &c. R. Co. v. Christian, 8 Tex. Civ. App. 246; s. c. 27 S. W. Rep. 932.

<sup>84</sup> Harkins v. Pittsburgh &c. Trac-tion Co. Corp., 173 Pa. St. 146; s. c. 33 Atl. Rep. 1044; 3 Am. & Eng. Rail.

Cas. (N. S.) 302; 26 Pitts. L. J. (N. S.) 375; 38 W. N. C. 122.

<sup>85</sup> Kitchell v. Brooklyn Heights R. Co., 151 N. Y. 630; aff'g s. c. 6 App. Div. (N. Y.) 99; 39 N. Y. Supp. 741.

<sup>86</sup> Vol. I, § 324, *et seq.*; *ante*, § 1432.  
<sup>87</sup> Payne v. Humeston &c. R. Co., 70 Iowa 584.

<sup>88</sup> Hooker v. Chicago &c. R. Co., 76 Wis. 542; s. c. 41 Am. & Eng. Rail. Cas. 498; 44 N. W. Rep. 1085.



*grounds*. As we shall see hereafter,<sup>89</sup> where this rule of law obtains, if cattle stray upon a railway track and are run over by a train under such circumstances that the accident might have been avoided by the exercise of reasonable care on the part of the trainmen, the company will be liable to pay damages to their owner. It is not perceived how helpless *children*, escaping from the custody of their parents, are not entitled to equal protection at the hands of the law; or how the rule of the common law which was successfully invoked to protect the hogs of Kerwhaker<sup>90</sup> should not be invoked to prevent the murder of children who are so young as to be no more capable of caring for themselves than are dumb beasts. If this is a sound view, children of tender years *can not be trespassers* within the meaning of the rule of law under consideration in this chapter; but if such children stray upon a railway track, although at a place other than a public crossing, the railway company will be liable for running over them, if the catastrophe could have been avoided by the exercise of reasonable care; and it is not necessary to a recovery of damages in such a case to show that the company, through its servants, acted either *wantonly, recklessly, or maliciously*.<sup>91</sup> But the draconic rule stated at the beginning of this chapter<sup>92</sup> makes a child of two years a trespasser when it gets upon a railway track, at a point other than a crossing, although negligence can not be predicated of its conduct.<sup>93</sup> But, on the other hand, where railway tracks traverse a *street* of a city or village, or cross a *public highway*, and a child is injured thereon, the company can not set up the defense that the child was a trespasser on its track, without showing a franchise conferring upon it an exclusive right to the use of the street or highway; since an adult would not be a trespasser under such circumstances.<sup>94</sup>

§ 1819. Injuries to Children through "Kicking" or "Shunting" Cars, Making the "Flying Switch," etc.<sup>95</sup>—The extent to which the courts have denounced this dangerous and reprehensible practice has already been shown.<sup>96</sup> It has been held that for the employés of a railway company to "kick" two cars out of sight around a curve on a down grade, without any person on them, in a thickly settled community, where it is the custom to use the track as a footpath without

<sup>89</sup> *Post*, § 2005, *et seq.*

<sup>90</sup> *Post*, § 2006, *et seq.*; Kerwhaker v. Cleveland & C. R. Co., 3 Ohio St. 172; s. c. 1 Thomp. Neg., 1st. ed., 472.

<sup>91</sup> Ludden v. Columbus & C. R. Co., 7 Ohio N. P. 106.

<sup>92</sup> *Ante*, § 1805.

<sup>93</sup> Baltimore & C. R. Co. v. Bradford,

20 Ind. App. 348; s. c. 67 Am. St. Rep. 252; 49 N. E. Rep. 388.

<sup>94</sup> Smith v. Pittsburgh & C. R. Co., 90 Fed. Rep. 783; s. c. 41 Ohio L. J. 113; 13 Am. & Eng. Rail. Cas. (N. S.) 713.

<sup>95</sup> This section is cited in §§ 1820, 1850, 1960.

<sup>96</sup> *Ante*, §§ 1695, 1696, 1717.



objection from the railroad company, and it is known that from fifty to one hundred people a day walk along the track, and the cars are not usually sent this way, is such *gross and willful negligence* that the railroad company will be liable for the death of a child killed by a car thus kicked,—especially where two cars were “kicked” on parallel tracks at the same time; and this, although the child has in strictness no right to use the track.<sup>97</sup> It has also been held that a gang of trainmen engaged in “shunting” cars have no right, as matter of law, to assume that a child may not escape from a house, situated among several other houses, close to the track, where there is no obstruction between it and the track, and get upon the track, because they did not see it when running an engine in the opposite direction a few moments before; but whether they are bound, in the exercise of reasonable care, to anticipate the presence of children on the track at such a place, and to have some one upon the shunted cars to look out for them, is a question *for the jury*.<sup>98</sup> Upon clearer grounds, where a railroad company assumes to use a track *laid upon a public street*, for the purpose of “shunting” cars, it becomes a *quasi* insurer of children too young to care for themselves, who may happen to be upon the street, and is bound to take precautions to avoid injuring them, and must pay damages if it injures them.<sup>99</sup>

§ 1820. **Precautions in the Favor of Children with Respect to Switch Yards, to Cars on Side Tracks, etc.**<sup>100</sup>—We have already observed a distinction, with reference to the question of negligence, between the act of a railway company in shunting cars in its own *switch yards*, and the act of shunting them across a public *highway*, where the public have a right to be.<sup>101</sup> Under the doctrine stated at the commencement of this chapter,<sup>102</sup> which is that a railway company is not bound, any more than any other land-owner, to look out for, or to take any special precautions in anticipation of, children trespassing

<sup>97</sup> Roth v. Union Depot Co., 13 Wash. 525; s. c. 31 L. R. A. 855; 43 Pac. Rep. 641; 44 Pac. Rep. 253.

<sup>98</sup> Lindsay v. Canadian &c. R. Co., 68 Vt. 556; s. c. 35 Atl. Rep. 513.

<sup>99</sup> Smith v. Pittsburgh &c. R. Co., 90 Fed. Rep. 783; s. c. 41 Ohio L. J. 113; 13 Am. & Eng. Rail. Cas. (N. S.) 716. In a case in Kansas it appeared that a railroad corporation owned a switch track, constructed from the main track to a mining company's coal shaft. The latter company was furnished, by the former, with cars to load with coal, and the mining company was in the

habit of loosening the brakes of these cars and permitting them to run, with no one on them, down a steep grade. A car, which was thus used, ran over a child two years old. It was held that the railroad company was responsible: Smith v. Atchison &c. R. Co., 25 Kan. 738. Compare the same case on a subsequent appeal: Atchison &c. R. Co. v. Smith, 28 Kan. 541.

<sup>100</sup> This section is cited in §§ 1850, 1960.

<sup>101</sup> *Ante*, §§ 1572, 1695, 1717, 1819.

<sup>102</sup> *Ante*, §§ 1805, 1808.



upon its premises,—it has been held that it is not bound to anticipate that a child will come unattended into its switch yard and expose itself upon its switch track in front of a slowly moving car.<sup>103</sup> So, a railway company maintaining a *gravity yard* performs its duty, with reference to trespassing children, when it securely fastens, by means of the ordinary brake, such cars as it has occasion to place upon its side track there situated.<sup>104</sup>

**§ 1821. Duty of Care toward Children Residing near the Track.—**

It has been well held that a railway company owes the duty of exercising reasonable care to the end of avoiding injury to small children residing in houses situated close to the track, where there is no obstruction between them and the track, and the place is one at which the track is frequently used as a passageway by the public; and that this duty is not performed where cars are “kicked” or “shunted” along the track at such a place without any one upon them to give warnings, or to check their speed in case of danger to children.<sup>105</sup>

**§ 1822. No Duty to Warn Children to Keep Away.—**There is judicial authority to the effect that a railroad company is *not under any duty* to warn boys, who have been in the habit of playing about its tracks at a street crossing, to keep away.<sup>106</sup>

**§ 1823. Effect of Failing to Give Danger Signals to Children.—**

Applying the severe doctrine already considered,<sup>107</sup> in connection with the doctrine that a statutory obligation of giving signals on approaching crossings is for the protection of persons lawfully on the highway at such crossings, and not for the protection of *trespassers* on the

<sup>103</sup> *Malone v. Boston & C. R. Co.*, 51 Hun (N. Y.) 532; s. c. 21 N. Y. St. Rep. 656; 4 N. Y. Supp. 590.

<sup>104</sup> *Haesley v. Winona & C. R. Co.*, 46 Minn. 233; s. c. 48 N. W. Rep. 1023. According to an official syllabus in Georgia, a railroad company permitting children to come into its yard at noon to bring dinners to their fathers employed there, and to cross a track for the purpose, does not become liable for injuries to a seven-year-old boy who, while returning from such an errand, ran under one of some standing freight cars to get a ball on request of one of several employes who were throwing and catching it, and was hurt by the sudden moving of the cars,

which were struck by an engine at some distance from the place where he was, where it does not appear that the employes in charge of the engine knew or had reason to know of his position, if there was a perfectly safe way for children to pass and repass without going upon the tracks where the cars were standing, and no occasion for their going under the cars at all: *Savannah & C. R. Co. v. Waller*, 97 Ga. 164; s. c. 34 L. R. A. 459; 25 S. E. Rep. 823.

<sup>105</sup> *Lindsay v. Canadian & C. R. Co.*, 68 Vt. 556; s. c. 35 Atl. Rep. 513.

<sup>106</sup> *Le Beau v. Pittsburg & C. R. Co.*, 69 Ill. App. 557; s. c. 29 Chicago Leg. N. 263; 2 Chic. L. J. Wkly. 233.

<sup>107</sup> *Ante*, § 1805.



track of the company at other places,<sup>108</sup> it has been held that the mere fact of the failure to give such a signal is not evidence of negligence such as, in the absence of other evidence, will take the case to the jury, where a boy is killed upon a railroad track under obscure circumstances, there being no evidence that he was upon a crossing.<sup>109</sup> Under this doctrine, the duty to give special signals to warn children who may possibly be upon, or about to enter upon, the track in front of an advancing train, rests on the same footing as the duty of taking other special precautions for the protection of such trespassers. The doctrine under consideration exonerates the railway company from the duty of giving any signals until the trespasser is *seen* upon the track in front of the advancing train in a situation of danger. But there may be a duty, imposed by statute or municipal ordinance, of giving signals at a particular place, as when the train has arrived at a stated distance from a highway crossing; and, as we shall see,<sup>110</sup> in the view of some courts, such statutes and ordinances extend to the protection of persons on the highway near a crossing; and they may with equal reason be regarded as extending to the protection of children who stray upon the track near a crossing. This is clearly so where the child is killed or injured upon a *street crossing*, and the railway company fails to give the statutory signal at the proper time when its train approaches the crossing, whereby the mother of the child might have been apprised of the approach of the train in time to have rescued it;<sup>111</sup> since the very purpose of requiring such signals is to alarm persons who are upon the track at crossings.<sup>112</sup>

§ 1824. Assuming that Child will Leave the Track in Time to Avoid Injury.<sup>113</sup>—We have already seen that where the engineer sees

<sup>108</sup> *Ante*, § 1707.

<sup>109</sup> *Missouri & C. R. Co. v. Porter*, 73 Tex. 304; s. c. 11 S. W. Rep. 324.

<sup>110</sup> *Post*, § 1926.

<sup>111</sup> *Chrystal v. Troy & C. R. Co.*, 52 Hun (N. Y.) 55; s. c. 22 N. Y. St. Rep. 384 (reversed because of the insufficiency of the evidence, in 124 N. Y. 519).

<sup>112</sup> *Ante*, § 1556, *et seq.* It has well been held that if a railway company runs a train without warning through a narrow city street upon which children are playing, where-by a child is injured, it can not avoid liability for the injury on the ground that, if a warning had been given, the child would not have heeded it, —the child being a bright and intelligent girl more than six years old and somewhat accustomed to rail-

road trains: *Finn v. Delaware & C. R. Co.*, 59 N. Y. Supp. 771. That a railroad company, which permits children to travel over an unfenced space between its tracks, is not, as matter of law, free from negligence in running a car silently along one of the tracks without giving warning to children who may be upon the track,—see *Ficker v. Cleveland & C. R. Co.*, 6 Ohio N. P. 36. Evidence of negligence not to give any danger signal on observing a small boy standing close to the track while the train is advancing rapidly, though half a mile away,—see *Eply v. Lehigh Valley R. Co.*, 3 Super. Ct. (Pa.) 509.

<sup>113</sup> This section is cited in §§ 1735, 1736, 1737, 1738, 1812.



an *adult person* upon the track in front of his engine, in the absence of knowledge of any infirmity of his faculties, or of any difficulty in his quitting the track at the particular place, he may justly assume that the person so exposed will hear the noise of the train or the warning signals in time to quit the track so as to avoid injury, unless the contrary plainly appears. Manifestly, the engineer may rightfully indulge in this presumption in the case of children of considerable size;<sup>114</sup> but can not properly indulge it in the case of infants who are manifestly so small as not to possess sufficient discretion to take care of themselves.<sup>115</sup> It is true that there are decisions to the contrary, but they are not to be commended.<sup>116</sup>

§ 1825. **Extent of Duty to Children Climbing upon Engines or Cars, "Stealing Rides," etc.**—Under the doctrine stated at the commencement of this chapter,<sup>117</sup> and under the general law,<sup>118</sup> in cases where children trespass upon or meddle with the property and operations of a railway company, by climbing upon its engines or cars, stealing rides, etc., the extent of the duty of the railway company to the juvenile trespasser is to refrain from injuring him *wantonly, recklessly, or intentionally*,<sup>119</sup> or at most to exercise reasonable care to avoid injuring him as soon as he is discovered in a perilous situation.<sup>120</sup> The railway company is not bound to keep a special lookout for such trespassers, nor to require its employes to neglect their ordinary duties for this purpose;<sup>121</sup> nor is it bound to give them special warnings until it discovers them in a situation of danger.<sup>122</sup> It has even been held that the mere permission or acquiescence of the em-

<sup>114</sup> Rangeley v. Southern R. Co., 95 Va. 715; s. c. 30 S. E. Rep. 386 (boy nineteen years old).

<sup>115</sup> Burg v. Chicago & C. R. Co., 90 Iowa 106; s. c. 57 N. W. Rep. 680; Ludden v. Columbus & C. R. Co., 7 Ohio N. P. 106; Gunn v. Ohio & C. R. Co., 42 W. Va. 676; s. c. 2 Chic. L. J. Wkly. 163; 26 S. E. Rep. 546 (child six years old).

<sup>116</sup> Foley v. New York & C. R. Co., 78 Hun (N. Y.) 248; s. c. 60 N. Y. St. Rep. 6; 28 N. Y. Supp. 816. One court has gone to the shocking length of holding that the engineer may rightfully act upon this presumption where he sees upon the track in front of him, something which turns out to be a child but *seventeen months old!*: Chrystal v. Troy & C. R. Co., 105 N. Y. 164, 170; s. c. 11 N. E. Rep. 380; 7 Cent. Rep. 245.

<sup>117</sup> *Ante*, § 1805.

<sup>118</sup> Vol. I, §§ 1024, 1025.

<sup>119</sup> Hughes v. Detroit & C. R. Co., 65 Mich. 10; s. c. 8 West. Rep. 100; McEachern v. Boston & C. R. Co., 150 Mass. 515; s. c. 23 N. E. Rep. 231; Chicago & C. R. Co. v. Berg, 57 Ill. App. 521; Mexican & C. R. Co. v. Crum, 6 Tex. Civ. App. 702; s. c. 25 S. W. Rep. 1126.

<sup>120</sup> Wabash R. Co. v. Norway, 7 Ohio C. C. 449; Catlett v. St. Louis & C. R. Co., 57 Ark. 461; s. c. 36 Cent. L. J. 458; 54 Am. & Eng. Rail. Cas. 113; 21 S. W. Rep. 1062; Vertree v. Newport News & C. Co., 95 Ky. 314; s. c. 15 Ky. L. Rep. 680; 25 S. W. Rep. 1.

<sup>121</sup> Catlett v. St. Louis & C. R. Co., 57 Ark. 461; s. c. 36 Cent. L. J. 458; 54 Am. & Eng. Rail. Cas. 113; 21 S. W. Rep. 1062.

<sup>122</sup> Compare Le Beau v. Pittsburgh & C. R. Co., 69 Ill. App. 557; s. c. 29 Chic. Leg. N. 263; 2 Chic. L. J. Wkly. 233.



ployés of a railroad company, that a child seven years of age may get upon one of its cars, does not raise any special duty on their part toward the child, except to refrain from willfully or knowingly injuring it.<sup>123</sup> But it is hard to believe that the law is in such a state as will exonerate the railroad company from liability for an injury to a child of such tender years, who gets upon one of its cars by invitation of its employés, on the theory that such an invitation is not within the scope of the authority of the employé who gave it.<sup>124</sup> The invitation implies a *knowledge* on the part of the employé making it that the child will be upon the car, and consequently in a situation of danger; and this knowledge raises a duty on his part at least to exercise reasonable care to the end that the child—obviously incapable of caring for itself—is not injured. But, in a jurisdiction where the doctrine of *comparative negligence* does not obtain, a holding that the fact that a railroad is guilty of greater negligence than a boy who gets upon one of its hand cars at the invitation of the company's employés, will not render it liable for an injury to such boy received by falling from the car, where he was himself guilty of negligence contributing to the injury, is obviously sound.<sup>125</sup> Contrary to this doctrine, an authoritative court, in holding that a railroad company is not liable for the death of a boy more than eleven years old, who was killed while meddling with a car of the company, added the qualification that he had not been invited or enticed there by the company.<sup>126</sup> It is plain that the general doctrine of the courts applicable to injuries to children, received while climbing upon railway locomotives or cars, is very much like the doctrine applicable to cases where children are injured upon railway tracks or in the railway yards. Subject to exceptions, as in cases where the railway traverses populous districts where the presence of children on the track may be expected, the general rule is that the duty of exercising care arises when the child is *discovered* in a perilous situation. It is so with reference to children climbing upon railway engines or trains. They have no right to do so: it is their duty to abstain from such acts: it is the duty of their parents or guardians to compel them to abstain from such acts: the railway company has the right to the unmolested use of its premises and to the unremitting care and attention of its servants to its business. The law does not, therefore, put upon it the duty of turning its trainmen into police officers to keep children from molesting them, or from interfering with them in the discharge of

<sup>123</sup> Mexican &c. R. Co. v. Crum, 6 Tex. Civ. App. 702; s. c. 25 S. W. Rep. 1126.

<sup>124</sup> Mexican &c. R. Co. v. Crum, 6 Tex. Civ. App. 702; s. c. 25 S. W. Rep. 1126.

<sup>125</sup> Missouri &c. R. Co. v. Rodgers, 89 Tex. 675; s. c. 36 S. W. Rep. 243; rev'g 35 S. W. Rep. 412.

<sup>126</sup> McEachern v. Boston &c. R. Co., 150 Mass. 515; s. c. 23 N. E. Rep. 231.



their duties to their employer, or require them to act as parents or guardians of trespassing and meddling children, to the end of keeping them out of danger.

§ 1826. **What does and what does not constitute Reckless, Wanton, Willful, or Intentional Negligence in Case of Trespassing Children.**<sup>127</sup>—Negligence of this kind has already been defined in several relations.<sup>128</sup> It has been held that the mere fact that a locomotive engineer sees an adult person walking toward the track, who is afterwards run over by the train, does not authorize a recovery of damages from the company, on the ground that the engineer recklessly, wantonly, or intentionally drove his engine over him.<sup>129</sup> But this might well be; since the engineer might rightfully suppose that an adult person would care for himself and get out of the way.<sup>130</sup> It has also been held that a railroad company is not chargeable with willful, wanton, or intentional negligence, whereby a boy upon its tracks is killed, when its engineer, as soon as he gains the top of the grade and sees the boy, sounds the whistle, shuts off the steam, applies the brakes, and resorts to all the methods at hand to prevent the accident.<sup>131</sup> But, assuming that the appliances for checking the speed of the train were proper and reasonably sufficient, this is very clear; since, under such circumstances, the railway company would not be guilty of any negligence at all. The meaning is said to be that “in wanton negligence, the party doing the act, or failing to act, is conscious of his conduct, and, *without having the intent* to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will naturally or probably result in injury.”<sup>132</sup> The true conception is that it is not necessary that the railway company should have been guilty of wanton, willful, or intentional negligence with reference to the child *after it is discovered* on the track in dangerous proximity to the advancing train; but that, from that point of time, the railway company is liable for failing to exercise *reasonable* or *ordinary care* to avoid running over the child, and is hence liable for what may be called *simple negligence*. The true doctrine is that the failure of those in charge of the train to do all they can, with the means at their command, after discovering the dangerous situation of the child, to avoid running over it, is culpable negligence; and any debate about degrees

<sup>127</sup> This section is cited in §§ 1848, 1997, 2000, 2121.

<sup>128</sup> Vol. I, §§ 246, 948; *ante*, §§ 1713, 1747, 1760.

<sup>129</sup> *Burson v. Louisville & C. R. Co.*, 116 Ala. 198; s. c. 22 South. Rep. 457.

<sup>130</sup> Vol. I, §§ 1336, 1337; *ante*, §§ 1601, 1782.

<sup>131</sup> *Alabama & C. R. Co. v. Moorer*, 116 Ala. 642; s. c. 9 Am. & Eng. Rail. Cas. (N. S.) 742; 22 South. Rep. 900.

<sup>132</sup> *Alabama & C. R. Co. v. Burgess*, 116 Ala. 509; s. c. 22 South. Rep. 913. Compare Vol. I, § 206, *et seq.*



of negligence under such circumstances is mere casuistry, and a trifling with human life.

§ 1827. **Injuries to Children from Defective Railway Turntables.**—It seemed proper to consider the subject of injuries to children from unguarded and unfastened railway turntables in the preceding volume in connection with the more general subject of the liability of the owners and occupiers of real property for maintaining thereon “attractive nuisances,” dangerous to children.<sup>133</sup> Plainly, the principle which should govern the inquiry in cases where children are killed or injured by being attracted to such a dangerous machine, and tempted by their childish instincts to use it as a merry-go-round, is to consider whether it is necessary to the reasonable use of it by the railway company to leave it (1) unguarded in a public place frequented by children where they can easily get to it, or (2) unfastened, so that they can use it as a plaything, provided it could be kept fastened when not in use, at slight inconvenience or expense to the railway company. In view of its great danger to children, as shown by the numerous cases in the law books founded upon injuries of this kind, the just and humane conclusion must be that if the railway company can, at slight expense or inconvenience to itself, keep it guarded from trespassing children or locked so that they can not use it, it should be held bound to do so, and should stand liable in damages if, in consequence of the failure of this duty, a child of tender years, to whom contributory negligence can not be imputed, is injured while playing with it. This, on the one hand, allows the railway company the reasonable use of its property, while at the same time it refuses to release it from those obligations of social duty which rest upon all men in a state of civilized society. Decisions of authoritative courts contravening this doctrine, no doubt exist;<sup>134</sup> but the author does not hesitate to characterize them, as he has always done whenever he has had occasion to comment upon them, as being cruel, wicked, and blots upon the jurisprudence of civilized communities.<sup>135</sup>

<sup>133</sup> Vol. I, § 1036, *et seq.*

<sup>134</sup> Vol. I, §§ 1040, 1041.

<sup>135</sup> Decisions of enlightened courts holding railway companies liable for injuries to children through unguarded and unfastened turntables, may be quoted to the following effect: If a child, not having sufficient knowledge or discretion to know her danger, is injured while riding upon a *turntable*, the company is liable if guilty of negligence in not enclosing or securing it, and

it is not necessary to prove willful intent to inflict injury: *Gulf & C. R. Co. v. Styron*, 66 Tex. 421. Where there was proof that the plaintiff was injured by the defendant's *turntable*, and that it was negligently kept; that it was in an exposed public place, much frequented; that it was not secured by fastenings on the morning of the injury; that the father of the child was a night watchman at the depot; that he was kept awake all night and had prom-



§ 1828. **Injuries to Children from Defective Cattle Chutes.**—Applying the doctrine that a railway company owes no special duty to trespassing children except to refrain from injuring them wantonly, willfully, or intentionally, it has been held that a railway company whose *stockpens* are properly and sufficiently fenced for the purposes for which they are constructed, is not liable for injuries to a boy who climbed over the fence of a pen and was hurt by having his foot caught in the chute by the *gang plank*, which was not pulled far enough back to prevent its being struck and pushed along by a moving car.<sup>136</sup>

§ 1829. **Right to Kill and Injure Children by Starting, without Warning, Cars which have been Standing Still.**—This question has already been considered in another relation.<sup>137</sup> It has been held that some knowledge on the part of a railway company that many persons, including children, frequently pass through its yard in a populous part of a city and crawl under its cars stored upon its tracks, does not render it liable for injuries to a child under such cars caused by a sudden movement of them produced by the negligence of its servants in running other cars against the end of the line hundreds of yards away;<sup>138</sup> in other words, that a railway company has the right to make the “flying switch,” or to “kick,” or to “shunt” its cars in its own yards wholly without reference to the safety of trespassers, intruders, or bare licensees therein, who, in coming, without invitation or lawful authority, upon the premises of the company, assume the risk of the dangers which there exist.<sup>139</sup> Outside of this, it has been held that a conductor is not negligent in giving the signal to start the train, because he sees a boy six years of age between the track and box cars on a side track, where there is a space of five feet and ten inches beside the track and at least three feet between the cars, and the boy is clear of the track,

ised to give such supervision and take such care of defendant's property at this yard as he could without entirely depriving himself of sleep during the day; that he had gone home for his breakfast, and, in his absence, had left his son to watch and act for him, and that the child was sent to carry breakfast to her brother,—the question of the negligence of the defendant was a *question for the jury*: *Ferguson v. Columbus & C. R. Co.*, 75 Ga. 637. Where a child was seriously injured at a *turntable*, what the child said when a person reached the place a few

minutes afterwards, as to how she was hurt, was part of the *res gestae*. Nor did it matter as to the admission of her statements whether the child lived or died: *Ferguson v. Columbus & C. R. Co.*, 75 Ga. 637.

<sup>136</sup> *Gulf & C. R. Co. v. Cunningham*, 7 Tex. Civ. App. 65; s. c. 26 S. W. Rep. 474.

<sup>137</sup> *Ante*, § 1694.

<sup>138</sup> *Central R. & C. Co. v. Rylee*, 87 Ga. 491; s. c. 13 L. R. A. 634; 13 S. E. Rep. 584.

<sup>139</sup> Vol. I, § 945, *et seq.*; § 1024, *et seq.*, and especially § 1041. Compare Vol. I, § 1095, *et seq.*



with ample space to move, and not going towards the track, but straight forward.<sup>140</sup>

§ 1830. **Instances under the Foregoing Rules.**—Railway companies have been held *liable* under the following circumstances:—Where an infant was struck by a train within the corporate limits of a town, which was moving up grade at a speed of about twelve miles an hour, at a place where the road curved to the left, and the engineer had the cab window on his right closed, but kept a lookout through the front window, but did not give the statutory signals on entering or while passing through the town,—there being no evidence as to the time and manner in which the train could have been stopped with the means at hand;<sup>141</sup> and where a *boy eight years of age* was hurt by the concurring negligence of a shipper and the servants of the railway company, in not pulling back a gang plank for a sufficient distance before starting a train, where they knew that the boy might be hurt if the cars were not moved with care, although he was a trespasser, and censurable in not leaving the premises when directed.<sup>142</sup> Railway companies have been held *not liable* for killing or hurting children under the following circumstances:—Where a boy more than *seven years old* ran along a path six feet from the track, with a rope tied around him, and trailing behind, and, after the engine and half of the train had passed him, the rope was, by some means, drawn under the train, and the boy was pulled thereunder and injured;<sup>143</sup> where a man and his *daughter, six years of age*, had been passengers on a train, and had been wrongfully carried by the railway company to a station beyond their destination, and were walking back to the station of their destination along the track, there being no other direct route, and, while so walking, the girl suddenly broke away from her father and ran in front of an engine on another track, the engineer having made every possible effort to stop his engine after discovering the perilous situation of the girl;<sup>144</sup> where a boy, not intending or wishing to cross certain railway tracks at a public crossing, but at another place, found himself unable to do so because of a moving train, and, while running along parallel to the track, fell and was injured,—the failure of the trainmen to leave an opening at the public crossing being, under such

<sup>140</sup> *Barkley v. Missouri &c. R. Co.*, 96 Mo. 367; s. c. 9 S. W. Rep. 793.

<sup>141</sup> *Georgia &c. R. Co. v. Blanton*, 84 Ala. 154; s. c. 4 South. Rep. 621 (the failure to give the statutory signals making a *prima facie* case of negligence).

<sup>142</sup> *Gulf &c. R. Co. v. Cunningham*, 7 Tex. Civ. App. 65; s. c. 30 S. W. Rep. 367.

<sup>143</sup> *Cross v. Southern R. Co.*, 109 Ga. 170; s. c. 34 S. E. Rep. 277.

<sup>144</sup> *Benson v. Central &c. R. Co.*, 98 Cal. 45; s. c. 54 Am. & Eng. Rail. Cas. 126; 32 Pac. Rep. 809.



circumstances, immaterial;<sup>145</sup> and under the circumstances of the cases noted in the margin.<sup>146</sup>

§ 1831. **Injuries Received while Attempting to Rescue Trespassing Children upon Railway Tracks.**—This subject is fully discussed elsewhere.<sup>147</sup> A child, too young to appreciate the danger of its position, was at play upon a railroad track, when a train suddenly approached, at an unlawful rate of speed, giving no signals of warning. The plaintiff's intestate, seeing the danger, rushed upon the track and threw the child out of reach of the locomotive, but was too late to save himself, and was killed. The claim of his widow, as administratrix, for damages was allowed, the majority of the court being of opinion that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons."<sup>148</sup>

§ 1832. **Burden of Proof in Case of the Death of a Child upon a Railway Track.**—No general doctrine upon this question can be stated, which will be applicable in all jurisdictions and in all cases.<sup>149</sup> It has been held that proof of the death of a child by being run over

<sup>145</sup> *Barkley v. Missouri &c. R. Co.*, 96 Mo. 367; s. c. 9 S. W. Rep. 793.

<sup>146</sup> *Chicago &c. R. Co. v. Graham*, 84 Ill. App. 480 (trespassing boy ordered off a freight train by a brakeman and hurt by jumping off, or by being caught by a cattle chute and jerked off, the reason being that he took the risk of obeying the brakeman); *Vanderpool v. Lexington &c. R. Co.*, 20 Ky. L. Rep. 479; s. c. 46 S. W. Rep. 699 (not to be rep.) (track visible at place where accident occurred for only 140 yards, and no evidence as to how the child got upon the track); *Richmond &c. R. Co. v. Didzoneit* (D. C. App.), 21 Wash. L. Rep. 824 (boy injured while asleep on railway platform too close to the track, with his foot resting on the rail, his danger not being apparent to the engineer until too late).

<sup>147</sup> Vol. I, §§ 138, 198, 199.

<sup>148</sup> *Eckert v. Long Island &c. R. Co.*, 43 N. Y. 502. In this case Allen, J., dissented, on the principle *volenti non fit injuria*, holding that the defendant was not liable, though neg-

ligent, and no matter in what degree. The principle of this case was approved by the Supreme Judicial Court of Massachusetts in the case of *Linnahan v. Sampson*, 126 Mass. 506; s. c. 8 Cent. L. J. 442,—and has been generally followed: Vol. I, § 198; *ante*, § 1780. If one attempts the rescue of *personal property*, e. g., horses which have run upon the track, and assumes an obvious risk of injury, he can claim no damages resulting from his deliberate act: *Denville v. Southern &c. R. Co.*, 50 Cal. 383. Compare Vol. I, § 199; *ante*, § 1781. But in a case in which there was *no evidence of negligence* on the part of the railroad company, a son who had rescued his father from a perilous position upon the track, and was himself injured in so doing, was of course held not to be entitled to recover damages of the company: *Evansville &c. R. Co. v. Hiatt*, 17 Ind. 102.

<sup>149</sup> The subject is considered in Volume I, § 395, *et seq.*, and it is intended to consider it in Volume V.



by a *backing train*, imposed upon the railroad company the burden of showing justification or excuse, in an action by the mother of such child.<sup>150</sup> The backing of a train, without a lookout ahead to give danger signals, within the limits of a city is *prima facie* negligence.<sup>151</sup>

<sup>150</sup> Louisville &c. R. Co. v. Hirsch, 69 Miss. 126; s. c. 13 South. Rep. 244.  
<sup>151</sup> Savannah &c. R. Co. v. Shearer, 58 Ala. 672.



## CHAPTER LVIII.

## INJURIES TO PERSONS LAWFULLY UPON RAILWAY TRACKS.

| SECTION   | SECTION  |
|---|--|
| 1836. Care required toward persons using the track for passage.                                 | 1844. Injuries by railway companies to their own passengers afoot on their tracks.                             |
| 1837. Rule where such persons use the track for passage by the bare tolerance of the company.   | 1845. Injuries to persons upon streets on which railway tracks are laid.                                       |
| 1838. Opposing views where the railway company habitually allows the public a right of passage. | 1846. Care required in moving trains through crowded cities, towns, villages, etc.                             |
| 1839. Care required in favor of persons lawfully at work upon the track.                        | 1847. Injuries from mail bags thrown from passing trains, and from mail cranes.                                |
| 1840. Employés of contractors entitled to this measure of care.                                 | 1848. Care demanded of railway companies with reference to the condition of their tracks, yards, and switches. |
| 1841. Injuries to persons engaged in loading and unloading cars.                                | 1849. Further of this subject.   |
| 1842. To whose protection this rule extends.  | 1850. Necessity of maintaining a watchman on front of a car in backing.  |
| 1843. Injuries in loading and unloading for which the railroad company was not liable.          | 1851. Injuries from defects in "foreign cars."   |
|   | 1852. Duty to give warning assumed by promising to do so.  |

§ 1836. Care Required toward Persons Using the Track for Passage.—This subject calls up a question considered in a previous chapter.<sup>1</sup> The distinction is between those who use a railway track for the purpose of passage without the consent of the company, express or implied, but with its bare tolerance, on the one hand,—and those who use it with its consent or invitation, express or implied, on the other hand. In many cases it will be difficult to decide into which class the particular case falls. The owner or occupier of real property has, of course, the right to consent to have a stranger make a passageway over it for his own convenience entirely, and not in any sense for the benefit of such owner or occupier; and if he makes such a concession to a stranger, although gratuitously, it is a sound and just conclusion that

<sup>1</sup> *Ante*, § 1718, *et seq.*



this raises a duty upon the part of the owner or occupier, not merely to abstain from wantonly injuring the stranger when so using his premises, as in the case of a trespasser or bare licensee, but to exercise ordinary or reasonable care to avoid injuring him. Applying this principle to the situation with which we are now dealing, it may be said that if a railway company allows the people in the neighborhood at a particular place to use its track for the purpose of crossing or of passage along it, and its track is habitually so used, so that it may reasonably expect that they will be upon its track at any time,—this raises a duty on its part of exercising reasonable watchfulness and care to the end of not injuring them.<sup>2</sup> An opposing view is that the fact that persons living in the vicinity of the railroad have been in the habit of travelling over it, and that no measures have been taken to prevent them from so doing, does not change the relative rights and obligations of the public and the railroad company.<sup>3</sup>

§ 1837. **Rule where such Persons Use the Track for Passage by the Bare Tolerance of the Company.**—Plainly, in order to impose this duty of care upon the railway company, or to place it under any higher obligation than to refrain from wantonly, willfully, or intentionally injuring the person so using its track,—there must be something in the nature of an *invitation* so to use it, or from which its *consent* so to use it may be fairly inferred. Bare toleration, without attempting actively to prevent such a use of its track, will not be enough to take the person so using it out of the category of trespassers or bare licensees. The fact that persons living in the vicinity of the track have been in the habit of travelling over it at a particular place, and that no affirmative measures have been taken by the company to prevent them from doing so, does not enlarge the rights of such trespassers or licensees, nor increase the obligation of care and vigilance due them from the company. They enjoy the license subject to its perils. The company receives no benefit from permitting them to enjoy it, and the law imposes upon it no burden as a punishment for its benevolence.<sup>4</sup> The Supreme Judicial Court of Massachusetts say

<sup>2</sup> Illinois &c. R. Co. v. Hammer, 72 Ill. 347; Murphy v. Chicago &c. R. Co., 45 Iowa 661; s. c. 38 Iowa 539; Harty v. Central &c. R. Co., 42 N. Y. 468; Brown v. Hannibal &c. R. Co., 50 Mo. 461; Kansas &c. R. Co. v. Pointer, 9 Kan. 620; s. c. 14 Kan. 38; Kay v. Pennsylvania R. Co., 65 Pa. St. 269; Pennsylvania R. Co. v. Lewis, 79 Pa. St. 33; Daley v. Norwich &c. R. Co., 26 Conn. 591.

<sup>3</sup> Illinois &c. R. Co. v. Hetherington, 83 Ill. 510; Jeffersonville &c. R. Co. v. Goldsmith, 47 Ind. 43; Finlayson v. Chicago &c. R. Co., 1 Dill. (U. S.) 579; Bancroft v. Boston &c. R. Co., 97 Mass. 276; Illinois &c. R. Co. v. Godfrey, 71 Ill. 500; Galena &c. R. Co. v. Jacobs, 20 Ill. 478.

<sup>4</sup> Philadelphia &c. R. Co. v. Hummell, 44 Pa. St. 375; s. c. 1 Thomp. Neg., 1st ed., 433; Lingenfelter v.



upon this point: "The law requires no one to provide protection or safeguards for mere trespassers or wrong-doers, nor, indeed, for those who enter by mere permission, without inducement held out by the owner. Such go at their own risk and enjoy the license subject to its perils. Towards them there exists no unfulfilled obligation or duty on the part of the owner."<sup>5</sup>

§ 1838. **Opposing Views where the Railway Company Habitually Allows the Public a Right of Passage.**—In the case of *Dublin &c. R. Co. v. Slattery*, before the House of Lords, on appeal from the Court of Exchequer Chamber of Ireland, it was decided that where notices have been put up by a railway company forbidding persons to cross the line at a particular point, but these notices have been continually disregarded by the public, and the company's servants have not interfered to enforce their observance, the company can not, in the case of an injury occurring to any one crossing the line at that point, set up the existence of the notices by way of answer to an action for damages for such injury.<sup>6</sup> The degree of care which licensees may expect of a

Baltimore &c. R. Co., 154 Ind. 49; s. c. 55 N. E. Rep. 1021 (fell into a hole in the night). Compare *post*, § 1869.

<sup>5</sup> *Gaynor v. Old Colony &c. R. Co.*, 100 Mass. 208. See also *Indiana &c. R. Co. v. Hudelson*, 13 Ind. 325, 329.

<sup>6</sup> *Dublin &c. R. Co. v. Slattery*, 3 App. Cas. 1155. In delivering the opinion of the court in the case of *Illinois &c. Railroad Company v. Godfrey*, 71 Ill. 500. Sheldon, J., cited with approval the principle laid down in *Philadelphia and Reading Railroad Company v. Hummell*. The plaintiff was injured on the depot grounds of the defendant, and claimed that, because the citizens of the town had habitually passed and repassed over the tracks of the defendant at this point, he was in the exercise of a legal right at the time he was injured. The court stated that, as the plaintiff was at the time engaged attending to his own private concerns, in no manner connected with the defendant, "there was nothing to exempt him from the character of a wrong-doer and trespasser in so doing;" that "because the company did not see fit to enforce its rights, and keep people off its premises, no right of way over its ground was thereby acquired." This case was decided

at the January term, 1874. At the June term, however, of that same year, Walker, C. J., in delivering the opinion of the court on an identical state of facts (*Illinois &c. R. Co. v. Hammer*, 72 Ill. 347), approved of a principle the reverse of that announced in *Illinois &c. Railroad Company v. Godfrey*, and, without referring to that case, said that the public may pass over the depot grounds in going from one part of the city to another,—“such grounds are made *quasi* public by the general use to which they are appropriated;” that when the railroad company permit people to pass over their grounds, they thereby tacitly license persons to come upon them, and that they do not become trespassers in doing so in a proper manner. It is a significant circumstance that in this opinion no authority whatever is cited, and it would seem that the learned judge who delivered it was not aware of the recent decision of *Illinois &c. Railroad Company v. Godfrey*, which, doubtless, at the time was not reported. In a later case (*Illinois &c. R. Co. v. Hetherington*, 83 Ill. 510), decided by that court, the opinion of the majority of the court being delivered by Craig, J., the case of *Illinois &c. Railroad Company v. Godfrey* was cited with approval as



railroad company whose tracks they use for travel is well illustrated by a case in the New York Court of Appeals.<sup>7</sup> For a period of twenty years, workmen in a foundry near the defendant's premises had enjoyed a license to cross its tracks by a private way. The plaintiff's intestate endeavored to cross at this place. Before he crossed, some cars were pushed down the track in advance of the engine, and, being uncoupled, were allowed, by their momentum, to go past this place. There was a brakeman, as usual, on these cars; but, upon leaving them, he either set the brake ineffectually or not at all; for, there being a slight down-grade on the track of one and one-half inches in twelve feet, the cars moved slowly backwards a distance of about

to this point, and the principle of that case affirmed; but no reference was made to the later case of *Illinois &c. Railroad Company v. Hammer*, asserting the contrary rule. In this case, Walker, J., dissented on the principle, but without mention, of *Illinois &c. Railroad Company v. Hammer*. In *Kay v. Pennsylvania Railroad Co.*, 65 Pa. St. 269, Agnew, J., endeavored to distinguish the case of *Philadelphia and Reading Railroad Company v. Hummell* from the conclusion which he arrived at in that case, which was an action brought by a child nineteen months old, by her next friend, for injuries sustained by her while at play on the track. It appears that the railroad company leased a large tract of land for its purposes, upon which an extensive lumbering business was carried on. Among these piles of lumber ran the company's tracks. The place was traversed by hands engaged in piling lumber, and by the public generally. The plaintiff's parents lived, without objection by the company, in a shanty on these premises. A lumber-car, unattended by a brakeman, was propelled around a curve, in advance of the engine, and, by its own momentum, allowed to go along the track, which was slightly down grade. In its course, it ran over this child. On these facts, this case might have been decided without disturbing the principle of *Philadelphia and Reading Railroad Company v. Hummell*, and the earlier leading case of *Railroad Company v. Norton*, 24 Pa. St. 465; for manifestly the conduct of the company's servants was grossly negligent, in which case even a tres-

passer might recover for injuries received; but the learned judge sets up a rule entirely inconsistent with the authority of *Philadelphia and Reading Railroad Company v. Hummell*, saying that, by license to others, the company devoted their ownership to a use involving their interests and their safety, and by sufferance permitted the public to enjoy a privilege of passage which might bring their persons into danger; that the rights of the company should be exercised in view of such license, so as not to mislead others to their injury without proper warning of intention to recall this permission. Sharswood, J., dissented, on the authority of *Philadelphia and Reading Railroad Company v. Hummell*. The case of *Philadelphia and Reading Railroad Company v. Hummell*, as before stated, was simply distinguished from this case, and its authority not impeached. In a later case (*Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33), where a boy was injured on a portion of the track the ties of which were worn smooth by public travel, Agnew, J., who delivered the opinion of the court, did not deny that the boy was a trespasser,—in fact, so styles him; and again, in referring to the instructions of the court below, in which the jury was pointedly instructed that the boy was a wrong-doer and a trespasser, he states that "there can not be any serious objection to the charge."

<sup>7</sup> *Sutton v. New York &c. R. Co.*, 66 N. Y. 243; s. c. 4 Hun (N. Y.) 760. See also *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Donaldson v. Milwaukee &c. R. Co.*, 21 Minn. 293.



thirty feet, and ran over the deceased, who had crossed this track, but who had stepped back upon it to avoid a passing train on the next track. The court held that, although the deceased was authorized to cross the track, yet the company owed him no duty to set the brake to the cars in question. The accident was one of the dangers incident to the enjoyment of his license. A mere omission in their ordinary course of procedure, as a result of which loss of life could be scarcely anticipated, was not sufficient to demonstrate the violation of a duty owed to the deceased.

**§ 1839. Care Required in Favor of Persons Lawfully at Work upon the Track.**—Persons lawfully at work in repairing a railway track, or in repairing a highway where it crosses a railway track, can not be expected to pursue their labors and at the same time maintain a constant lookout for an approaching train. They are passive, and are not a source of danger to the train; those who are driving the train are active, and are handling and in control of the instrument of danger and mischief. The obligation of reasonable care, which the law puts upon the railway company under these circumstances, therefore demands nothing less than an active vigilance in favor of persons thus lawfully at work upon the track, and the giving of seasonable danger signals to arouse their attention and enable them to get out of the way before it is too late.<sup>8</sup>

**§ 1840. Employes of Contractors Entitled to this Measure of Care.**<sup>9</sup>—A person employed by one who has entered into a contract with the railroad company to do a job of work upon its road, is obviously entitled to this measure of care,—and this, although the contractor may have entered into an agreement with the railway company whereby the latter is released from all claims for injuries to sub-contractors, workmen, and others, by reason of the negligence of the servants of the company. Such an agreement is inoperative as against the employé of the contractor, unless he is made privy to it in some other way than by the mere fact of being employed by the contractor.<sup>10</sup>

<sup>8</sup> *Haley v. New York &c. R. Co.*, 7 Hun (N. Y.) 84; *Goodfellow v. Boston &c. R. Co.*, 106 Mass. 461; *Baltimore &c. R. Co. v. State*, 33 Md. 542; *McWilliams v. Detroit &c. Mills Co.*, 31 Mich. 274; *Barton v. New York &c. R. Co.*, 1 N. Y. Sup. Ct. (T. & C.) 297; affirmed in 56 N. Y. 660; *Stinson v. New York &c. R. Co.*, 32 N. Y. 333. The provision of a statute (Tenn. Code, §§ 1166,

1167), denouncing a penalty for the failure of railroad companies to sound the whistle when there are obstructions on the track,—were held not to apply to contractors engaged in constructing a road: *Griggs v. Houston*, 104 U. S. 553.

<sup>9</sup> This section is cited in § 1759.

<sup>10</sup> *Ominger v. New York &c. R. Co.*, 4 Hun (N. Y.) 159.



A person thus employed by an independent contractor is neither a servant of the railway company nor a trespasser on its track, and, if free from contributory negligence, is entitled to recover for injuries inflicted upon him by the negligence of the servants of the company.<sup>11</sup>

§ 1841. **Injuries to Persons Engaged in Loading and Unloading Cars.**<sup>12</sup>—Where the shippers or consignees of car loads of freight assume the task of loading or unloading the cars on the side track of the company, with its consent, express or implied, the company is not at liberty to act toward them or their servants as though they were trespassers or bare licensees, but is bound to exercise ordinary care to the end of avoiding injury to them while so engaged.<sup>13</sup> If, therefore, while so engaged, and without negligence on their own part, other than that inattention to their own safety which an absorption in the duties in which they are engaged naturally produces, they are hurt by the negligence of the employes of the railway company, they have an action for damages.<sup>14</sup> For example, a drayman who, by the direction of the railway company, has driven his dray alongside a car on a side track, for the purpose of hauling away freight from the car, is not a bare licensee, and is entitled to protection from injury by approaching trains or locomotives.<sup>15</sup> So, if a train is backed on to a side track for the purpose of having attached to it loaded cars standing there, and goes with such force that the coupling is missed and the loaded cars are driven against one partially loaded, whereby a person engaged in *loading such car* is killed, the railroad company will be

<sup>11</sup> *Galveston &c. R. Co. v. Garteiser* (Tex. Civ. App.), 29 S. W. Rep. 939 (no off. rep.). A railroad company is liable for the death of one employed by a contractor to remove gravel delivered by the company, when it negligently permitted the track to become obstructed, so that a locomotive was derailed and fell upon the decedent, who was without contributory fault: *St. Louis &c. R. Co. v. Ridge*, 20 Ind. App. 547; s. c. 49 N. E. Rep. 828.

<sup>12</sup> This section is cited in § 1761.

<sup>13</sup> *Chicago &c. R. Co. v. Goebel*, 119 Ill. 515; s. c. 7 West. Rep. 689; *Missouri &c. R. Co. v. Holman*, 15 Tex. Civ. App. 16; *St. Louis &c. R. Co. v. Fenlaw* (Tex. Civ. App.), 36 S. W. Rep. 295 (no off. rep.); *Weatherford &c. R. Co. v. Duncan*, 88 Tex. 611; s. c. 32 S. W. Rep. 878; *International &c. R. Co. v. Hall* (Tex. Civ. App.), 25 S. W. Rep. 52 (no off.

rep.) (injury through the fastening of a car being negligently removed); *St. Louis &c. R. Co. v. Ridge*, 20 Ind. App. 547; s. c. 49 N. E. Rep. 828; *Gessley v. Missouri Pac. R. Co.*, 32 Mo. App. 413 (injury through backing train against cars being unloaded on side track); *Union &c. R. Co. v. Harwood*, 31 Kan. 388 (railroad liable for furnishing cars to be loaded by shipper, which are not properly secured by brakes); *Foss v. Chicago &c. R. Co.*, 33 Minn. 392 (plaintiff directed to unload at a particular place where his team must necessarily stand partly on the track, and team struck by moving car).

<sup>14</sup> *Texas &c. R. Co. v. Pennell*, 2 Tex. Civ. App. 127; s. c. 21 S. W. Rep. 273.

<sup>15</sup> *Pittsburg &c. R. Co. v. Ives*, 12 Ind. App. 602; s. c. 40 N. E. Rep. 923.



liable in damages.<sup>16</sup> So, also, it has been held that the practice of a lumber company to lay a tramway across a spur track laid by the railroad company for their mutual accommodation, which had continued for two or three years, and was well known to all the employés of the railway company having duties to perform on such track, and no one had ever objected to such use of the track,—should be taken as an equivalent to an agreement between the lumber company and the railroad company that the tramway might be laid across the track when not actually in use by the railroad company for hauling its cars, and would prevent the servants of the lumber company, when engaged in removing such tramway, from having the character of trespassers.<sup>17</sup>

§ 1842. **To whose Protection this Rule Extends.**—The same rule may be invoked in behalf of one lawfully engaged in *receiving mail and express packages* from a train which has been stopped at a station, and who is injured by a train coming from the opposite direction, by

<sup>16</sup> Jacobson v. St. Paul &c. R. Co., 41 Minn. 206; s. c. 42 N. W. Rep. 932.

<sup>17</sup> St. Louis &c. R. Co. v. Miles, 79 Fed. Rep. 257; s. c. 49 U. S. App. 101; 24 C. C. A. 559. A person engaged by a shipper to load a car with lumber is not, as a matter of law, guilty of such contributory negligence in furnishing insufficient stakes or in loading the car in an improper manner, as will prevent recovery for an injury caused by the negligence of the employés of the railroad company in breaking one of the stakes: Pollard v. Maine &c. R. Co., 87 Me. 51; s. c. 32 Atl. Rep. 735. In an action for the negligent killing of a mail transfer clerk, a *rule of the postoffice department* requiring of such clerks extraordinary vigilance in guarding the mails under their charge, and especially in making transfers between trains, was held *admissible in evidence*, where the transfer clerk was killed by a train approaching on another track while attending to the transfer of mails from a mail train; since the railway company, being a carrier of mails, and consequently familiar with the rule, should, in the exercise of reasonable care and foresight, have expected the presence of the transfer clerk at the time and place in the discharge of his duty, and should have regulated its trains with regard to

his safety: Chicago &c. R. Co. v. Kelly, 182 Ill. 267; s. c. 54 N. E. Rep. 979; aff'g s. c. 80 Ill. App. 675. Circumstances under which a *requested instruction* on the subject of contributory negligence of one who was injured while *loading hogs into a car* by an engine being violently backed against it after he had signaled the fireman to slow down so that he might close the door to prevent the escape of the hogs, at the same time protecting himself,—was properly refused, on the ground that it withdrew from the consideration of the jury the circumstances in which the plaintiff was placed at the time of the accident: Illinois &c. R. Co. v. Anderson, 184 Ill. 294; s. c. 56 N. E. Rep. 331; aff'g s. c. 81 Ill. App. 137. For another request for an *instruction* in the same case which was properly refused, on the ground that it withdrew from the consideration of the jury the question whether the *rate of speed* with which the engine was approaching was such as to awaken in the plaintiff a reasonable apprehension of the peril, and the consideration of the further question whether or not the plaintiff was justified in believing that the speed would be slackened before the engine reached the car which he was engaged in loading,—see Illinois &c. R. Co. v. Anderson, *supra*.



reason of the failure to stop it at the accustomed place.<sup>18</sup> This rule of protection is not confined to cases where cars are being loaded or unloaded at a *regular station*, but may be equally invoked for the protection of those employed in the removal of property transported by the company when delivered by it at any other place.<sup>19</sup> It has been extended to an *employe of a compress company* who entered a car on the siding of the compress company, with the knowledge of the local agent of the railroad company having control of the car, for the purpose of verifying the count of the bales of cotton which had been placed therein,—with the conclusion that he was not a trespasser to whom the railroad owed no greater duty than to abstain from injuring him willfully or wantonly, but that it owed to him the duty of exercising ordinary care to avoid injuring him.<sup>20</sup> It was extended to the protection of an *employe of a coal company*, who was charged, in behalf of his employer, with the duty of maintaining a car on the scales while it was being loaded, and who had control of an empty car standing near by which was to be placed by him in a position for loading, with the conclusion that he did not become a trespasser or forfeit the right to the protection due to one rightfully on the railroad track, by reason of getting upon the empty car to set the brake in order to prevent the destruction of the property of his employer, where it was threatened with injury from cars which had been improperly switched by the employes of the railroad company on the track upon which such empty car was standing.<sup>21</sup>

<sup>18</sup> *Tubbs v. Michigan &c. R. Co.*, 107 Mich. 108; s. c. 2 Det. L. N. 619; 64 N. W. Rep. 1061; 28 Chicago Leg. N. 118.

<sup>19</sup> *St. Louis &c. R. Co. v. Ridge*, 20 Ind. App. 257; s. c. 49 N. E. Rep. 828.

<sup>20</sup> *Missouri &c. R. Co. v. Holman*, 15 Tex. Civ. App. 16; s. c. 39 S. W. Rep. 130.

<sup>21</sup> *Weatherford &c. R. Co. v. Duncan*, 88 Tex. 611; s. c. 32 S. W. Rep. 878. Applying this doctrine, it has been held that where a railroad company puts cars upon a side track, for the purpose of being *unloaded by the owners of the freight therein*, and such owners or their servants, with the express or implied consent of the company, proceed to remove it, the company has no right, without special notice or warning, to run or back a train upon the side track, where the cars are being unloaded. The court reason that, in such case, those engaged in unloading may give their undivided atten-

tion to their work, and are justified in assuming that the company will not render their position hazardous without such notice or warning: *Chicago &c. R. Co. v. Goebel*, 119 Ill. 515; s. c. 7 West. Rep. 689. On the other hand, a decision is found to the effect that a railroad company is not the master of employes of a proprietor of a lumber yard in which a switch connecting with the company's track is maintained; and it performs all the duty resting upon it in respect to giving warning of its intention to remove cars from the switch at the request of the proprietor, by *notifying the proprietor*, and is not liable for injuries to such an employe resulting from his failure to personally receive the notice, where the persons in charge of the engine had no notice that he was in a place of danger: *McInerney v. Delaware &c. Canal Co.*, 151 N. Y. 411; s. c. 45 N. E. Rep. 848. This decision is entitled to little respect. The doctrine of *imputed negligence*



§ 1843. **Injuries in Loading and Unloading for which the Railroad Company was not Liable.**—It has been held that a railroad company which licenses the employes of a factory to uncouple cars standing on a side track and intended for the factory, for the purpose of moving them to it, is not bound to anticipate that such employes will uncouple more cars than are to be moved at once, so as to render the company responsible for injuries to one crossing such track by the moving of such cars through the concussion of a train.<sup>22</sup> The owner of a *logging railroad* has been held not liable for an injury to one of a crew of men employed by another person to unload the logs, caused by the train striking a skid used in unloading the logs, which had been allowed to get too close to the track, and throwing it against the person injured, while he was standing with his back to the train.<sup>23</sup>

does not extend so far as to result in the conclusion that the servant in such a case puts his safety into the hands of his own master. He is entitled to personal protection from those who are handling the instrument of danger. The failure of his master to give him warning when the cars are about to be moved does not exonerate the railroad company from liability for moving them without warning to him; but both may be liable. Nor ought it to have helped to exonerate the railroad company that the person in charge of its engine did not know that the servant of the proprietor of the lumber yard was in a position of danger. It was their duty to know it before starting the cars forward, especially in view of the fact that they knew that persons had been at work upon the cars. But a railway company was not liable for the death of the employes of a lumber company, who, without the knowledge of the railway company, have been accustomed to get upon its track for the purpose of removing a *tramway* which they had placed across the track, whenever a switch engine approached upon the track, by their being caught between the box cars while on the track and crushed by a fast running freight train coming upon the track through an open switch: *St. Louis &c. R. Co. v. Bennett*, 69 Fed. Rep. 525, 530; s. c. 16 C. C. A. 300, 680; 32 U. S. App. 621, 630. See also *St. Louis &c. R. Co. v. Miles*, 79 Fed. Rep. 257; s. c. 16 C. C. A. 682; 32 U. S. App. 632; *St. Louis &c. R. Co. v. Hicks*, 69

Fed. Rep. 531; s. c. 32 U. S. App. 633; 16 C. C. A. 680.

<sup>22</sup>*Jakoboski v. Grand Rapids &c. R. Co.*, 106 Mich. 440; s. c. 2 Det. L. N. 483; 64 N. W. Rep. 461.

<sup>23</sup>*Sheridan v. Bigelow*, 93 Wis. 426; s. c. 67 N. W. Rep. 732. There is a holding to the effect that a railroad company is not liable for an injury to a person *unloading a car* of corn upon a side track, by a collision with other cars therewith which were struck by a car set out upon the side track, where the collision was due to a *defective brake* on the latter car, and the defect was not known to the railroad employes, and they were not negligent in failing to know it: *St. Louis &c. R. Co. v. Fenlaw* (Tex. Civ. App.), 36 S. W. Rep. 295 (no off. rep.). But it is submitted that the true question was, not whether the employes of the railway company knew of the defect in the brake, but whether the railway company, in the exercise of reasonable care and inspection of its cars and appliances, ought to have known it. - - - Evidence that a railway company had been notified by the consignee of freight that the latter's gang of workmen was engaged in unloading cars at a place where they had been left by the company is clearly *admissible* as bearing upon the amount of care that would be reasonable, under the circumstances, in moving cars on another track in close proximity: *Spotts v. Wabash &c. R. Co.*, 111 Mo. 380; s. c. 20 S. W. Rep. 190. For a case where a man was hurt while attempting to *pull outward a sliding*



§ 1844. **Injuries by Railway Companies to their own Passengers Afoot on their Tracks.**—A railway company is bound to exercise at least ordinary care to the end of protecting from injury its own passengers who may be lawfully on its tracks in the act of boarding its trains or alighting from them,—a subject with which it is intended to deal in the next volume, when treating of the liability of railway carriers of passengers. It is enough to say now that, such persons being lawfully upon its track by its implied invitation, it owes them at least, the duty of ordinary care, and, under some theories, the duty of extraordinary care. For example, actionable negligence is shown where the engineer of a railway company runs his train in violation of the rules of the company, by following another train at the interval of three minutes instead of ten, and by passing a station at full speed, where a passenger train is taking on and discharging passengers, and fails to give any signal on approaching the station until the locomotive is within a few feet of a person whom it runs over at that place.<sup>24</sup> To permit a train to pass on a track between a depot and another track on which a train is standing, receiving or discharging passengers, and across which track they have to pass, without taking proper means to warn such persons and avert danger to them, is actionable negligence on the part of the railroad company.<sup>25</sup> Such conduct on the part of the railroad company has also been characterized as *gross negligence*.<sup>26</sup> It is held to be negligence for the company to allow a train to pass the station at all under such circumstances, and that passengers have a right to expect the company so to regulate the movements of its trains, that its tracks may, under such circumstances, be crossed in safety.<sup>27</sup> To permit a hand-car moving at the rate of fifteen miles an hour to pass a station at which persons are gathered to take a train, no bell being sounded or other

door of a freight car to which he had access, by the door falling on him, and there was no evidence of negligence and no right of action against the railway company,—see *Kleimenhagen v. Chicago & C. R. Co.*, 65 Wis. 66. The reason was that the door was intended only to yield to pressure laterally, and not outwardly - - - Circumstances under which the question of the contributory negligence of one injured while loading hogs into a car on a side track of the defendant railway company, was properly left to the jury: *Illinois & C. R. Co. v. Anderson*, 184 Ill. 294; s. c. 56 N. E. Rep. 331; aff'g s. c. 81 Ill. App. 137.

<sup>24</sup> *Barkley v. New York & C. R. Co.*,

35 App. Div. 228; s. c. 54 N. Y. Supp. 766; 5 Am. Neg. Rep. 218.

<sup>25</sup> *Klein v. Jewett*, 26 N. J. Eq. 474; *Sanchez v. San Antonio & C. R. Co.*, 3 Tex. Civ. App. 89; *Terry v. Jewett*, 78 N. Y. 338; *Armstrong v. New York & C. R. Co.*, 66 Barb. (N. Y.) 437; aff'd. in 64 N. Y. 635; *Chicago & C. R. Co. v. Czaja*, 59 Ill. App. 21; *Baltimore & C. R. Co. v. Chambers*, 81 Md. 372.

<sup>26</sup> *Robostelli v. New York & C. R. Co.*, 33 Fed. Rep. 796; *Hirsch v. New York & C. R. Co.*, 25 N. Y. St. Rep. 156; *Denver & C. R. Co. v. Hodgson*, 18 Colo. 117.

<sup>27</sup> *Chicago & C. R. Co. v. Ryan*, 165 Ill. 88; *Gonzalez v. New York & C. R. Co.*, 39 How. Pr. (N. Y.) 407.



signal given, is negligence, especially where a freight train, standing on a side track in front of the station, partially obstructs the view.<sup>28</sup> Where a person boards a train which does not stop at his station, and when the station is reached and while the train is moving slowly, steps therefrom at a place indicated by the conductor, and is struck by a train, invisible to him on a parallel track, there is evidence of negligence in the railway company, sufficient to go to the jury.<sup>29</sup> So, where one steps from a slowly moving dummy train at night, assisted by the conductor, near the station at which he wants to get off, but which has been passed, and is struck by a train on an opposite track and killed, a *prima facie* case is made out against the railway company, and the question is one for the jury.<sup>30</sup>

§ 1845. **Injuries to Persons upon Streets on which Railway Tracks are Laid.**—The subject of the relative rights of railway companies and the general travelling public, where railway tracks are laid upon public streets and highways, has been already considered, when dealing with the negligence of street railway companies,<sup>31</sup> and also when dealing with the negligence of steam railway companies at highway crossings;<sup>32</sup> from which it may be concluded that, where the tracks of a railway company are laid upon a public street or road, and the street or road is not vacated by the proper public authorities, nor abandoned by the public to the railway company,—the right of the public to the use of *the whole street* for the purpose of passage continues to exist as before, although necessarily subordinate to the right of passage of the railway company over its own tracks. This being so, the fact that a person is upon the track of a railroad laid on the public street of a town, although not at a public crossing, is not of itself negligence;<sup>33</sup> nor does his presence there make him a trespasser on the track of the railway company,<sup>34</sup>—especially where other portions of the street are

<sup>28</sup> Conklin v. New York & C. R. Co., 43 N. Y. St. Rep. 414.

<sup>29</sup> Lewis v. Delaware & C. Canal Co., 145 N. Y. 508.

<sup>30</sup> McDonald v. Kansas City & C. R. Co., 127 Mo. 38. But where one alighted from a train at a depot, but on the opposite side from the depot, and, in passing over another track, was struck and injured by a train thereon, which was moving about three miles an hour, with its bell ringing; and he was seen by neither the fireman nor the engineer; and he testified that he could not see the train because it was enveloped in smoke and steam; and the train from which the plaintiff had alight-

ed had started from the depot before the trains met,—it was held that there was no evidence of negligence on the part of the railway company, and that a nonsuit should have been granted: *Goldberg v. New York & C. R. Co.*, 133 N. Y. 561.

<sup>31</sup> *Ante*, § 1374, *et seq.*

<sup>32</sup> *Ante*, § 1485, *et seq.*

<sup>33</sup> *Fulmer v. Illinois & C. R. Co.*, 68 Miss. 355; s. c. 8 South. Rep. 517.

<sup>34</sup> *Toledo & C. R. Co. v. Chisholm*, 83 Fed. Rep. 652; s. c. 49 U. S. App. 700; 27 C. C. A. 663; *St. Louis & C. R. Co. v. Neely*, 63 Ark. 636; s. c. 37 L. R. A. 616; 40 S. W. Rep. 130; *Bryson v. Chicago & C. R. Co.*, 89 Iowa 677; s. c. 57 N. W. Rep. 430.



obstructed, and the public are obliged, for convenience, to use the railway track for the purpose of passage, and notwithstanding other portions of the street are not impassable.<sup>35</sup> The fact that the right of a railway company in the use of that portion of the street occupied by its tracks is superior to the right of the general public, does not relieve the company from the obligation of exercising reasonable care toward members of the public thereon;<sup>36</sup> and persons lawfully using the street have the right to presume, and to act upon the belief that the railroad company will not move its locomotive or cars thereon without giving the usual signals, especially at a season of the year when the snow on the rails deadens the sounds of moving locomotives or cars, and when a storm obscures the vision.<sup>37</sup> It has been said that extraordinary care must be shown by a railroad company in the use of its tracks on one of the principal streets of a city, which is constantly used for street travel, and in which there are three tracks, in order to exempt it from liability for injuring travellers on the street.<sup>38</sup> But this seems to be nothing more than an expression of the doctrine that, under such circumstances of danger to the public, the railroad company is under the duty of exercising such watchfulness and care as will prevent, as far as possible, accidents or injuries to persons or property in the lawful use of the street. This degree of care is the care which the books generally describe as ordinary or reasonable care, which care varies with the danger to be avoided and with the circumstances of each case.<sup>39</sup> Both parties, the pedestrian and the railway company, are bound to use care which is commensurate with the hazards of the situation, namely,

<sup>35</sup> Galveston &c. R. Co. v. Lewis, 5 Tex. Civ. App. 638; s. c. 25 S. W. Rep. 293.

<sup>36</sup> Bryson v. Chicago &c. R. Co., 89 Iowa 677; s. c. 57 N. W. Rep. 430; St. Louis &c. R. Co. v. Neely, 63 Ark. 636; s. c. 37 L. R. A. 616; 40 S. W. Rep. 130; Louisville &c. R. Co. v. Yniestra, 21 Fla. 700; Fletcher v. Baltimore &c. R. Co., 168 U. S. 135; s. c. 42 L. ed. 411; 25 Wash. L. Rep. 774; 30 Chic. Leg. N. 137; 18 Sup. Ct. Rep. 35. One court has, in an action for an injury of this kind, sustained an instruction to the effect that if the railroad company was guilty of *gross negligence*, the plaintiff might recover even though he was guilty of *slight negligence*: Lake Shore &c. R. Co. v. Johnson, 135 Ill. 641; s. c. 26 N. E. Rep. 510; aff'g s. c. 25 Ill. App. 430. But this seems to be merely an application of the abandoned doctrine of comparative negligence,—as to which see Vol. I, § 259, *et seq.* The railway

company must exercise reasonable diligence to the end that persons who are on its trains shall not be guilty of any act which may be reasonably regarded as dangerous to persons on the street: Fletcher v. Baltimore &c. R. Co., 168 U. S. 135; s. c. 42 L. ed. 411; 25 Wash. L. Rep. 774; 30 Chic. Leg. N. 137; 18 Sup. Ct. Rep. 35. It will not be justified in running a loaded car without proper care, down a steep grade in a public street, apparently without any concern for the injury it may do to persons on the street: Smith v. Pittsburgh &c. R. Co., 90 Fed. Rep. 783; s. c. 41 Ohio L. J. 113; 13 Am. & Eng. Rail. Cas. (N. S.) 716.

<sup>37</sup> Solen v. Virginia &c. R. Co., 13 Nev. 106.

<sup>38</sup> Kentucky &c. R. Co. v. Smith, 93 Ky. 449; s. c. 18 L. R. A. 63; 14 Ky. L. Rep. 455; 20 S. W. Rep. 392.

<sup>39</sup> Lott v. Frankford &c. R. Co., 159 Pa. St. 471; s. c. 28 Atl. Rep. 299.



ordinary care. The pedestrian can not expect of the railway company that utmost care and diligence which it is bound to bestow upon its passengers.<sup>40</sup>

§ 1846. **Care Required in Moving Trains through Crowded Cities, Towns, Villages, etc.**—We have already had occasion to note a judicial view to the effect that the fact that the servants of a railway company may, at a particular place, know and expect that the public, in considerable numbers, will use its track for the purpose of passage, imposes upon such servants the obligation of taking extra precautions at that point.<sup>41</sup> This rule has been applied in cases where the members of the public, so using the track, were technical trespassers, or bare licensees.<sup>42</sup> For stronger reasons, it applies in cases where railroads pass through cities, towns, and villages, over public streets or unfenced commons, where the public have a right to be, though subordinate to the right of the railroad company, and where persons may be expected on or near the track in considerable numbers. It is therefore a just conclusion, frequently emphasized by judicial decisions, that where a railway passes through a *crowded city* the company is under a duty of observing due caution and of making reasonable efforts to prevent injury to persons who may be on its tracks,<sup>43</sup> especially at night.<sup>44</sup> Nor is a railroad company released from the duty of exercising reasonable care to avoid injury to persons on its tracks running through cities, from the fact that the tracks are *laid upon an embankment* which is the property of the company;<sup>45</sup> nor will the law excuse the failure to perform the duty of ringing the engine bell constantly while an engine or train passes through a town or village.<sup>46</sup> In running a train *backward* through the streets of a city or town, it is the duty of the engineer to see that the brakeman is at his post keeping a lookout along the track, to warn the engineer in case of danger to the train, or to persons ahead of it.<sup>47</sup>

<sup>40</sup> *Brand v. Troy & C. R. Co.*, 8 Barb. (N. Y.) 368. See also *Chicago & R. Co. v. Ryan*, 70 Ill. 211.

<sup>41</sup> *Ante*, § 1726.

<sup>42</sup> *Ante*, § 1711, *et seq.*, §§ 1781, 1784, *et seq.* But the prevailing rule seems to be otherwise: *Ante*, § 1705, *et seq.*

<sup>43</sup> *Duffy v. Missouri & C. R. Co.*, 19 Mo. App. 380; s. c. 2 West. Rep. 198.

<sup>44</sup> *Louisville & C. R. Co. v. Howard*, 82 Ky. 212.

<sup>45</sup> *McGuire v. Vicksburg & C. R. Co.*, 46 La. An. 1543; s. c. 16 South. Rep. 457.

<sup>46</sup> *Hamilton v. Morgan's & C. R. Co.*,

42 La. An. 824; s. c. 8 South. Rep. 586.

<sup>47</sup> *Hamilton v. Morgan's & C. R. Co.*, *supra*. It has been held that the violation by a railroad company of a valid municipal ordinance by running a train within the corporate limits of a city at a prohibited rate of speed, is negligence *per se*, which may constitute the basis of a recovery by one who, in consequence thereof, received personal injuries while a *licensee* on the company's track, where he himself was not negligent: *Barfield v. Southern R. Co.*, 108 Ga. 744; s. c. 33 S. E. Rep. 988.



§ 1847. **Injuries from Mail Bags Thrown from Passing Trains, and from Mail Cranes.**—Injuries of this kind, inflicted upon persons standing upon the platform of railway stations or inside of the station building, or at any other place where they have a lawful right to be, will generally support an action against the company on the theory of negligence, and the question of the contributory negligence of the person injured will generally be for the jury. For example, a person, who has come to a railway station to get a time-table, containing information about the running of the train, and who, while walking along the middle of a platform nine feet wide near the track, without looking for an approaching train, is struck by a mail-bag thrown from the train, is not, as matter of law, debarred from recovering damages on the ground of being guilty of contributory negligence.<sup>48</sup> It was so held where a mail agent threw a mail bag from a car, and the bag went through the window of the station and struck the plaintiff, who was seated by the window, in the eye,—the theory of the court being that, although the actor was a servant of the United States, yet the railway company had notice of the practice and ought to have stopped it.<sup>49</sup> It has been held that a person standing on land of a rail-

<sup>48</sup> *Bradford v. Boston &c. R. Co.*, 160 Mass. 392; s. c. 35 N. E. Rep. 1131. Compare *Snow v. Fitchburg &c. R. Co.*, 136 Mass. 552. It was so held where an employé of a shipper of stock received an injury from a mail pouch thrown from a rapidly moving train while he was on the platform, to which he went on hearing the whistle of such train, which he heard while he was between the main track and the side track, on which the cattle car was standing, for the purpose of preventing injury to the cattle, some of which were down in the car: *Williams v. Louisville &c. R. Co.*, 98 Ky. 247; s. c. 17 Ky. L. Rep. 860; 32 S. W. Rep. 934; rehearing denied in 98 Ky. 252. Compare *Galloway v. Chicago &c. R. Co.*, 56 Minn. 346.

<sup>49</sup> *Shaw v. Chicago &c. R. Co.* (Mich.), 82 N. W. Rep. 618. In this case it was held competent to admit evidence to the effect that, for a considerable time, the mail agent had so thrown the bag, when passing the station, that it occasionally struck on the platform, and had been known to go into the open door of the station house, for the purpose of showing that there had been such previous acts, similar to the one which resulted in the injury to the

plaintiff, as to put the railway company upon the duty of anticipating such accidents from the practice, and of preventing it: *Shaw v. Chicago &c. R. Co.* (Mich.), 82 N. W. Rep. 618. In the same case evidence that a man standing on the platform had once been hit by a mail bag, so thrown, was held to have been properly admitted: *Shaw v. Chicago &c. R. Co.* (Mich.), 82 N. W. Rep. 618. The theory of the case was that, although a railroad company is not primarily liable for the negligence of a government mail agent, yet it owes a duty of not permitting him to fall into dangerous habits in delivering packages from its car in such manner as to endanger persons lawfully on its premises; and hence that evidence of such a practice on the part of a mail agent for a considerable period of time, raises the presumption that the company had notice of it, and renders the company liable to one who is injured by it while lawfully on its premises: *Shaw v. Chicago &c. R. Co.* (Mich.), 82 N. W. Rep. 618. The declaration in the action in question was not defective for failing to allege that the defendant knew of the dangerous practice; since it averred that it



road company, not in the highway, near a *mail crane*, for the purpose of witnessing the catch of a *mail pouch* or for some other like purpose, is a mere volunteer, or bare licensee, to whom the railroad company does not owe the duty of keeping the mail crane in suitable and safe condition.<sup>50</sup> But one standing on the platform of a railway station seven feet from the track, where the public habitually congregate, was not deemed negligent as matter of law in not looking or listening for an approaching train, so as to prevent a recovery for an injury received by being struck by a mail bag thrown from the train.<sup>51</sup>

**§ 1848. Care Demanded of Railway Companies with Reference to the Condition of their Tracks, Yards, and Switches.**<sup>52</sup>—This question arises most frequently in cases of injuries to the *employes* of railway companies, and it is intended to treat it in Volume IV. But it may arise with reference to other people lawfully at the place where the injury is received, but not with reference to trespassers or bare licensees; for, as already seen,<sup>53</sup> if they come upon the premises of the railway company, they do so at their own risk and take the premises as they find them, and (subject to exceptions in case of injuries to children) the company is under no duty to prepare its tracks, its yards, its switches, or its other premises, in any particular way for their accommodation and safety. For example, a railway company owes no special duty of having its tracks in any particular state of repair, toward a person who attempts to pass over one of its cars ready to start or actually moving on a private switch, and is not liable for an injury to such person caused by a defective track where he remains on the train without the knowledge of the railroad employes.<sup>54</sup> But it is under the duty of keeping its track in a reasonably safe condition, to the end of preventing injury to persons who may lawfully pass over it.<sup>55</sup> It is under the duty of keeping a *road* crossing over its land, which is open to the public and which leads to its depot, in a reasonably safe condition for travel.<sup>56</sup> It may receive from the State

made the practice of permitting mail bags to be so ejected from its passing trains, and this averment implied knowledge of the practice on its part: *Shaw v. Chicago & C. R. Co.* (Mich.), 82 N. W. Rep. 618.

<sup>50</sup> *Poling v. Ohio & C. R. Co.*, 38 W. Va. 645; s. c. 24 L. R. A. 215; 18 S. E. Rep. 782.

<sup>51</sup> *Bradford v. Boston & C. R. Co.*, 160 Mass. 392; s. c. 35 N. E. Rep. 1131.

<sup>52</sup> This section is cited in §§ 1997, 2000, 2121.

<sup>53</sup> *Ante*, § 1705, *et seq.*

<sup>54</sup> *Bollinger v. Texas & C. R. Co.*, 47 La. An. 721; s. c. 17 South. Rep. 253.

<sup>55</sup> *Burdick v. Missouri & C. R. Co.*, 123 Mo. 221; s. c. 26 L. R. A. 384; 27 S. W. Rep. 453 (employé of company injured by stepping into a ditch which ran crosswise under the track).

<sup>56</sup> *Moore v. Wabash & C. R. Co.*, 84 Mo. 481.



the franchise of building and maintaining a safe and convenient roadway thereon for the use of the public, and it may become liable to a member of the public who is injured through its negligent failure to perform this duty.<sup>57</sup> In such a case it has been held not necessary to bring *knowledge of the defect* in the bridge home to the railway company;<sup>58</sup> but clearly, its position with respect to the knowledge of the defect is analogous to that of a municipal corporation; so that it will be necessary either to prove that it had, through its proper agents, actual notice of it, or else that a sufficient time had elapsed prior to the accident to have enabled it, by the exercise of reasonable care and diligence, and by maintaining that *continuous inspection* which is demanded by the obligation of reasonable care and diligence,—to have acquired knowledge of it.<sup>59</sup> With respect to defects in its own tracks which may endanger passengers, its obligation is undoubtedly stronger; for, as we shall see in the next volume, the law puts upon carriers of passengers, with respect to the safety of their means of transit, the duty of exercising extraordinary care, diligence and foresight. A railroad company was therefore held liable for the derailment of its train and the death of its engineer, caused by a defect in the track, consisting of a depression which caused a rocking and swaying of trains passing over it, which defect had existed for three days at least before the accident, and had attracted the attention of a conductor, who had communicated the fact to the section boss.<sup>60</sup> Where a railroad company had a trestle-work fourteen feet in height, erected for the purpose of receiving freight and passengers from ships, and this trestle-work had been used by the ship of which the plaintiff was steward,—it was held that the company would be liable for an injury resulting, without negligence on his part, from the broken condition of the steps leading up to the trestle-work.<sup>61</sup> So, where the evidence showed that a railroad company knew, or might have known by the exercise of reasonable diligence, that a *rock*, superimposed above its track, was dangerous, and had had time to remove or secure it prior to the accident which was caused by its fall, its failure so to do was a negligent breach of a legal duty, for which it was liable.<sup>62</sup> But it is

<sup>57</sup> For example, the bridgeway over the Missouri river at Kansas City is a public highway, and the railway company owning and managing it is under as much obligation to keep it in a reasonably safe condition for public travel as though it were a ferry: *Pembroke v. Hannibal & C. R. Co.*, 32 Mo. App. 61.

<sup>58</sup> *South & C. R. Co. v. McLendon*, 63 Ala. 266.

<sup>59</sup> A subject considered in the next volume.

<sup>60</sup> *Worden v. Humeston & C. R. Co.*, 76 Iowa 310; s. c. 41 N. W. Rep. 26.

<sup>61</sup> *Baltimore & C. R. Co. v. Rose*, 65 Md. 485; s. c. 3 Cent. Rep. 722.

<sup>62</sup> *Baltimore & C. R. Co. v. McKenzie*, 81 Va. 71.



not *willful negligence*, under a rule existing in Kentucky,<sup>63</sup> for a railroad company to fail to remove a *tree* standing a considerable distance from its track and leaning in the opposite direction, so that there is no apparent danger of its creating an obstruction of the track by falling.<sup>64</sup>

§ 1849. **Further of this Subject.**—Defective switches, unblocked frogs, and the like, whereby the feet of persons are caught and they are held until run over by engines or trains, are a frequent source of danger. While the victims of such accidents are generally employes of the company, yet railway companies owe the duty of exercising reasonable care to the end of removing such sources of danger to any other person who may be lawfully upon its track at such place. The courts have been more sedulous to protect the railway companies from damages than to protect the public from death and maiming, in cases of derelictions of this kind; and the legislatures in many cases have been obliged to interpose with specific enactment, some of them enforced with penal sanctions.<sup>65</sup> In these, as in other cases,

<sup>63</sup> As to willful negligence, see Vol. I, §§ 206, 207, 208, 265, 266, 276, 948; *ante*, §§ 1606, 1627, 1713, 1714, 1715, 1747, 1760, 1826.

<sup>64</sup> *Filbin v. Chesapeake & C. R. Co.*, 91 Ky. 444; s. c. 13 Ky. L. Rep. 14; 16 S. W. Rep. 92. In an action to recover damages on account of the death of a person who was killed by the collapse of the defendant's railroad station while he was there for the purpose of meeting a passenger, an instruction that the law imposed the duty on one constructing a public building to make it reasonably safe against storms was not deemed objectionable as imposing such duty with regard to those who were in the building at their own risk as mere licensees: *Godfrey v. New York & C. R. Co.*, 161 N. Y. 565; s. c. 56 N. E. Rep. 77; *aff'g* s. c. 54 N. Y. Sup. 1102.

<sup>65</sup> Of this nature is a statute of Kentucky providing that every railroad company, before a date named, shall adjust, fix, or *block the frogs* on its tracks, to prevent the feet of its employes from being caught therein. This statute imposes a *continuing obligation* upon railway companies, and they may be *indicted* for any violation of it, happening within twelve months of the finding of the indictment: *Commonwealth v. Illinois & C. R. Co. (Ky.)*, 55 S. W. Rep. 10. An indictment under

the statute was held defective in failing to state that the defendant was operating a railroad at the time or place mentioned in the indictment: *Commonwealth v. Illinois & C. R. Co. (Ky.)*, 55 S. W. Rep. 10. No power in the Railway Committee of the Privy Council of Canada to dispense with the filling in of all the spaces behind and in front of railway frogs or crossings and the fixed rails of switches, during the winter months: *Washington v. Grand Trunk R. Co.*, 28 Can. S. C. 184. In the absence of any precise statutory specification, it has been held that whether or not the failure of a railroad company, in constructing a *split switch*, to restrict as much as possible the space where a person's foot could become fastened between the rails, is negligence, presents a *question for the jury*: *Brooke v. Chicago & C. R. Co.*, 81 Iowa 504; s. c. 47 N. W. Rep. 74. It has been reasoned that, whereas the law holds a railroad company to the highest degree of care for the safety of its passengers, a court will not undertake to dictate to it the details of the construction of its road at the instance of a property owner complaining of the interference by the company's embankment with the surface drainage: *Harrelson v. Kansas City & C. R. Co.*, 151 Mo. 482; s. c. 52 S. W. Rep. 368. In *South Caro-*



there must be *reasonable evidence of negligence* to take the question of the liability of the railway company to the jury.<sup>66</sup> This evidence is not furnished by proof of the mere fact that a railway yard is a dangerous place. All railway service is more or less dangerous; railway tracks are dangerous places; railway yards, where switching is constantly taking place, are dangerous places. A railway company is not liable for damages which may be incident to the exercise of its franchises in the ordinary way and without negligence.<sup>67</sup> The mere fact that a railway yard is a dangerous place is not sufficient to render the railway company liable for injuries received by one who is lawfully within it, but it must be shown to be *unnecessarily* dangerous through the act or omission of the company, or that the injury resulted from the *negligence* or *wrongful act* of the company or its employés.<sup>68</sup>

§ 1850. **Necessity of Maintaining a Watchman on Front of a Car in Backing.**—The duty of maintaining a watchman on the foremost

line the remedy for the failure of a railroad company to adopt the suggestions of the Railroad Commissioners as to repairs and improvements, under the governing statute, is an action brought by the Attorney-General in the name of the State upon the request of the Railroad Commissioners, and not by the Commissioners themselves: *Railroad Commissioners v. Railroad Co.*, 26 S. C. 353; s. c. 2 S. E. Rep. 127. In an action to recover from a railroad company for a horse and cart lost by falling into a river, through the alleged negligence of the company in not providing *cap logs for its pier*, it was held that the company might show that such logs would interfere with the loading of vessels in the course of its business: *Philadelphia &c. R. Co. v. Ervin*, 89 Pa. St. 71. In an action for an alleged injury in passing over a *foot-walk* leading to a railroad depot, by reason of its defective condition, the *burden* is upon the plaintiff to show that the walk where he received his injury was constructed by the defendant corporation, and was in its possession and control as one of the approaches to its station: *Quimby v. Boston &c. R. Co.*, 69 Me. 340.

<sup>66</sup> For example, the breaking, without fault or negligence, of the *draw-bar* and *coupling pins* holding freight cars together, which were

apparently in good condition and sound, caused by the momentum of the freight train, upon the engine being reversed, upon the engineer discovering the approach of another train,—was ascribed to *inevitable accident*, for which there was no liability: *Evansville &c. R. Co. v. Krapf*, 143 Ind. 647; s. c. 36 N. E. Rep. 901. Proof that a *switch track* in a mine was built on a grade does not tend to establish negligence in the construction: *Heath v. Whitebreast Min. Co.*, 65 Iowa 737. The fact that one *switch* at a station was farther from a cattle-guard than another did not tend to prove that there was negligence in building and maintaining the latter one so near the cattle-guard: *Robinson v. Chicago &c. R. Co.*, 71 Iowa 102; s. c. 32 N. W. Rep. 193. Evidence that the *flanges* of the tender wheels of a locomotive engine, on one side of the tender, were worn; that, when so worn, the wheel is apt to leave the main rail at a split switch; and that the wheels did leave the track at such a place,—was held sufficient to support a finding that an accident to the train was caused by the defective flanges, there being no proof that the switch was defective: *Illinois &c. R. Co. v. Pirtle*, 47 Ill. App 498.

<sup>67</sup> *Post*, §§ 1908, 1945.

<sup>68</sup> *Atchison &c. R. Co. v. Whitbeck*, 57 Kan. 729; 48 Pac. Rep. 16.



car when a train of cars is being propelled backward, or forward before the engine, is emphasized in so many decisions that it seems scarcely necessary to allude to it again.<sup>69</sup> It has been held that the use of a *box car* at the end of a freight train, instead of the usual caboose, does not relieve the company from the imputation of negligence in failing to have a brakeman on the rear of the train while it is backing, to give warning to persons properly on the track.<sup>70</sup>

§ 1851. **Injuries from Defects in "Foreign Cars."**—Injuries received from defects in cars which one railroad company receives upon its tracks from another company, are generally inflicted upon the *servants* of the company receiving such cars; and the question which generally arises is whether the company receiving them owes the duty to its own servants of *inspecting them*, before requiring its servants to use them, to see that they are free from dangerous defects. Most of the decisions relating to injuries from defects in "foreign cars" belong therefore to the subject of Master and Servant, and it is intended to deal with them in Volume IV. Another question which frequently arises in these cases is whether the railway company which delivers its car in a defective condition to another railway company, or to any other consignee, where the servants of the consignee are injured in consequence of the defect, is liable *to them* for the injury. Some of the cases hold that there is no such liability, because of a *want of privity* between the railway company owning the cars and the servants of the consignee,—on a principle similar to that which exonerates the constructor of a passenger elevator in a building from liability to the customers of his vendee, or to third persons, for defects therein;<sup>71</sup> or by analogy to the rule which exonerates a contractor of work from liability to a stranger, after the work has been turned over to the proprietor and accepted by him.<sup>72</sup> But an exception to this rule of liability exists in cases where the contractor delivers the work to the proprietor in a condition so defective that it is *inherently dangerous*, so that its use is likely to lead to mischief, and so that its existence is in the nature of a *nuisance*,—in which case the contractor may become liable to any person injured by its use without fault on his own part.<sup>73</sup> Applying these doctrines to the subject under consideration,

<sup>69</sup> *Ante*, §§ 1572, 1594, 1695, 1696, 1717, 1819, 1820.

<sup>70</sup> *Illinois &c. R. Co. v. Mahan*, 17 Ky. L. Rep. 1200; s. c. 34 S. W. Rep. 16 (no off. rep.).

<sup>71</sup> Vol. I, § 1095.

<sup>72</sup> Vol. I, § 686. As to the liability of a proprietor for an injury to a

servant of an independent contractor, see, further, Vol. I, §§ 680, 979.

<sup>73</sup> Vol. I, § 689. See further, as to liability for vending, shipping, or letting dangerous goods or machines,—Vol. I, § 817, *et seq.*; and especially §§ 828 to 831.



it has been held, on the one hand, that a railway company which does not furnish one of its own cars to another in a defective condition, but which merely performs the office of *switching a car* belonging to another railway company into the yards of a manufacturing company, does not become liable to a servant of the manufacturing company for an injury caused by the defective condition of the car.<sup>74</sup> On the other hand, where a flat car was insecurely loaded by the railway company whose car it was, and in that condition was sent to the end of its road, where it was inspected and turned over to another company, which in turn inspected it and turned it over to a third company to convey it to its destination, and an employé of the third company was injured while passing over it, in consequence of the insecure manner in which it had been loaded,—it was held that the first two companies, knowing that the car was to be handled by the servants of the connecting company, owed a duty to them of exercising reasonable care to the end of having the car securely loaded so that no harm would result to them in switching it; that the third company had violated its duty in failing to inspect the car; but that its interposition did not break the causal connection between the injured person and the first two companies; and hence that they were liable to the person injured.<sup>75</sup> A railroad company which receives cars from another company to haul over its own road, is negligent if it fails to subject such so-called “foreign cars” to a reasonable inspection, with the view of discovering and repairing dangerous defects, provided it has an opportunity to do so.<sup>76</sup> If it performs this duty it will not be liable for its failure to discover a *latent defect* in case one of its servants is injured thereby.<sup>77</sup> If it has discharged this duty, but its employé is injured in consequence of *some peculiarity* in the construction of the “foreign car,” of which the employé is aware, or which is patent and easily discoverable by him, he is deemed to *take the risk* of danger from such peculiarity of construction.<sup>78</sup> A refined distinction with reference to this subject has been discovered in a holding to the effect that a railroad company which has contracted to furnish cars for stone at a quarry is not liable to a servant of the other party to the contract for injuries resulting from any breach of duty arising purely *under the contract*;

<sup>74</sup> Atchison &c. R. Co. v. Bump, 60 Ill. App. 444. That a railroad company is under such a duty,—see Pennsylvania R. Co. v. Snyder, 55 Ohio St. 342; s. c. 36 Ohio L. J. 351; 45 N. E. Rep. 559. That it is not under such a duty,—see Caledonian R. Co. v. Warwick, (H. L.) (1898) A. C. 216; s. c. 67 L. J. P. C. (N. S.) 1; 77 Law. T. Rep. 570.

<sup>75</sup> Missouri &c. R. Co. v. Merrill, 61 Kan. 670; s. c. 60 Pac. Rep. 819.

<sup>76</sup> Bender v. Missouri &c. R. Co., 137 Mo. 240.

<sup>77</sup> Guttridge v. Missouri &c. R. Co., 94 Mo. 468.

<sup>78</sup> Thomas v. Missouri &c. R. Co., 109 Mo. 187; Baltimore &c. R. Co. v. Mackey, 157 U. S. 72.



but if it was charged by the contract with the duty of selecting the cars, it is liable to such servant for injuries resulting from a failure to use ordinary care to provide cars which are reasonably safe.<sup>79</sup>

§ 1852. **Duty to Give Warning Assumed by Promising to do so.**—Where the agent of a railway company, for a third party, promised a person at work in its subway that he would give him suitable notice of the approach of his train; and, relying upon this promise, the person so at work became inattentive to his own safety, though he might have seen the approaching train if he had looked, and was injured by it,—it was held that the railway company was liable, because, the workman, being there with its consent, had a right to rely on such promise; and hence a failure to give such signal, resulting in injury to the workman, was negligence.<sup>80</sup>

<sup>79</sup> Roddy v. Missouri &c. R. Co., 104 Mo. 234; s. c. 12 L. R. A. 746; 43 Alb. L. J. 479; 15 S. W. Rep. 1112.

<sup>80</sup> Wendell v. Pennsylvania R. Co., 57 N. J. L. 467; s. c. 31 Atl. Rep. 720. The court treat the right of action as one *in tort*, and not on contract, and hold the defendant liable

for carelessly neglecting to carry out its promise when the plaintiff had put himself in a place of peril in reliance upon it. The pleadings, however, were carelessly drawn and demurrable, and the argument of counsel proceeded upon the theory of contract.



## CHAPTER LIX.

### QUESTIONS OF PROCEDURE IN ACTIONS FOR INJURIES TO TRESPASSERS, LICENSEES, ETC., UPON RAILWAY PREMISES.

| SECTION  | SECTION   |
|--|---|
| 1856. Joint liability of two or more railway companies.                                  | 1863. Evidence which has been held relevant and admissible in these actions.                                  |
| 1857. When railroad company may recover over against primary wrong-doer.                 | 1864. Questions of fact for the jury in these actions.  |
| 1858. Questions of pleading in such actions: what allegations have been held sufficient. | 1865. Other circumstances in which negligence and contributory negligence are questions of fact for the jury. |
| 1859. What complaints have been held not sufficient.                                     | 1866. Instructions which have been held not erroneous.  |
| 1860. When the plaintiff may be compelled to elect upon which charge he will rely.       | 1867. Instructions which were held erroneous.   |
| 1861. Evidence of negligence in these cases sufficient to take the question to the jury. | 1868. Evidence which has been held inadmissible in these cases.   |
| 1862. Conditions of fact not presenting such evidence of negligence.                     | 1869. Requests for instructions which were properly refused.  |
|  | 1870. Peremptory instructions deciding the case one way or the other.   |

§ 1856. **Joint Liability of Two or More Railway Companies.**—Railroad corporations created by the concurrent legislation of two or more States, having a joint interest in the operation of an entire line of road, extending through or into the several States of their creation, are, according to one theory, jointly liable for a tort committed in the operation of the road in either State.<sup>1</sup> While several railroad companies thus created are, in the refined and subtle theory of the law, separate legal entities and separate legal persons, they are in point of fact, one corporation, having but one board of directors, and but one collection of stockholders, and but one seat of management; and the courts will possibly in another century be able to grasp this con-

<sup>1</sup> Smith v. New York &c. R. Co., 96 Fed. Rep. 504.



ception.<sup>2</sup> It has been held that where three railroad companies use a common track, and two of them maintain a platform near it for the reception of freight, and the servants of these two pile freight so close to the track that a person lawfully standing upon the platform is struck and killed by a passing train of the third company, a joint judgment against all the companies is erroneous. The theory of the decision is that there was no concurrent action among all the defendants, and no concurrent neglect of a common duty resting upon all.<sup>3</sup>

§ 1857. **When Railroad Company may Recover over against Primary Wrong-Doer.**—We shall, in the next volume, meet with the doctrine that a municipal corporation which has been obliged to pay damages for a nuisance negligently allowed to exist and remain in its streets, may have an action over to recover such damages from the primary author of the nuisance.<sup>4</sup> By analogy to this doctrine, a railroad company which has been obliged to pay damages for an injury arising from an obstruction of its platform by *mail bags* negligently left there by a *mail contractor*, does not become, by reason of its neglect to keep the *platform* clear of the obstructions, a *joint wrong-doer* with the contractor, so as to prevent it from recovering over from him the damages which it has thus been compelled to pay for his wrong.<sup>5</sup>

§ 1858. **Questions of Pleading in such Actions: What Allegations have been Held Sufficient.**—An averment that the defendant negligently and carelessly drove a certain locomotive upon its railroad up to, upon, and across a certain public highway, at the crossing of the same and the said railroad, without giving the necessary statutory signals, namely, ringing the bell or sounding a whistle,—has been held to be a sufficiently specific averment of the negligence of the defendant in connection with an averment of the injury and damage which followed, so as to entitle the plaintiff to give evidence in support of it, under an issue made upon it by the defendant's plea of general issue.<sup>6</sup> Allegations in a complaint to the effect that a certain described crossing was a dangerous one; that the defendant had, for some time, to the knowledge of the plaintiff, maintained guard gates at said crossing;

<sup>2</sup> Upon the question of the *status* of corporations created by the concurrent legislation of two or more States, see 1 Thomp. Corp., §§ 47, 48, 319, 320, 321, 322, 323 and 688; 6 Thomp. Corp., § 7438; 7 Thomp. Corp., §§ 8246, 8247, 8248, 8263, 8264.

<sup>3</sup> Chicago &c. R. Co. v. Rolvink, 31 Ill. App. 596.

<sup>4</sup> And see Vol. I, §§ 1205, 1242, where the doctrine is stated.

<sup>5</sup> Old Colony &c. R. Co. v. Slavens, 148 Mass. 363; s. c. 19 N. E. Rep. 372.

<sup>6</sup> Chicago &c. R. Co. v. Miller, 46 Mich. 532.



that, relying on the fact that such gates were always lowered, the plaintiff approached the crossing and was about to pass over it, when a train of the defendant passed, and caused his horse to run away, inflicting the injuries subsequently described,—charges actionable negligence on the part of the defendant.<sup>7</sup>

§ 1859. What Complaints have been Held not Sufficient.—A few decisions have advanced the theory that, in actions of this kind, it is

<sup>7</sup> *Rhode v. Chicago &c. R. Co.*, 86 Wis. 309; s. c. 56 N. W. Rep. 872. As to the failure of railroad companies to take precautions at crossings whereby travellers driving their horses too near the track so that they take fright at passing trains,—see *post*, § 1926, *et seq.* A complaint alleging in substance that the plaintiff was injured by the negligence of the defendant, while walking upon its track, which was “necessarily used” by the public in passing along the street, and “without fault or negligence” on his part,—has been held not to be demurrable, however improbable it might be, that the use of the track for a foot-path was necessary: *Lewis v. Galveston &c. R. Co.*, 73 Tex. 504; s. c. 11 S. W. Rep. 528. A declaration alleging that an engine and cars of the defendant were run at a great and unlawful rate of speed, within the limits of a designated village, in consequence of which the plaintiff’s husband was struck by the train and killed; setting out in full an ordinance of the village prohibiting railway companies from running their trains through the village at a greater rate of speed than ten miles an hour; and alleging that the death of the plaintiff’s husband was occasioned by the negligence of the defendant, in running the engine and cars at a greater rate of speed than that allowed by such ordinance,—sufficiently notifies the defendant that the plaintiff relies upon the ordinance, and upon the fact that the defendant ran its train at an unlawful rate of speed, as a ground of recovery, and consequently constitutes a good cause of action: *Atchison &c. R. Co. v. Feehan*, 47 Ill. App. 66; *aff’d* 149 Ill. 202; s. c. 36 N. E. Rep. 1036. An allegation in a petition, in substance, that the defendant un-

lawfully and recklessly ran over the plaintiff by its engine, which approached him from behind, which engine was being run backwards at a fast rate of speed, in violation of a city ordinance,—has been held sufficient to authorize the court to submit to the jury the question whether the engine was run at an unusually high rate of speed: *Houston &c. R. Co. v. Harvin* (Tex. Civ. App.), 54 S. W. Rep. 629. The failure of a petition to allege that the defendant did not use due care to prevent the accident, after deceased was seen on the track by its employes, is supplied by an allegation in the answer that defendant’s servants used every effort to stop the engine and prevent an accident: *International &c. R. Co. v. Sein*, 11 Tex. Civ. App. 386; s. c. 33 S. W. Rep. 558. A petition which alleges that the defendant negligently killed the plaintiff’s intestate at a street crossing or place habitually used by the public as a pathway, with the permission of the defendant, predicated the defendant’s negligence upon its making a running or flying switch across such pathway,—was not bad: *Gulf &c. R. Co. v. Smith* (Tex. Civ. App.), 26 S. W. Rep. 644. For a petition which sufficiently alleges negligence on the part of the defendant, and freedom from contributory negligence on the part of the child who was killed while walking along the track of the defendant, which had been used by the public as a thoroughfare, the killing having been done by a locomotive of the defendant, which was negligently, wantonly and willfully run swiftly and noiselessly over the track without signals at crossings in the immediate vicinity,—see *Rider v. Cincinnati &c. R. Co.*, 10 Ohio C. C. 299.



necessary to allege a state of facts showing a legal duty on the part of the defendant not to visit upon the plaintiff or the person injured the injury therein described. One court has held that an injury to a traveller from being run over by a railway train at a highway crossing furnishes no exception to this rule of pleading; but that here, as in other cases, the declaration must state the facts upon which the supposed duty to the person injured is founded, and the duty to him the breach of which is charged.<sup>8</sup> The author submits that there is no such general rule of pleading. For example, if the action were to recover damages for an assault and battery, it would be absurd to require the plaintiff to endeavor to set out a state of facts whereby it became the duty of the defendant not to knock him down. It seems equally absurd to require a pleader in the case where a person has been killed or injured at a railway crossing, to set out a state of facts whereby it became the duty of the railway company not to kill him or injure him. It is only in cases of duties voluntarily assumed by contract, or specially imposed by legislation, or arising under special and peculiar circumstances, and by reason of such circumstances,—*e. g.*, in cases of bailments, that the rule of pleading here invoked has any just application. For example, where the plaintiff predicates his action upon the fact that at the place where he was injured upon the defendant's railway track, the public had acquired a license from the defendant to cross, he must plead a state of facts from which the legal conclusion of such a license arises; otherwise, the rule of the law already considered<sup>9</sup> leaves him in the category of a trespasser, to whom the railway company owes no special duty of care until discovering him in a situation of danger. Applying this principle, it was held that an allegation in the declaration in an action to recover damages for the death of a child upon the defendant's track, that the defendant's road at the place of the accident had been used by the public as a thoroughfare for more than ten years, to the knowledge of the defendant and its employes, by reason of which fact it became the duty of the defendant and its employes to use greater diligence in looking out for persons who might be upon the track at that place, than if the defendant had not permitted such use of its track without objection,—was insufficient because it did not allege a license on the part of the company to the public to use the track, but stated a legal conclusion resulting from a mere use of the track by the public without the invitation or consent of the defendant, which did not, in the opinion of the court, amount to a license, or create any obligation on the part of the defendant of taking special care toward persons so using its

<sup>8</sup> *Wilson v. New York &c. R. Co.*, 18 R. I. 491; s. c. 29 Atl. Rep. 258.      <sup>9</sup> *Ante*, § 1705, *et seq.*



track.<sup>10</sup> Recurring to the rule that a railroad company incurs no liability by reason of its failure to take special care for the safety of a trespasser upon its track, until it discovers his presence in a situation of danger,<sup>11</sup> we find a holding to the effect that a declaration which states that the engineer and fireman of a train of the defendant by which the plaintiff was injured while crossing a trestle of the defendant's railway at night, could have seen him by the exercise of ordinary diligence, and that he could have fallen between the cross-ties and escaped if the whistle had been blown, but without alleging that they did see him, or that the engineer in charge of the defendant's locomotive was guilty of willful negligence, or that the plaintiff made efforts to escape,—does not state a cause of action.<sup>12</sup> It is quite clear that to authorize a recovery of damages for the killing of a person by a railway locomotive, upon the theory of the failure of those in charge of it to exercise ordinary care to avoid running over the deceased, after they saw his danger, notwithstanding his contributory negligence in getting into the position of danger,—such theory must be presented by the plaintiff's petition.<sup>13</sup> An averment that the defendant, "after discovering that plaintiff's intestate was in danger of injury, negligently failed then and there to use reasonable care and diligence to avoid injuring said intestate, when the use of such reasonable care and diligence might have prevented her injury," has been held, in one jurisdiction, to charge no more than simple negligence, and not to constitute a cause of action, except where the negligence of the defendant was *subsequent* to the discovery of the deceased in the exposed situation.<sup>14</sup> Where, however, the action is predicated upon the theory of the doing of a willful injury to a trespasser upon the defendant's railroad track, by those in charge of its train, an intention on their part to commit such an injury, must be directly and explicitly alleged, and hence an allegation of *willful negligence* is not sufficient.<sup>15</sup> On the other hand, it has been held that a complaint in an action for a personal injury to a trespasser upon a railroad track, is not open to demurrer on the ground that it fails to show that the injury to the plaintiff was *inflicted wantonly or intentionally*, but that it shows that the negligence of the defendant, if any, was simple negligence merely,—where it alleges that the defendants so carelessly, negligently, and recklessly moved, handled, and operated a steam engine

<sup>10</sup> *Burg v. Chicago &c. R. Co.*, 90 Rail. Cas. (N. S.) 474; 37 S. W. Iowa 106; s. c. 57 N. W. Rep. 680. Rep. 119.

<sup>11</sup> *Ante*, § 1705, *et seq.*

<sup>12</sup> *Georgia &c. R. Co. v. Richardson*, 80 Ga. 727; s. c. 7 S. E. Rep. 119.

<sup>13</sup> *McManamee v. Missouri &c. R. Co.*, 135 Mo. 440; s. c. 5 Am. & Eng.

<sup>14</sup> *Alabama &c. R. Co. v. Burgess*, 116 Ala. 509; s. c. 22 South. Rep. 913.

<sup>15</sup> *Cleveland &c. R. Co. v. Tartt*, 99 Fed. Rep. 369.



and tender, that the plaintiff was struck or run against by such engine and injured, and that such injury was the result of the wanton and reckless negligence of the defendant in the handling and moving of such engine.<sup>16</sup>

**§ 1860. When the Plaintiff may be Compelled to Elect upon which Charge he will Rely.**—It has been held that where the complaint alleges that the defendant was negligent in running at a greater rate of speed than that allowed by law, in failing to give the signals required by statute, and in failing to see the injured person on the track, and that “by reason of said negligence” the injury complained of was caused,—he may be compelled to elect upon which charge of negligence he will rely. The reason was that three distinct causes of action were set up. One under a statute, one under a municipal ordinance, and one at common law.<sup>17</sup> The decision is either a misconception or an abuse of the rule which requires the plaintiff to elect on which cause of action he will rely where he states separate causes of action. One cause of action may consist in a number of concurrent acts or omissions, either one of which would have caused the injury. These are properly regarded as one concrete negligence, and a decision which drives the plaintiff to eliminating some of them and standing on a single one of them is oppressive.

**§ 1861. Evidence of Negligence in these Cases Sufficient to Take the Question to the Jury.**—The following conditions of fact have been held to disclose what is termed “evidence of negligence” sufficient to take the question of the negligence of the defendant to the jury:—That a freight train of the defendant parted and was afterwards derailed by a collision of the two sections; that the body of the person, to recover damages for whose death the action was brought, was found underneath the wreck; that shortly before the accident he was seen walking near the track on a path habitually used by the public; and that neither men nor lights were seen upon either section of the train by those who saw the accident;<sup>18</sup> that the plaintiff when injured was

<sup>16</sup> Georgia &c. R. Co. v. Ross, 100 Ala. 490; s. c. 14 South. Rep. 282. In Alabama “simple negligence” includes “gross” and “reckless” negligence. There was another count alleging that the engine and tender were moved at such a high, negligent and reckless rate of speed that the plaintiff was struck with such force and violence that he received the injuries stated, and that such injuries were the result of the wan-

ton and reckless negligence of the defendant in so moving, handling and running such engine,—which count was also held not demurrable: Georgia &c. R. Co. v. Ross, 100 Ala. 490; s. c. 14 South. Rep. 282.

<sup>17</sup> Matz v. Chicago &c. R. Co., 88 Fed. Rep. 770; citing Harris v. Wabash &c. R. Co., 51 Mo. App. 125.

<sup>18</sup> Washington v. Missouri &c. R. Co., 90 Tex. 314; s. c. 38 S. W. Rep. 764; rev'g 36 S. W. Rep. 778.



walking without the permission of the defendant, upon its track, about 200 yards beyond the crossing of a public road, which he had passed; that he was injured by being run upon by a train which came up from behind him; that the company had not complied with the statute law by erecting blow-posts, and by blowing and continuing to blow the steam whistle, and by checking and continuing to check the speed of the train so as to keep it under control, which precautions were prescribed by statute with reference to trains approaching public crossings;<sup>19</sup> that the accident to the plaintiff, an employé of a contractor with the company, was caused by the act of its trainmen in closing up a gap, without any signal or warning to him, between its cars, through which gap, with their knowledge, he was accustomed to pass;<sup>20</sup> that the deceased was knocked off the right side of the track of the defendant by a train going at the speed of from 25 to 35 miles an hour; that it was a moonlight night, and that a man could have been seen for a distance of 200 yards ahead of the engine; that, with the proper look-out upon the engine, the headlight would have enabled the engineer, on the right side of the engine, to have seen a man sitting or lying down on the right side of the track; that no whistle was sounded for the station which was 300 yards west of the spot where the body of the deceased was found, nor for the crossing 100 yards east of it, both of which were within an incorporated town; and that the engineer of the defendant in charge of the train did not know that his engine had killed the deceased, until two days thereafter.<sup>21</sup>

**§ 1862. Conditions of Fact not Presenting Such Evidence of Negligence.**—No evidence of negligence sufficient to take the question to the jury has been discovered in the following conditions of fact:—That an engine and train were backing tender foremost, the train being hauled behind the engine;<sup>22</sup> that the body of a child was found on a railroad track where it had been struck by a train, where the track was straight and clear, but there was no evidence speaking upon the question of how the accident occurred, or how long the child had been upon the track when run over;<sup>23</sup> that an engine was left on a side

<sup>19</sup> Georgia R. Co. v. Williams, 74 Ga. 723 (the holding being that, although these statutory precautions were intended for the safety of travellers at highway crossings, yet the omission of them might go to the jury as a circumstance tending to show negligence as toward a trespasser upon its track near the crossing).

<sup>20</sup> Dempsey v. New York & C. R. Co.,

81 Hun (N. Y.) 156; s. c. 62 N. Y. St. Rep. 686; 30 N. Y. Supp. 724.

<sup>21</sup> Powell v. Southern R. Co., 125 N. C. 370; s. c. 34 S. E. Rep. 530. See also Baltimore & C. R. Co. v. Cumberland, 26 Wash. L. Rep. 306; s. c. 12 App. (D. C.) 598.

<sup>22</sup> Battishill v. Humphreys, 64 Mich. 494; s. c. 7 West. Rep. 806.

<sup>23</sup> Ward v. Southern & C. R. Co., 25 Or. 433; s. c. 25 L. R. A. 715; 36



track, with its fire banked, where it could not get upon any main track without passing several switches, with a competent man in charge of it, who left it after it had stood six hours, and when it was not likely to start.<sup>24</sup>

§ 1863. Evidence which has been Held Relevant and Admissible in these Actions.—Where the plaintiff, while walking along upon the track of the defendant within the limits of a city, was struck and injured by two cars which had been shunted forward without an engine attached to them, in violation of an ordinance of the city, it was held that the ordinance was admissible in evidence, although not pleaded, as having a bearing upon the question of the contributory negligence of the plaintiff.<sup>25</sup> Upon the question whether the engineer in charge of a train was guilty of negligence, in failing to stop his train upon the appearance of lights upon the track, a rule of the company as to the signal for stopping a train is relevant evidence.<sup>26</sup> In an action against a railway company for personal injuries alleged to have been caused by its negligence in not stopping a train after seeing the plaintiff in a dangerous position on its track, it has been held that evidence that two men—the engineer and fireman—were in charge of the train, is material and competent.<sup>27</sup> It is not error, in a proper state of pleadings and other evidence, to admit evidence of experiments made by a witness at the place of the accident, tending to show how far a man could be seen down the track, on a moonlight night, such as the night of the accident.<sup>28</sup> In such an action, it is not error to admit the testimony of an expert railroad builder as to the time within which an engine could be stopped, under the circumstances detailed in the

Pac. Rep. 166. It seems that the decision of this case ought to have been the other way; that the fact that the defendant's train ran over a child upon its track should be regarded as *prima facie* evidence of negligence under the principle *res ipsa loquitur*.

<sup>24</sup> Mars v. Delaware &c. R. Co., 54 Hun (N. Y.) 625; s. c. 28 N. Y. St. Rep. 228, 8 N. Y. Supp. 107 (not negligence as matter of law). Circumstances under which the fact that one of two gates at a crossing was down, was held to be notice that persons were not permitted on the tracks at the particular time, or expected to be there, and under which the fact that one of the gates was opened was not deemed to be an invitation to cross where a prac-

tical railroad man got upon the track and was run over by a train: Kent v. New York &c. R. Co., 64 N. Y. Supp. 623. Circumstances under which the plaintiff was deemed to have been without right on the track when struck by the train, and under which no negligence was imputed to the railway company: McClaren v. Indianapolis &c. R. Co., 83 Ind. 319.

<sup>25</sup> Meek v. Pennsylvania R. Co., 38 Ohio St. 632.

<sup>26</sup> Helton v. Alabama &c. R. Co., 97 Ala. 275; s. c. 12 South. Rep. 276.

<sup>27</sup> Reardon v. Missouri &c. R. Co., 114 Mo. 384; s. c. 21 S. W. Rep. 731.

<sup>28</sup> Cox v. Norfolk &c. R. Co. (N. C.), 35 S. E. Rep. 237.



other evidence.<sup>29</sup> Where the injury was caused by an engine running upon a switch track, evidence of the *knowledge* which the person injured had of the *use* made by a railroad company of such a track, and of the *custom* of the defendant in operating its trains over the track in question, is relevant and proper.<sup>30</sup> Where the plaintiff was injured by reason of the broken condition of certain steps leading to a trestle-work erected by the defendant for the purpose of receiving freight and passengers from ships, evidence tending to show that the plaintiff had *knowledge of a sign* fastened to the trestle-work containing the words "*keep off*," was held to be relevant and admissible.<sup>31</sup> That just before the accident, a *remark* was made *that a train was approaching*, was deemed admissible if the deceased heard the remark, without reference to the question whether the remark was made to him or to some one else.<sup>32</sup>

§ 1864. **Questions of Fact for the Jury in these Actions.**—It has been held a question of fact for the jury:—Whether one who was killed or injured while lawfully on a railroad track was guilty of negligence contributing to the accident, where, owing to his death, or to his inability to testify, there is no direct evidence as to the manner in which he was killed or injured;<sup>33</sup> whether a locomotive engineer was or was not able to keep a lookout on both sides of the track, while his fireman was engaged in replenishing the fire;<sup>34</sup> whether the failure of those in charge of a train to see a pile of stones dangerously near the track and to stop the train, constituted negligence imputable to the company;<sup>35</sup> whether the use of the side tracks of a railroad in storing cars or switching trains is, under given circumstances, negligence or not;<sup>36</sup> whether warnings were given by the engineer and fireman of a railroad train, upon perceiving a person upon the track 200 to 300 feet ahead, and whether an earlier effort to reduce the speed of the train, or to bring it to a stop, should have been made;<sup>37</sup> whether a lookout stationed upon a train saw a child which was run

<sup>29</sup> Cox v. Norfolk &c. R. Co., 126 N. C. 103; s. c. 35 S. E. Rep. 237.

<sup>30</sup> International &c. R. Co. v. Brooks (Tex. Civ. App.), 54 S. W. Rep. 1056.

<sup>31</sup> Baltimore &c. R. Co. v. Rose, 65 Md. 485; s. c. 3 Cent. Rep. 722.

<sup>32</sup> Banning v. Chicago &c. R. Co., 89 Iowa 74; s. c. 56 N. W. Rep. 277.

<sup>33</sup> Cahill v. Cincinnati &c. R. Co., 13 Ky. L. Rep. 714; s. c. 49 Am. & Eng. Rail. Cas. 390; 18 S. W. Rep. 2.

<sup>34</sup> Hinkle v. Richmond &c. R. Co., 109 N. C. 472; s. c. 11 Rail. & Corp. L. J. 81; 13 S. E. Rep. 884; 26 Am. St. Rep. 581.

<sup>35</sup> Carrico v. West Virginia &c. R. Co., 35 W. Va. 389; s. c. 11 Rail. & Corp. L. J. 64; 14 S. E. Rep. 12.

<sup>36</sup> Houston &c. R. Co. v. Stewart (Tex.), 17 S. W. Rep. 33.

<sup>37</sup> Louisville &c. R. Co. v. Morlay, 86 Fed. Rep. 240; s. c. 58 U. S. App. 526; 30 C. C. A. 6.



over by the train while walking on the track ahead of the train, before the child was run upon,—there being evidence tending to establish this hypothesis;<sup>38</sup> whether the failure to give any signal was or was not *wantonness*, where the deceased stepped upon the track in front of the engine at a place which had been used for many years by the public as a passway, before being struck by the engine;<sup>39</sup> whether the failure to perform the statutory duty of sounding the steam whistle and checking the speed of the train on approaching a crossing, was negligence with reference to a person who was struck by the train while walking on the track 200 yards from the crossing;<sup>40</sup> whether a man walking on a railroad track and there run over by a fast train, was imputable with contributory negligence, where there was evidence to the effect that other trains on parallel tracks had attracted his attention, and he testified that the statutory signals were not given;<sup>41</sup> whether the failure of train operatives to ring the bell or blow the whistle constitutes negligence under given circumstances,—it being error to charge that such failure would be negligence, it being a charge upon the weight of the evidence;<sup>42</sup> whether the failure of a railroad company, under given circumstances, to comply with statutory precautions constitutes negligence;<sup>43</sup> and whether a person run over while walking upon the tracks of a railroad was in the exercise of due care, or was negligent, regard being had to the environment and attending circumstances.<sup>44</sup>

**§ 1865. Other Circumstances in which Negligence and Contributory Negligence are Questions of Fact for the Jury.**—The question of negligence on the part of the defendant, and of contributory negligence on the part of the person killed or injured, will be submitted to the jury unless the evidence speaks unequivocally on the subject, so that the judge can decide it as matter of law.<sup>45</sup> This conclusion

<sup>38</sup> *Jamison v. Illinois &c. R. Co.*, 63 Miss. 33.

<sup>39</sup> *Dowdy v. Georgia R. &c. Co.*, 88 Ga. 726; s. c. 16 S. E. Rep. 62.

<sup>40</sup> *Georgia &c. R. Co. v. Williams*, 74 Ga. 723.

<sup>41</sup> *Crow v. Wabash &c. R. Co.*, 23 Mo. App. 357.

<sup>42</sup> *Texas &c. R. Co. v. Roberts*, 2 Tex. Civ. App. 111; s. c. 20 S. W. Rep. 960.

<sup>43</sup> *Atlanta &c. R. Co. v. Bryant*, 110 Ga. 247; s. c. 34 S. E. Rep. 350. According to the weight of authority such failure is negligence *per se* (Vol. I, § 10), subject, it may be assumed, to the right of the railway company to show, if it can, that it

was not possible to comply with the statute.

<sup>44</sup> *Kingma v. Chicago &c. R. Co.*, 85 Ill. App. 133. Digressing a little from the subject of the text, a decision may be referred to, to the effect that, whether the rate of speed at which a person was driving was greater than that permitted by ordinance, and, if so, whether the illegal act contributed to a *collision with another team*, are questions for the jury: *Broschart v. Tuttle*, 59 Conn. 1; s. c. 21 Atl. Rep. 925; 11 L. R. A. 33.

<sup>45</sup> *Kansas &c. R. Co. v. Ward*, 4 Colo. 30.



flows from the premise that what is reasonable or ordinary care is generally a question of fact, and not a question of law. For example, it is a question of fact for the jury, to be determined by a consideration of the circumstances in evidence, as to what would have been reasonable care to be exercised by the men in charge of a train, to avert injury to a trespasser upon the track, after discovering him in a position of danger, from which he could not extricate himself by reasonable efforts.<sup>46</sup> In jurisdictions where the independence of juries is upheld, it is error for the judge to charge the jury that a particular act or fact would constitute gross negligence on the part of a railroad company with reference to a trespasser on its track; but the question whether there was gross negligence in operating the train should be submitted to the jury, to be determined with reference to all the circumstances disclosed by the evidence.<sup>47</sup> Where the trespasser did not look back before being struck, to see whether a train was coming, it was held that evidence that the engineer and fireman saw her at a distance of seventy rods, and that her mind seemed to be absorbed, but that they did not sound the whistle until within a car's length, when she tried to get out of the way but failed, and that she would in all probability have gotten off the track had the whistle been sounded at the proper time,—was properly submitted *to the jury*.<sup>48</sup> In an action for personal injuries received by the plaintiff while engaged in loading flour from a mill upon a car on a siding at the mill, occasioned by a moving car striking the car which he was loading, alleged to be due to backing the car, without sufficient warning and at an unusual and dangerous rate of speed, the usages of the business, the negligence of the trainmen, and the speed of the cars, were all proper questions for the jury.<sup>49</sup>

<sup>46</sup> *Christian v. Illinois & C. R. Co.*, 71 Miss. 237; s. c. 15 South. Rep. 71.

<sup>47</sup> *Sabine & C. R. Co. v. Hanks*, 2 Tex. Civ. App. 306; s. c. 21 S. W. Rep. 947. The rule that the railroad company must have been guilty of gross negligence in order to be liable, was derived from a railroad-manipulated statute of Texas, since repealed by the Texas act of March 25, 1887.

<sup>48</sup> *Omaha & C. R. Co. v. Cook*, 37 Neb. 435; s. c. 55 N. W. Rep. 943.

<sup>49</sup> *Breen v. Railway Transfer Co.*, 51 Minn. 4; s. c. 52 N. W. Rep. 975. The question of negligence on the part of the defendant and of contributory negligence on the part of the person killed were for the

jury where a man was killed by being run over while *unloading coal* from a flat car on a side track under the circumstances disclosed in *Deisen v. Chicago & C. R. Co.*, 43 Minn. 454; s. c. 45 N. W. Rep. 864. For a collection of facts under which a *man addicted to drink* was last seen at a store near the defendant's railway station at a given point of time, and was afterwards found dead near its track with appearances indicating that he had been killed by a passing train, the evidence showing that his usual way home was along the railroad track towards a crossing near which his body was found,—which were deemed sufficient to warrant the court in submitting to the jury the question



§ 1866. Instructions which have been Held not Erroneous.—An instruction, in an action of the kind under consideration, defining “ordinary care” to be such care as a reasonably prudent person would exercise under like circumstances *while in the exercise of care*, and not at a time when such prudent person *happened to be careless*, has been held not objectionable as giving two definitions of ordinary care.<sup>50</sup> Where an action was brought to recover damages for injuries inflicted upon the plaintiff while working on a street near the defendant’s railroad track, an instruction that if the engineer saw that he was engaged in his work, and apparently unconscious that the train was approaching, notwithstanding the warning that may have been given him, it was the duty of the engineer *to use all reasonable means in his power* to arrest his attention and avoid injuring him,—was not deemed erroneous as requiring too high a degree of care, nor as assuming that the engineer did not use every reasonable effort, or that the railroad company was bound to exercise more care to avoid inflicting injuries than the injured person was required to exercise to escape it.<sup>51</sup> An

whether he had been knocked off the track and killed by a train of the defendant,—see *Powell v. Southern R. Co.*, 125 N. C. 370; s. c. 34 S. E. Rep. 530. State of evidence under which it was a question for the jury whether a person killed upon a railway track, upon which he was walking with his back to the train, could have left the track before being struck, and, if he could not, whether the engineer saw his danger and made reasonable efforts to avoid injuring him, although there was no direct evidence on the point: *White v. New York & C. R. Co.*, 65 Hun (N. Y.) 621; s. c. 47 N. Y. St. Rep. 174; 20 N. Y. Supp. 6. In another case the plaintiff, a little girl, walking along a railroad track upon a “switch-path,” between the main and side tracks, in attempting to cross one of the side tracks, caught her foot, and a freight train, backing towards her, ran over it. It was held that, whether plaintiff was on the track at the time of turning the switch leading to the place where she was caught, or of giving the signal; or whether the switchman ought to have seen her before giving the signal, and then have given the alarm sooner than he did, or have rescued her by his own efforts; or whether the yard-master should have gone to her relief when he first saw she was in danger; or

whether the brakeman on the train acted as his duty required,—were all questions peculiarly within the province of the jury: *Townley v. Chicago & C. R. Co.*, 53 Wis. 626. In an action against a railway company for injuries to a person on its track claimed by the company to have been a trespasser, it was *for the jury* to determine *upon conflicting testimony* when plaintiff’s dangerous position was discovered, how far the engine was from him when he fell on the track, within what time and space it could have been stopped, what means were used to check the train, and what success attended the engineer’s efforts: *Reardon v. Missouri & C. R. Co.*, 114 Mo. 384; s. c. 21 S. W. Rep. 731.

<sup>50</sup> *Chicago & C. R. Co. v. Kelly* (Ill.), 54 N. E. Rep. 979; aff’g s. c. 80 Ill. App. 675.

<sup>51</sup> *Louisville & C. R. Co. v. Morley*, 58 U. S. App. 526; s. c. 30 C. C. A. 6; 86 Fed. Rep. 240. See *ante*, §§ 1734, 1738. An instruction predicating a right to recover damages for a personal injury to the plaintiff, who was a trespasser on the defendant’s track, but at a place where trespassers were likely to be found, upon the failure of the employes in charge of the train to give notice of its approach, or *to use every means at their command*, consistent with the safety of themselves and



instruction to the effect that the duty of a railroad company is *greater to a minor than to an adult*, when discovered on its track, was not deemed erroneous on the ground of involving a statement to the jury that mere minority exempts one who is on a railroad track from the obligation to look and listen for a train.<sup>52</sup> Where the action was to recover damages for an injury sustained by being struck by a switch engine of the defendant, an instruction that if the defendant did not keep a reasonably careful lookout to discover plaintiff on the track, etc.,—was not deemed erroneous as requiring defendant to keep a watchman and lookout for that purpose.<sup>53</sup>

§ 1867. **Instructions which were Held Erroneous.**—Instructions, in actions of the kind under consideration, have been held erroneous in the following cases:—An instruction to the effect that the jury must believe, in order to find a verdict for the defendant, that it was impossible for the employes of the defendant, *by the use of any means or effort*, to prevent the injury, after they discovered the peril of the deceased upon the track,—the reason being that the defendant, through its employes, was required to use only such care as ordinarily prudent persons would exercise under like circumstances;<sup>54</sup> an instruction that the plaintiff was entitled to recover if his injuries were caused by being run upon by a passenger train of the defendant at a *dangerous* rate of speed,—the reason being that the speed of an express train is necessarily dangerous to persons on the track,—but the jury should have been instructed that the plaintiff could recover if he was struck by the passenger train, and if it was running substantially faster than a reasonable rate of speed, unless he was guilty of contributory negli-

the train, to avert the threatened collision, after seeing him in a place of danger, and telling the jury that it was the duty of plaintiff to use his senses, both of hearing and seeing, both to know of the approach of the train, and to avoid it by getting off the track,—was approved in *Chesapeake & C. R. Co. v. Perkins*, 20 Ky. L. Rep. 608; s. c. 47 S. W. Rep. 259 (not to be rep.). An instruction that, if the train by which the plaintiff's intestate was killed was backing under a shed used at a depot "without displaying the light from the front end of the leading car, and without having a flagman stationed thereon," and the deceased knew such fact, but nevertheless placed himself in a place of danger, no recovery could be had; but that if the defendant backed its train "without

a light on the front end of the leading car - - - or without a flagman thereon, and the intestate did not discover the train in time to escape, the defendant would be liable,—was held not objectionable as requiring the light to be held by any other person than the flagman: *Purnell v. Raleigh & C. R. Co.*, 122 N. C. 832; s. e. 29 S. E. Rep. 953.

<sup>52</sup> *Mack v. South Bound R. Co.*, 52 S. C. 323; s. c. 40 L. R. A. 679; 3 Chic. L. J. Wkly. 272; 29 S. E. Rep. 905.

<sup>53</sup> *Houston & C. R. Co. v. Harvin* (Tex. Civ. App.), 54 S. W. Rep. 629.

<sup>54</sup> *International & C. R. Co. v. McDonald* 75 Tex. 41; s. c. 42 Am. & Eng. Rail. Cas. 211; 12 S. W. Rep. 860.



gence.<sup>55</sup> Where plaintiff, a section hand, knew of a rule requiring two certain tracks to be kept clear for ten minutes before the time of two certain trains, and was injured, while walking along one of such tracks, by an engine being propelled along such track in violation of the rule, an instruction that the rule was made for the dispatch of defendant's business, and that plaintiff had no right to rely on it, was held erroneous.<sup>56</sup> Where the only testimony upon the question whether the trainmen saw the deceased upon the track in front of the train in time to avert the injury, was that of the engineer, who testified that he never saw him on the track, and that of the fireman, who stated that, when within about twenty feet of the deceased, he saw him step upon the track and that he was immediately struck by the locomotive, and that it would have been impossible to prevent the injury,—it was held error to submit to the jury the question whether the employes in charge of the train saw the deceased in a place of danger in time to prevent the accident, by checking up or stopping the train,—or giving a signal,—the reason being that the evidence offered no substantial hypothesis for such an instruction.<sup>57</sup>

**§ 1868. Evidence which has been Held Inadmissible in these Cases.**—Where the question was whether the railway company had been guilty of gross negligence in not stopping its train *after seeing* the person killed on its trestle, evidence tending to show that a person on the engine before entering upon a curve could see one on the trestle 400 yards ahead, by looking to the side of the track across the curve, was inadmissible.<sup>58</sup> In an action against a railway company for an injury resulting to the plaintiff from the broken condition of certain steps leading up to a trestle-work erected by the defendant, for the purpose of receiving freight and passengers from ships, which trestle-work had been used by the ship of which the plaintiff was the steward,—evidence that a custom house officer, who was a stranger to the defendant, had directed the plaintiff to go over the trestle-work, was inadmissible, since the defendant was not responsible for his act.<sup>59</sup>

<sup>55</sup> Louisville &c. R. Co. v. McCombs (Ky.), 54 S. W. Rep. 179.

<sup>56</sup> Kingma v. Chicago &c. R. Co., 85 Ill. App. 138.

<sup>57</sup> Missouri &c. R. Co. v. Richie (Tex. Civ. App.), 37 S. W. Rep. 863 (no off rep.). A charge to a jury under the Federal system of giving oral instructions has been condemned, which in the opinion of the reviewing court tended to create in the minds of the jurors the impres-

sion that they might go beyond a general inquiry as to reasonable care and diligence, and establish some particular standard of their own: Springman v. Baltimore &c. R. Co., 5 Mackey (D. C.) 1; s. c. 3 Cent. Rep. 281.

<sup>58</sup> Central R. &c. Co. v. Vaughan, 93 Ala. 209; s. c. 9 South. Rep. 468.

<sup>59</sup> Baltimore &c. R. Co. v. Rose, 65 Md. 485; s. c. 3 Cent. Rep. 722.



In an action against a railroad company for running over and killing the plaintiff's intestate while on a trestle of the defendant, evidence that a good many people travelled over a plank walk on the trestle was inadmissible, in the absence of an allegation in the plaintiff's complaint that the company had negligently permitted the public to use the walk, and in the absence of other evidence tending to show that the company knew of the fact that the public used the walk, where the evidence showed that a notice was posted at the end of the trestle warning the public to keep off the trestle.<sup>60</sup>

**§ 1869. Requests for Instructions which were Properly Refused.—**

A request for an instruction which tells the jury, in effect, that a railroad company is not liable for injuries to a trespasser on its track, unless the jury believe from the evidence that his injury was caused by wanton or willful negligence of the employes of the company, after they discovered the trespasser in his perilous position, is properly refused, for the reason that, under the conditions of facts stated, the railway company is bound through its employes to exercise ordinary care to avoid injuring the trespasser, and, after discovering him, its liability is not restricted to the mere avoiding of willful and wanton injury to him.<sup>61</sup> Where the injury was to one in charge of cattle being shipped, an instruction to the effect that if the jury should find from the evidence that the plaintiff was guilty of contributory negligence in failing to place himself, or his prod-pole, out of reach of the approaching engine, after the engineer saw him in a situation of peril, he could not recover, was properly refused, for the reason that it had the effect of making the contributory negligence of the plaintiff bar his recovery, without any reference to the negligence of the engineer after discovering his peril.<sup>62</sup> Following the principle that instructions must conform to the hypothesis of fact presented by the evidence,—that is to say, which the evidence tends to support,—it was held that where the evidence showed that the deceased stepped on the railway track about 100 yards in advance of the train which ran over him, it was not error to refuse an instruction based on the hypothesis that the deceased

<sup>60</sup> *Smalley v. Southern R. Co.*, 57 S. C. 243; s. c. 35 S. E. Rep. 489. In an action for injuries to a boy, received while trespassing on a car standing on a side track or switch of the defendant, by coupling the car to a train, evidence that there was no railing between the depot, or the ground bordering on the switch, and the switch itself, and that persons were in the habit of crossing the switch, and that no bell

was rung or whistle blown at the time of the accident, was held relevant: *Louisville & C. R. Co. v. Hurt*, 11 Ky. L. Rep. 825; s. c. 13 S. W. Rep. 275 (no off. rep.).

<sup>61</sup> *Louisville & C. R. Co. v. Chism*, 20 Ky. L. Rep. 584; s. c. 47 S. W. Rep. 251 (not to be rep.); *ante*, § 1734, *et seq.*

<sup>62</sup> *Texas & C. R. Co. v. Gay* (Tex. Civ. App.), 38 S. W. Rep. 533 (no off. rep.).



entered upon the track "immediately" in front of the train.<sup>63</sup> The giving of argumentative instructions which have no direct reference to the issues, but which consist of attempts by one party or the other to argue the case to the jury through the mouth of the judge, ought to be avoided. For this reason, if for no other, there was no error in refusing a special instruction to the effect that the railway company had a right to the use of its tracks and yards, which had been made a general thoroughfare for pedestrians, there being no such issue in the case, where the court had already instructed the jury that it was the duty of the plaintiff, in thus making use of the defendant's yard, to get out of the way of an engine which was approaching him.<sup>64</sup>

§ 1870. **Peremptory Instructions Deciding the Case One Way or the Other.**—An instruction which in effect told the jury that the defendant would not be liable for injuries to a trespassing boy ten years old, received through an attempt of the defendant's flagman to remove him from a position of danger, if the flagman had reasonable cause to believe that he could be removed without injury, while the train was moving three or four miles an hour, if the fall of the plaintiff under the wheels was an unavoidable and unintended accident,—was held erroneous.<sup>65</sup> Where, in the opinion of the reviewing court, the evidence tended strongly to show that the plaintiff was struck by a backing freight train, in the operation of which there was no negligence, it was held error to submit to the jury the question of negligence in the operation of the train; but the jury should have been told that, if the plaintiff was struck by the train, he could not recover.<sup>66</sup>

<sup>63</sup> *Missouri &c. R. Co. v. Cardena*, 22 Tex. Civ. App. 300; s. c. 54 S. W. Rep. 312.

<sup>64</sup> *International &c. R. Co. v. Brooks* (Tex. Civ. App.), 54 S. W. Rep. 1056. An instruction that if the jury should find from the evidence that the accident would not have happened if the plaintiff had not taken his wagon to a certain place, then they should find for the defendant, was properly refused, where there was no evidence tending to show that the wagon was improperly there, or that the plaintiff was a trespasser: *Missouri &c. R. Co. v. Lyons* (Tex. Civ. App.), 53 S. W. Rep. 97 (no off. rep.). And it may have been refused if the evidence had tended to show that it was im-

properly there or that the plaintiff was a trespasser: *Ante*, § 1734.

<sup>65</sup> *Southern &c. R. Co. v. Shaw*, 58 U. S. App. 201; s. c. 86 Fed. Rep. 865; 31 C. C. A. 70.

<sup>66</sup> *Louisville &c. R. Co. v. McCombs* (Ky.), 54 S. W. Rep. 179. In one case an instruction was held erroneous which predicated the liability of the defendant upon the failure to give signals required by statute to be given within the limits of a city or town, without first finding the fact that the town had been incorporated, in conformity with a construction which had been put upon the statute by the Supreme Court of the State: *Felton v. Newport*, 92 Fed. Rep. 470.







## TITLE THIRTEEN.

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OTHER PERSONAL INJURIES IN RAILWAY  
OPERATION.







# TITLE THIRTEEN.

## OTHER PERSONAL INJURIES IN RAILWAY OPERATION.

### CHAPTER

- LX. Injuries Caused by the Excessive or Prohibited Speed of Railway Trains, . . . . . §§ 1873-1905.  
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### CHAPTER LX.

#### INJURIES CAUSED BY THE EXCESSIVE OR PROHIBITED SPEED OF RAILWAY TRAINS.

- ART. I. Generally, §§ 1873-1892.  
ART. II. Under Statutes and Ordinances, §§ 1895-1905.

#### ARTICLE I. GENERALLY.

##### SECTION

1873. No rate of speed negligent as matter of law.  
1874. Speed may be so excessive as to be negligent.  
1875. Rate of speed must be adjusted to the danger.  
1876. Which generally presents a question of fact for a jury.  
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## SECTION

1888. Excessive rate of speed in connection with contributory negligence of the person injured.
1889. Further of excessive speed in connection with the contributory negligence of the traveller.
1890. What rate of speed is wanton so as to render trespassing or contributory negligence immaterial.
1891. Right to assume that the traveller will take care of himself.
1892. Relevancy of evidence as to the speed of trains.

§ 1873. No Rate of Speed Negligent as Matter of Law.<sup>1</sup>—In considering this subject, it must be kept in mind that, in the absence of a statute or municipal ordinance limiting the speed of railway trains, no rate of speed is negligent as matter of law; but whether the rate of speed, in a given instance, was so great as to evince negligence on the part of the railway company, will be a question of fact for a jury.<sup>2</sup> Occasional decisions are met with which qualify this statement, as by indicating that it is the general rule to be applied, unless in exceptional

<sup>1</sup> This section is cited in §§ 1875, 1902, 1946, 1949.

<sup>2</sup> *Cohoon v. Chicago &c. R. Co.*, 90 Iowa 169; s. c. 57 N. W. Rep. 727; *Partlow v. Illinois &c. R. Co.*, 150 Ill. 321; s. c. 37 N. E. Rep. 663; aff'g 51 Ill. App. 597; *Chicago &c. R. Co. v. Lewis*, 48 Ill. App. 274; *Stepp v. Chicago &c. R. Co.*, 85 Mo. 229; *Lake Shore &c. R. Co. v. Schade*, 57 Ohio St. 650; aff'g s. c. 15 Ohio C. C. 424; 8 Ohio C. D. 316; *Omaha &c. R. Co. v. Krabenbuhl*, 48 Neb. 553; s. c. 4 Am. & Eng. Rail. Cas. (N. S.) 483; 67 N. W. Rep. 447; *Omaha &c. R. Co. v. Talbot*, 48 Neb. 627; s. c. 67 N. W. Rep. 599; *New York &c. R. Co. v. Kellam*, 83 Va. 851; *Roberts v. Alexandria &c. R. Co.*, 83 Va. 312; *Western R. Co. v. Sistrunk*, 85 Ala. 352; *East Tennessee &c. R. Co. v. Winters*, 85 Tenn. 240; *Childs v. Pennsylvania R. Co.*, 150 Pa. St. 73; *Duggan v. Peoria &c. R. Co.*, 42 Ill.

App. 536; *Newhart v. Pennsylvania R. Co.*, 153 Pa. St. 417; s. c. 19 L. R. A. 563; *Heiss v. Chicago &c. R. Co.*, 103 Iowa 590; s. c. 72 N. W. Rep. 787; *Wasson v. McCook*, 70 Mo. App. 393; *Young v. Hannibal &c. R. Co.*, 79 Mo. 336; *Houston v. Vicksburg &c. R. Co.*, 39 La. An. 796; s. c. 2 South. Rep. 562; *Main v. Hannibal &c. R. Co.*, 18 Mo. App. 388; *Powell v. Missouri &c. R. Co.*, 76 Mo. 80. It is said that no restraint is imposed by the law of Illinois as to the rate of speed at which railroad trains may be run, when not prohibited by municipal regulations, *provided it is reasonably safe to the passengers*: *Chicago &c. R. Co. v. Bunker*, 81 Ill. App. 616; following *Chicago &c. R. Co. v. Lee*, 68 Ill. 576. But why not say provided it is reasonably safe to *all persons* acting lawfully and in the exercise of due care?



cases.<sup>3</sup> The conclusion is necessarily implied from the rule that negligence can not be predicated, as matter of law, on the speed of a train, where a limit of speed has been fixed by a statute or municipal ordinance, and there is no proof that such limit was exceeded;<sup>4</sup> but, as we have already seen,<sup>5</sup> it does not follow that, because a statute or municipal ordinance has fixed a maximum rate of speed, it may not be negligent, if so found by a jury, to run a train even at a less rate of speed. The general rule here stated does not apply alone to the running of a train in making a transit: it has been held that no particular rate of speed *in depot grounds* is proof of negligence, in the absence of a statute or ordinance to the contrary.<sup>6</sup> Some of the cases state the rule by saying that negligence can not be imputed to a railway company solely from the speed of its train, however great, *outside of the limits of cities, villages and towns*.<sup>7</sup> As applied to the passage of trains through cities, towns and villages, it has been laid down that a railway company, in the absence of restrictions imposed by statute or ordinance, may determine for itself the rate of speed, but that this right must be consistent with the safety of the passengers and of those who have occasion to cross the track in travelling upon the highway.<sup>8</sup>

§ 1874. **Speed may be so Excessive as to be Negligent.**<sup>9</sup>—It does not follow from the foregoing that a railroad company is permitted by the principles of the common law, even in the absence of statute or municipal ordinance, to run its trains everywhere and under all circumstances, at any rate of speed which it may choose. It must regulate its rate of speed with proper regard for the safety of human life and property, especially when running through towns and cities, even at places where there are no public crossings.<sup>10</sup>

§ 1875. **Rate of Speed must be Adjusted to the Danger.**<sup>11</sup>—Moreover, the rate of speed at which a railway train may be run over a par-

<sup>3</sup> *Houston v. Vicksburg &c. R. Co.*, 39 La. An. 796; s. c. 2 South. Rep. 562.

<sup>4</sup> *Wasson v. McCook*, 70 Mo. App. 393.

<sup>5</sup> *Ante*, §§ 1494, 1555.

<sup>6</sup> *Heiss v. Chicago &c. R. Co.*, 103 Iowa 590; s. c. 72 N. W. Rep. 787.

<sup>7</sup> *Omaha &c. R. Co. v. Talbot*, 48 Neb. 627; s. c. 67 N. W. Rep. 599; *Omaha &c. R. Co. v. Krayenbuhl*, 48 Neb. 553; s. c. 4 Am. & Eng. Rail. Cas. (N. S.) 483; 67 N. W. Rep. 447; *Lake Shore &c. R. Co. v. Schade*,

57 Ohio St. 650; *aff'd* s. c. 15 Ohio C. C. 424; 8 Ohio C. D. 316.

<sup>8</sup> *Partlow v. Illinois &c. R. Co.*, 150 Ill. 321; s. c. 37 N. E. Rep. 663; *aff'g* 51 Ill. App. 597.

<sup>9</sup> This section is cited in §§ 2102, 2265.

<sup>10</sup> *Campbell v. Missouri &c. R. Co.*, 59 Mo. App. 151; s. c. 1 Mo. App. Rep. 3; *Chicago &c. R. Co. v. Spilker*, 134 Ind. 380; s. c. 32 Am. L. Reg. 763; 33 N. E. Rep. 280; rehearing denied in 34 N. E. Rep. 218; *Chicago &c. R. Co. v. Netolicky*, 67 Fed. Rep. 665.

<sup>11</sup> This section is cited in § 2102.



ticular highway or street crossing is to be measured by the danger to travellers at such crossing. The character of the crossing, it has been well reasoned, affects the duties of the railroad company toward travellers upon the public highway, and its trains must pass over dangerous crossings at a less rate of speed, proportionate to the danger.<sup>12</sup> It has been well reasoned that a rate of speed that may be allowable in a thinly settled part of the country, where but few persons will have occasion to cross the track, may be so dangerous as to constitute negligence on the part of the railroad company when driving a train through a city or village, where many persons are likely to cross the track.<sup>13</sup> So, manifestly, where the conformation of the ground, or the intervention of buildings or other obstacles, is such as to obstruct the view of approaching trains, the obligation to run at a more moderate rate of speed is merely the application of the duty of exercising reasonable care under the particular circumstances.<sup>14</sup> If, on the other hand, the railway company safeguards the travelling public by erecting gates or stationing flagmen at crossings, then it is at liberty to run its trains at any rate of speed which is compatible with the safety of its passengers and trainmen; but, on the other hand, if it neglects reasonable precautions for the safety of the public, according to the exigencies of the particular crossing, no moderation of speed will excuse its neglect.<sup>15</sup> From the rule that the rate of speed must be governed by the dangers of each particular situation, it follows that a reckless or dangerous rate of speed, within the limits of a town or city, may be found to be negligence, although permitted by a municipal ordinance.<sup>16</sup> Nor is it necessary, in an action for such an injury, for the plaintiff to prove that the railway company had notice of the circumstances surrounding the crossing.<sup>17</sup> It need scarcely be added that the failure of

<sup>12</sup> *Ellis v. Lake Shore &c. R. Co.*, 138 Pa. St. 506; s. c. 27 W. N. C. (Pa.) 145; 21 Pitts. L. J. (N. S.) 861; 48 Phila. Leg. Int. 336; 21 Atl. Rep. 140.

<sup>13</sup> *Chicago &c. R. Co. v. Spilker*, 134 Ind. 380; s. c. 32 Am. L. Reg. 763; 33 N. E. Rep. 280; rehearing denied in 34 N. E. Rep. 218.

<sup>14</sup> *Chicago &c. R. Co. v. Dillon*, 123 Ill. 570; s. c. 13 West. Rep. 286; 15 N. E. Rep. 181. The contrary is held by the Supreme Court of Connecticut, on the ground that to require a railway company to reduce the speed of its trains at such places would seriously incommode the public, and be unnecessary for travellers exercising proper care: *Dyson v.*

*New York &c. R. Co.*, 57 Conn. 9, 22; s. c. 17 Atl. Rep. 137.

<sup>15</sup> *Pennsylvania R. Co. v. Coon*, 111 Pa. St. 430.

<sup>16</sup> *Chicago &c. R. Co. v. Spilker*, 134 Ind. 380; s. c. 32 Am. L. Reg. 763; 33 N. E. Rep. 280; rehearing denied in 34 N. E. Rep. 218; *ante*, §§ 1494, 1555, 1873; *post*, § 1902.

<sup>17</sup> *Chicago &c. R. Co. v. Spilker*, 134 Ind. 380; s. c. 32 Am. L. Reg. 763; 33 N. E. Rep. 280; rehearing denied in 34 N. E. Rep. 218. *Evidence*, of the customary rate of speed of trains at a crossing has been held admissible in an action for the death at such crossing of a person living in the neighborhood and familiar with the crossing: *International &c. R. Co.*



the State or municipal legislature to regulate the rate of speed of trains at crossings does not authorize a railroad company to run its trains at a wanton, reckless, and dangerous speed over a public crossing, at a point where the people cross and recross in numbers and frequently;<sup>18</sup> or prevent a jury from finding, upon sufficient evidence, that to drive a train over a street crossing at a certain rate of speed is negligence.<sup>19</sup>

§ 1876. Which Generally Presents a Question of Fact for a Jury.<sup>20</sup>—It is plain that this rate of speed may and must vary according to location and other circumstances, and that, within reasonable limits, and in the absence of municipal or statutory definition, the question whether or not it is excessive, will be a question of fact for a jury.<sup>21</sup> It is equally plain that this proposition can not be affirmed without qualification. To attempt to apply such a rule without judicial restraint would be to subject the speed at which railway trains might be run to the conflicting views of different local juries, composed of farmers and others. Such a restraint would be onerous, even in the case of the running of local trains, and it would be unendurable in the case of express trains, and more especially in the case of trains engaged in interstate commerce. The question is not helped out by adopting such a rule as that formulated by the Supreme Court of Michigan, that it is a question for a jury whether a special train can be run without negligence, at such rate of speed as to make it difficult to check the same in a reasonable time and distance. The reason is that this rule submits the question, what is a reasonable time and distance, to the judgment of a jury.<sup>22</sup> No court would, for example,

v. Kuehn, 2 Tex. Civ. App. 40; s. c. 21 S. W. Rep. 58.

<sup>18</sup> Memphis &c. R. Co. v. Martin, 117 Ala. 367; s. c. 23 South. Rep. 231.

<sup>19</sup> Heath v. Stewart, 90 Wis. 418; s. c. 63 N. W. Rep. 1051.

<sup>20</sup> This section is cited in § 2102.

<sup>21</sup> Chicago &c. R. Co. v. Perkins, 26 Ill. App. 67; s. c. aff'd in 125 Ill. 127; s. c. 14 West. Rep. 400; 17 N. E. Rep. 1; Louisville &c. R. Co. v. Stommel, 126 Ind. 35; s. c. 25 N. E. Rep. 863; Meyer v. Midland &c. R. Co., 2 Neb. 319; Chicago &c. R. Co. v. Spilker, 134 Ind. 380; s. c. 32 Am. L. Reg. 763; 33 N. E. Rep. 280; Gugenheim v. Lake Shore &c. R. Co., 66 Mich. 150; s. c. 9 West. Rep. 903; 33 N. W. Rep. 161; East Tennessee &c. R. Co. v. Denver, 79 Ala. 216; Stepp v. Chicago &c. R. Co., 85 Mo. 229; Frick v. St. Louis &c. R. Co.,

75 Mo. 595; East Tennessee &c. R. Co. v. Bayliss, 74 Ala. 150; White v. Milwaukee &c. R. Co., 61 Wis. 536; Neier v. Missouri &c. R. Co., 12 Mo. App. 35; Lake Shore &c. R. Co. v. Foster, 74 Ill. App. 387; Chicago &c. R. Co. v. Grablin, 38 Neb. 90; s. c. 56 N. W. Rep. 796; 57 N. W. Rep. 522; Nutter v. Chicago &c. R. Co., 22 Mo. App. 328; s. c. 5 West. Rep. 72.

<sup>22</sup> Marcott v. Marquette &c. R. Co., 47 Mich. 1. An instruction which told the jury that they might find the company guilty of recklessness, if, at the rate of speed at which the train was running, it could not have been stopped within the distance at which the headlight of the locomotive would disclose objects upon the track,—has been held erroneous: Louisville &c. R. Co. v. Milan, 9 Lea (Tenn.) 223.



hesitate to set aside a verdict which should find that a speed of four miles an hour over a highway crossing in an open country is excessive, or that a speed of sixty miles an hour within the limits of a populous town or city is reasonable. The courts agree—and, in the absence of statutes or municipal ordinances, this may be taken as the rule in instructing a jury,—that the rate of speed at which railroad trains may be run across highways varies according to the circumstances and surroundings, the test being that no unnecessary risk or hazard must be cast upon those using the highway.<sup>23</sup>

§ 1877. **Negligence may be Predicated upon an Excessive Speed, although Other Precautions were Complied with.**—It seems scarcely necessary to add that the giving of the statutory signals, or, in the absence of statutes or ordinances, of reasonable signals, within the prescribed distance, or within a sufficient distance from the crossing, will not render the company free from the imputation of negligence, if it runs its train over the crossing at a prohibited or improper rate of speed.<sup>24</sup>

§ 1878. **The Unlawful or Excessive Speed must have been the Proximate Cause of the Injury.**—On principles already explained,<sup>25</sup> the running of a railway train at a prohibited or dangerously excessive

<sup>23</sup> *Lapsley v. Union Pac. R. Co.*, 50 Fed. Rep. 172; s. c. aff'd in 51 Fed. Rep. 174 (collision between two trains). But an *instruction* that it is the duty of the trainmen "to approach the crossing at such rate of speed as would enable them to check the train if necessary," has been held erroneous: *Cohen v. Eureka & C. R. Co.*, 14 Nev. 376. It is not the general law, nor is it sound law, as said by one court, that "where not prohibited by municipal regulations, the company may adopt such rate of speed as it shall deem advisable, provided always it is reasonably safe to the passengers being transported": *Chicago & C. R. Co. v. Lee*, 68 Ill. 576, 582, dictum by Scott, J. Quoted in *Chicago & C. R. Co. v. Florens*, 32 Ill. App. 365. Contrary to the above text, it has been said in Pennsylvania: "We do not think that a jury may fix the maximum rate of speed at which a train shall be moved in the open country, or

that a high rate of speed is negligence *per se*. But, while railroad companies may move their trains at such rate of speed as the character of their machinery and road-bed may make practicable, they must not forget that increased speed for the train means increased danger to those who must cross the tracks, and that increased care on their part to guard against accidents becomes a duty": *Childs v. Pennsylvania R. Co.*, 150 Pa. St. 73, 77; s. c. 1 Pa. Adv. R. 841; 30 W. N. C. 245; 22 Pitts. L. J. (N. S.) 466; 24 Atl. Rep. 341.

<sup>24</sup> *Thompson v. New York & C. R. Co.*, 110 N. Y. 636; s. c. 16 N. Y. St. Rep. 869; 17 N. E. Rep. 690; 13 Cent. Rep. 240; *Ellis v. Lake Shore & C. R. Co.*, 138 Pa. St. 506; s. c. 27 W. N. C. (Pa.) 145; 21 Pitts. L. J. (N. S.) 861; 48 Phila. Leg. Int. 336; 21 Atl. Rep. 140.

<sup>25</sup> Vol. I, § 43, *et seq.*



rate of speed, will not, in case of an accident, support an action grounded on negligence, unless it be made to appear that the rate of speed was the *proximate cause* of the injury.<sup>26</sup> The fact that the train was running at a prohibited rate of speed, does not raise a presumption that it was the cause of the injury, but that must be found as a fact from evidence supporting the conclusion.<sup>27</sup> Under what circumstances, in the case of an injury to a traveller at a highway or street crossing, by a train run at an unlawful or excessive rate of speed, the rate of speed of the train will be deemed the proximate cause of the injury, presents a question of more difficulty. Clearly, this does not, as we shall see,<sup>28</sup> excuse the *contributory negligence* of the traveller; but it seriously affects the solution of the question, what is, and what is not to be deemed contributory negligence on his part. If, seeing a train going at a dangerous rate of speed, he recklessly thrusts himself in front of it, and takes his chances of getting over the railway before it reaches him, he can not, if he is hurt, recover damages from the company, for the proximate cause of the injury will be ascribed to his own negligence and folly. This suggests the general rule, which we find laid down in some of the cases, that the running of a railroad train at a prohibited rate of speed past a highway crossing is negligence which renders the railroad company liable for *injuries which would not have been caused* had it been running at a proper speed, and the person injured was not himself guilty of negligence.<sup>29</sup>

<sup>26</sup> Chicago &c. R. Co. v. Kennedy, 2 Kan. App. 693; s. c. 43 Pac. Rep. 802.

<sup>27</sup> Bluedorn v. Missouri &c. R. Co., 121 Mo. 258; s. c. 25 S. W. Rep. 943; rev'g 24 S. W. Rep. 57. The reasoning of the court in this case is that the running at a rate of speed in violation of a city ordinance, does not raise a presumption that the illegal rate of speed was the proximate cause of the injury, although the circumstances in evidence may tend to show that, but for the excessive rate of speed, the injury would not have occurred. This reasoning is obviously unsound. The very fact that, but for the excessive rate of speed, the injury would not have occurred, proves, in the absence of contributory negligence, that the excessive rate of speed was the proximate cause of the injury: Gratiot v. Missouri &c. R. Co., 116 Mo. 450; s. c. 16 S. W. Rep. 384. Under a statute fixing the rate of

speed at which a train may pass through an incorporated town, the company is liable for an injury done when that speed has been exceeded, though at the instant of collision, the speed is within the prescribed limit: New Orleans &c. R. Co. v. Toulme, 59 Miss. 284.

<sup>28</sup> Post, § 1888.

<sup>29</sup> Gratiot v. Missouri &c. R. Co., 116 Mo. 450; s. c. 16 S. W. Rep. 384. Substantially to the same effect, see Duffy v. Missouri &c. R. Co., 19 Mo. App. 380; and Gulf &c. R. Co. v. Breitling (Tex.), 12 S. W. Rep. 1121. In Illinois, when the doctrine of comparative negligence prevailed, a traveller might recover if his negligence in comparison with that of the railway company was slight, while that of the railway company was gross: Wabash R. Co. v. Henks, 91 Ill. 406; Vol. I, § 269. Where a person, seeing an approaching train, started to get out of the way, and when out of its reach slipped and



§ 1879. What Rate of Speed has been Held not Negligent as Matter of Law.<sup>30</sup>—This brings us to the consideration of the question what rate of speed has been held not negligent as matter of law, in the absence of any statute or municipal ordinance limiting the speed. It has been held that the rate of speed stated in the following cases, under the circumstances there stated, is not negligence as matter of law:—Thirty miles an hour, where the track near the station is straight, so that a train can be seen some distance away, and it is running on its regular schedule time, and at its usual speed;<sup>31</sup> ten miles an hour, where the rate of speed is limited by law to fifteen miles an hour, and there is no special danger requiring a less rate of speed;<sup>32</sup> thirty miles an hour, in the case of trains run over public crossings in the open country, in the absence of special circumstances requiring a less rate of speed;<sup>33</sup> fifty miles an hour, in the case of trains run over ordinary country grade crossings, where the proper signals are given in time to warn travellers;<sup>34</sup> forty or fifty miles an hour, across a village street, in the absence of a statute or municipal ordinance fixing the rate of speed;<sup>35</sup> forty miles an hour;<sup>36</sup> twenty-five miles an hour over a city street much travelled;<sup>37</sup> thirty miles an hour through an unincorporated town of some importance, containing several stores and residences, and having a street which crosses the track at grade;<sup>38</sup> thirty-five miles an hour at the crossing of a public road;<sup>39</sup>

fell, and was struck and injured, and it appeared that the train was moving at a *rate of speed* forbidden by the city ordinances, it could not be ruled that, as matter of law, the unlawful rate of speed was not the cause of the accident: *Crowley v. Burlington &c. R. Co.*, 65 Iowa 658. It has been held not error for the court to charge the jury that the speed of a train could not be considered, in an action for negligence in respect of the *breaking of the siderods* of an engine, where the speed was not unlawful or unusual, and there was no evidence to connect the breaking with the speed of the train: *Beery v. Chicago &c. R. Co.*, 73 Wis. 197; s. c. 40 N. W. Rep. 687.

<sup>30</sup> This section is cited in § 2102.

<sup>31</sup> *St. Louis &c. R. Co. v. Denty*, 63 Ark. 177; s. c. 37 S. W. Rep. 719. As to the rate of speed permissible to *trains running past stations*, see *Parsons v. New York &c. R. Co.*, 113 N. Y. 355; s. c. 3 L. R. A. 683; *Louisville &c. R. Co. v. Hirsch*, 69 Miss. 126; *Denver &c. R. Co. v. Hodgson*, 18 Colo. 117; *Sanchez v. San An-*

*tonio &c. R. Co.*, 3 Tex. Civ. App. 89; *Atchison &c. R. Co. v. Shean*, 18 Colo. 368; s. c. 20 L. R. A. 729.

<sup>32</sup> *Wickham v. Chicago &c. R. Co.*, 95 Wis. 23; s. c. 69 N. W. Rep. 982.

<sup>33</sup> *Reading &c. R. Co. v. Ritchie*, 102 Pa. St. 425.

<sup>34</sup> *Newhard v. Pennsylvania R. Co.*, 153 Pa. St. 417; s. c. 19 L. R. A. 563; 32 W. N. C. 54; 26 Atl. Rep. 105.

<sup>35</sup> *Partlow v. Illinois &c. R. Co.*, 150 Ill. 321; s. c. 37 N. E. Rep. 663; aff'g 51 Ill. App. 597.

<sup>36</sup> *Sutton v. Chicago &c. R. Co.*, 98 Wis. 157; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 100; 73 N. W. Rep. 993. Or forty or forty-five miles an hour, over a highway in the open country: *Lamb v. New York &c. R. Co.*, 18 App. Div. 579; s. c. 46 N. Y. Supp. 404.

<sup>37</sup> *Tobias v. Michigan &c. R. Co.*, 103 Mich. 330; s. c. 61 N. W. Rep. 514.

<sup>38</sup> *Galveston &c. R. Co. v. Wink* (Tex. Civ. App.), 31 S. W. Rep. 326 (no off. rep.).

<sup>39</sup> *Pepper v. Southern &c. R. Co.*, 105 Cal. 389; s. c. 38 Pac. Rep. 974.



twenty-five miles an hour along a suburban road, although persons are accustomed to walk upon the tracks;<sup>40</sup> and in other cases mentioned in the note below.<sup>41</sup>

§ 1880. **What Rate of Speed Affords Evidence of Negligence Merely.**<sup>42</sup>—Evidence of negligence predicated upon the excessive rate of speed of railway trains, sufficient to take the question to the jury, or to justify a finding, in case of an accident, in behalf of the plaintiff, has been discovered under the facts of the following cases:—Where the rate of speed was four miles an hour, in switching a car in the private yards of the company, where its servants knew, or had reason to suspect, that teams might be lawfully between its tracks, without having a lookout upon the car;<sup>43</sup> where a “wild train” was driving through a frequented street over a crossing, at the rate of forty-five or fifty miles an hour, without ringing the bell or sounding the steam whistle;<sup>44</sup> where a train was run across a much travelled street, through a town having a population of about eleven hundred, at the rate of forty miles an hour, without any signal, although the view of the track from some directions was obstructed;<sup>45</sup> where a boy eleven years of age, driving a wagon over a street crossing, was run over by an engine driven from a depot yard at a rate of speed not allowed by its own regulations, and without giving any signals;<sup>46</sup> where a train was run between thirty-seven and forty miles an hour over a highway crossing, in a city or town on a dark and foggy night, and standing cars obstructed the view at the crossing, and the noise of other trains drowned the sound of the train in question;<sup>47</sup> where a train was run over a

<sup>40</sup> *Missouri &c. R. Co. v. Hansen*, 48 Neb. 232; s. c. 66 N. W. Rep. 1105.

<sup>41</sup> Twenty-five miles an hour, through an unincorporated village: *Garland v. Chicago &c. R. Co.*, 8 Ill. App. 571. Eighteen miles an hour, in the case of a train running past or through the streets of a city: *Burlington &c. R. Co. v. Wendt*, 12 Neb. 76. Thirty-five miles an hour, in the case of a train running through a small village: *Wabash &c. R. Co. v. Hicks*, 13 Ill. App. 407. Fifty-five or sixty miles an hour, at the time of a collision on a country highway crossing: *Dubois v. New York &c. R. Co.*, 88 Hun (N. Y.) 10; s. c. 68 N. Y. St. Rep. 158; 34 N. Y. Supp. 279. Sixty miles an hour in an open and sparsely settled country: *Ely v. Lehigh Valley R. Co.*, 3 Super. Ct. (Pa.) 509. That a railroad company is not liable, under a statute, for killing a

horse while being driven by its owner on the track in the depot grounds, merely because the train was running more than eight miles an hour, nothing else being proven to show the negligence,—see *Johnson v. Chicago &c. R. Co.*, 75 Iowa 157; s. c. 39 N. W. Rep. 242.

<sup>42</sup> This section is cited in § 2102.

<sup>43</sup> *Reifsnnyder v. Chicago &c. R. Co.*, 90 Iowa 76; s. c. 57 N. W. Rep. 692.

<sup>44</sup> *Skinner v. Prospect Park &c. R. Co.*, 67 Hun (N. Y.) 649; s. c. 51 N. Y. St. Rep. 554; 22 N. Y. Supp. 30; aff'd 140 N. Y. 621; s. c. 35 N. E. Rep. 891.

<sup>45</sup> *Pratt v. Chicago &c. R. Co.*, 98 Iowa 563; s. c. 67 N. W. Rep. 402.

<sup>46</sup> *Ketchum v. Texas &c. R. Co.*, 38 La. An. 777.

<sup>47</sup> *Noble v. New York &c. R. Co.*, 20 App. Div. 40; s. c. 46 N. Y. Supp. 645.



crossing at from twenty to thirty miles an hour, and the view of the train was obstructed after reaching a point about two hundred yards from the crossing;<sup>48</sup> where a train was run at the rate of forty miles an hour over a much-used street, in a populous city;<sup>49</sup> where a train is run over a street crossing in a thickly populated part of a city, at which no gates have been erected, but only a flagman is stationed, at the rate of more than twenty miles an hour;<sup>50</sup> where a train is run at the rate of forty miles an hour, through a city built close upon and on and along each side of the track, and across one of its public streets in a populous neighborhood, upon which there is frequent travel;<sup>51</sup> where a train was run at twenty miles an hour, through a populous city, over streets without any safeguards at the crossings;<sup>52</sup> and also under the facts of the cases cited in the margin.<sup>53</sup>

**§ 1881. Running at a High Rate of Speed without Giving Signals.**—It follows, then, that while the act of a railway company, in running a train at a high rate of speed over a highway crossing, in the absence of any limit of its speed fixed by statute or ordinance, may be justified as necessary for the discharge of its duty toward the traveling public,—yet all just-minded men will agree that, where this is done without giving the customary, reasonable, or statutory signals, as by ringing the locomotive bell or sounding the steam whistle, it will be guilty of aggravated negligence, and in every such case there will be evidence of negligence for the consideration of a jury. This will be more especially true where the nature of the ground, or the presence of intervening buildings, is such as to cut off the view of the approaching train from a traveller approaching the crossing. Here, as his sight is not available, as already seen,<sup>54</sup> he must use his ears, and the direction of the wind or the confusion of other noises may be such that he can not hear the mere rumbling of the rapidly approaching train, while he could easily hear the bell or steam whistle for which he is listening,<sup>55</sup> and this may be so, although the rate of speed is not in

<sup>48</sup> *International &c. R. Co. v. Starling*, 16 Tex. Civ. App. 365; s. c. 41 S. W. Rep. 181.

<sup>49</sup> *Waldele v. New York &c. R. Co.*, 4 App. Div. (N. Y.) 549; s. c. 38 N. Y. Supp. 1009.

<sup>50</sup> *Chicago &c. R. Co. v. Ohlsson*, 70 Ill. App. 487.

<sup>51</sup> *Louisville &c. R. Co. v. Orr* (Ala.), 26 South. Rep. 35.

<sup>52</sup> *Zwack v. New York &c. R. Co.*, 160 N. Y. 362; s. c. 54 N. E. Rep. 785; aff'g s. c. 40 N. Y. St. Rep. 321; 8 App. Div. 483.

<sup>53</sup> *Cohoon v. Chicago &c. R. Co.*, 91 Iowa 169; *Chicago &c. R. Co. v. Grablin*, 38 Neb. 90; *Holland v. Sparks*, 92 Ga. 753; *Duboise v. New York &c. R. Co.*, 88 Hun (N. Y.) 10; *Clyde v. Richmond &c. R. Co.*, 59 Fed. Rep. 394; *Annaker v. Chicago &c. R. Co.*, 81 Iowa 267; s. c. 47 N. W. Rep. 68.

<sup>54</sup> *Ante*, §§ 1447, 1655, 1670, 1671.

<sup>55</sup> That under such circumstances there is a question for a jury,—see *Guggenheim v. Lake Shore &c. R. Co.*, 57 Mich. 488; s. c. 24 N. W. Rep.



excess of that allowed by the city ordinance,<sup>56</sup> and although the customary signals are not required by statute or ordinance.<sup>57</sup>

§ 1882. **Other Circumstances under which Excessive Speed has been Judicially Condemned.**—Especially is it negligence to run what is called an irregular or “wild” train over dangerous crossings at a high rate of speed, without giving the proper warning.<sup>58</sup> It has been held to be negligence as matter of law, in such a sense that the court may so instruct the jury, for persons in charge of a “wild train” to run at full speed, in violation of the rules of the company, in approaching a sharp curve at a distance of only three hundred feet behind a flagman sent forward to warn a train, approaching from the other direction, of the danger.<sup>59</sup> The conclusion of negligence has been predicated upon the fact of running a train over a city crossing at a speed of from four to six times as fast as that allowed by a city ordinance, without giving any signals such as the ordinance requires;<sup>60</sup> running a train at a speed prohibited by ordinance and approximating twenty miles an hour, without giving any signals whatever, at a much used public crossing, in a populous part of a city, at which the view of persons approaching the track is cut off by a line of standing cars.<sup>61</sup> And, generally, it may be concluded that where a train is run at an unusual and reckless speed, without any warning of its approach, in a thickly settled district, the jury may consider these facts as tending

827; *McGill v. Pittsburgh & C. R. Co.*, 152 Pa. St. 331; s. c. 25 Atl. Rep. 540; 23 Pitts. L. J. (N. S.) 443; 31 W. N. C. 355; *Keim v. Union R. & C. Co.*, 90 Mo. 314 (dark and foggy morning); *Kelly v. St. Paul & C. R. Co.*, 29 Minn. 1.

<sup>56</sup> *Chicago City R. Co. v. Robinson*, 157 Ill. 9; s. c. 4 L. R. A. 126; 18 N. E. Rep. 772.

<sup>57</sup> *Vandewater v. New York & C. R. Co.*, 74 Hun (N. Y.) 32; s. c. 56 N. Y. St. Rep. 208; 26 N. Y. Supp. 397.

<sup>58</sup> *Williams v. Kein* (Pa.), 22 W. N. C. 372; s. c. 15 Atl. Rep. 654. That running a *wild engine* very fast through a cut and round a curve near a crossing, without blowing any whistle or giving such notice as the rules of the company require in case of extra or wild engines, renders the railroad company liable for the death of a traveler struck and killed by the engine at the crossing,—see *Lyman v. Boston & C. R. Co.*, 66 N. H. 200; s. c. 11

L. R. A. 364; 45 Am. & Eng. Corp. Cas. 163; 20 Atl. Rep. 976.

<sup>59</sup> *Northern & C. R. Co. v. O'Brien*, 1 Wash. 599; s. c. 21 Pac. Rep. 32. An *instruction* that the law does not impose any rule as to the rate of speed of trains on defendant's track, has been held not erroneous, as excluding the question of negligence in running a train rapidly under any state of circumstances, and does not preclude the jury from finding that the rate of speed may have been negligent under the facts of the case: *McDonald v. International & C. R. Co.*, 86 Tex. 1; s. c. 22 S. W. Rep. 939; rev'g s. c. 20 S. W. Rep. 847, and 21 S. W. Rep. 774.

<sup>60</sup> *Washington & C. R. Co. v. Lacey*, 94 Va. 460; s. c. 26 S. E. Rep. 834.

<sup>61</sup> *Norton v. North Carolina R. Co.*, 122 N. C. 910; s. c. 29 S. E. Rep. 886. Compare *Zwack v. New York & C. R. Co.*, 8 App. Div. 483; s. c. 40 N. Y. Supp. 821.



to show negligence,<sup>62</sup> especially where the approach of the train is concealed from the view of persons approaching the track, by obstructions on or near the right of way.<sup>63</sup>

§ 1883. **Duty to Slacken Speed on Approaching Crossings.**—There is no rule of the common law that requires a railroad company to slacken the speed of its train on approaching a crossing outside the limits of a town or city, or that predicates negligence on its failure to do so, in the absence of special circumstances requiring such a precaution.<sup>64</sup> Although the engineer may observe persons in the vicinity of the track waiting to cross, he is not imputable with negligence for failing to slacken the speed of his train in anticipation that they will attempt to cross while the train is in plain view.<sup>65</sup> Nor does the mere fact that the wind is high and the day not bright, make it incumbent upon him to slacken speed when approaching a crossing.<sup>66</sup> Hence, an instruction that it is the duty of the employes of a railroad company "to approach the crossing at such rate of speed as will enable them to check the train if necessary,"—is erroneous.<sup>67</sup> It is plain that such a rule of law would greatly delay the transit of trains, hamper railway service, and prejudice the rights of the public. Statutes exist creating this duty, and the construction of one of them is noted in the margin.<sup>68</sup> Contrary to the foregoing, it has been held that a railroad train approaching a public crossing, must not only give the warnings and observe the other precautions required by statute, but its speed must be so far slackened that the train may be more manageable in passing the crossing; and hence a request for an instruction in such a case, that the company "had a right to run its train at any speed it pleased, so that it did not endanger freight or persons on board," was properly refused.<sup>69</sup>

<sup>62</sup> *Duffy v. Missouri & C. R. Co.*, 19 Mo. App. 380; s. c. 2 West. Rep. 198.

<sup>63</sup> *Chicago & C. R. Co. v. Sanders*, 154 Ill. 531; s. c. 39 N. E. Rep. 481; aff'g 55 Ill. App. 87.

<sup>64</sup> *Griffith v. Baltimore & C. R. Co.*, 44 Fed. Rep. 574; *Louisville & C. R. Co. v. Pirschbacher*, 63 Ill. App. 144; *Bunnell v. Rio Grande & C. R. Co.*, 13 Utah 314; s. c. 44 Pac. Rep. 927 (action for killing a cow).

<sup>65</sup> *New York & C. R. Co. v. Kistler*, 16 Ohio C. C. 316; *Warner v. New York & C. R. Co.*, 44 N. Y. 465; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *Ohio & C. R. Co. v. Walker*, 113 Ind. 196.

<sup>66</sup> *Vincent v. Morgan's & C. S. S. Co.*,

48 La. An. 933; s. c. 20 South. Rep. 207.

<sup>67</sup> *Cohen v. Eureka & C. R. Co.*, 14 Nev. 376.

<sup>68</sup> A statute of Georgia requiring the checking of trains at road crossings, applies to the crossing of streets in cities: *Central & C. R. Co. v. Russell*, 75 Ga. 810.

<sup>69</sup> *South & C. R. Co. v. Thompson*, 62 Ala. 494. So, a *nisi prius* court in Ohio has held that it is the duty of those in charge of a train approaching a public street crossing to so far reduce the speed of the train that it can be controlled and stopped in a reasonably short time and within a reasonable distance:



§ 1884. **Effect of the Fact that the Train is Behind Time.**—On the principle that no rate of speed is negligent as matter of law, it may well be concluded that the fact that a train is being run at a crossing at an increased or unusual rate of speed, owing to the fact that it is behind time, does not constitute negligence *per se*,<sup>70</sup> though it will obviously be an evidentiary circumstance to be considered as a part of the *res gestae* in case of an accident at a crossing. Nor will the mere fact that a train was late, in the absence of circumstances tending to show negligence, render the railroad company liable for an accident at a *private crossing*.<sup>71</sup> The rule that regular trains, running on time, have an absolute right of way as against all persons intending to cross the railroad track,<sup>72</sup> does not, it seems, apply to a *switch train*, on the theory that such a train is always on time.<sup>73</sup>

§ 1885. **Effect of Absence of Gates, Flagmen, etc., in Connection with Speed of Trains.**—It is plain that a rate of speed which would be entirely safe *at crossings* protected by gates, or flagmen, or by flagmen without gates, might be highly dangerous at crossings where there was no such protection. It has been held negligence to run a railroad train over a city crossing at a high rate of speed, in the *absence of the flagman* usually stationed at the crossing;<sup>74</sup> or to run a train at so great a rate of speed as to put it out of control to prevent a collision with a vehicle attempting to cross the track before the train came in sight, where the conductor was aware that the *watchman or flagman* at the crossing was *not at his post*.<sup>75</sup> Negligence may be predicated

Ludden v. Columbus &c. R. Co., 7 Ohio N. P. 106. The failure to check a train in compliance with this statute may be evidence of negligence, although the person injured was not upon the crossing, but between it and the train, using the track as a footpath: Georgia R. &c. Co. v. Daniel, 89 Ga. 463; s. c. 15 S. E. Rep. 538. The statute requires the engineer in charge of the train to commence checking its speed at a blow-post: it is not necessary to commence checking speed before reaching the blow-post: Crawley v. Georgia R. Co., 82 Ga. 190; s. c. 8 S. E. Rep. 417. The statute does not require that a train started at or upon a public crossing should be *checked* and be kept checked while passing over that crossing: Harris v. Central R. Co., 78 Ga. 525; s. c. 3 S. E. Rep. 355.

<sup>70</sup> New York &c. R. Co. v. Kellam, 83 Va. 851; s. c. 3 S. E. Rep. 703;

Roberts v. Alexandria &c. R. Co., 83 Va. 312; s. c. 2 S. E. Rep. 518; Western R. Co. v. Sistrunk, 85 Ala. 352; s. c. 5 South. Rep. 79; East Tennessee &c. R. Co. v. Winters, 85 Tenn. 240; s. c. 1 S. W. Rep. 790.

<sup>71</sup> Annapolis &c. R. Co. v. Pumphrey, 72 Md. 82; s. c. 42 Am. & Eng. Rail. Cas. 599; 19 Atl. Rep. 8.

<sup>72</sup> *Ante*, § 1485.

<sup>73</sup> Northern &c. R. Co. v. Holmes, 3 Wash. Terr. 543; s. c. 18 Pac. Rep. 76. That negligence in the case of an employé run over and killed by a train, may be predicated upon the fact of a *change of schedule time*, without giving notice of the same,—see Baltimore &c. R. Co. v. Whittington, 30 Gratt. (Va.) 805.

<sup>74</sup> Chicago &c. R. Co. v. Blaul, 175 Ill. 183; s. c. 51 N. E. Rep. 895; aff'g s. c. 70 Ill. App. 518.

<sup>75</sup> Connell v. Regina, 5 Can. Exch. 74.



upon running a train at the rate of thirty or thirty-five miles an hour, over a crossing at which the gates have been left open and the flagman is not in position to warn travellers, where the governing statute limits the speed to six miles an hour.<sup>76</sup>

§ 1886. **Trains Running off the Track into Buildings.**<sup>77</sup>—It frequently happens that trains become derailed in consequence of running at a high rate of speed. When running at a high rate of speed in cities, if the locomotive becomes derailed, it sometimes runs into an adjacent building. A city ordinance regulating the rate of speed applies to an injury of this nature, and gives the right to recover damages in case of its violation.<sup>78</sup> Where, in such a case, it appeared that the train was moving at an unlawful rate of speed, it was held that the jury were warranted in inferring that the unlawful rate of speed was the cause of the injury, though there was no direct evidence that such speed caused the derailment.<sup>79</sup>

§ 1887. **Rate of Speed with Reference to Trespassers and Bare Licensees upon a Railway Track where they have no Right to be.**—The principle applies which protects other owners of real property from liability for passive injuries to such persons. The property owner is not bound to keep his property in any particular condition of safety for their benefit, but they take the premises as they find them and assume the risk of the dangers which may exist upon them. It is so with a trespasser or bare licensee upon a railway track. As we have seen,<sup>80</sup> he takes the premises as he finds them, and assumes the risk of dangers which exist upon them. The railway company is under no obligation to adjust its business for the accommodation and safety of such persons. It is not bound to regulate its rate of speed and thereby incommode the public, in order to promote the safety of persons who may thus unlawfully come upon its track and use it as a highway. This principle applies with peculiar force to the speed of railway trains.<sup>81</sup> A railroad company owes no duty to a trespasser upon its track as to the operation of its trains, so far as *speed* is concerned,

<sup>76</sup> *Romeo v. Boston & C. R. Co.*, 87 Me. 540; s. c. 33 Atl. Rep. 24. See further as to the effect of running a train at a rate of speed prohibited by ordinance, over a crossing at which there were *no gates*, and *no watchman*: *Graney v. St. Louis & C. R. Co.*, 140 Mo. 89; s. c. 38 L. R. A. 633; 41 S. W. Rep. 246; 8 Am. & Eng. Rail. Cas. (N. S.) 187; aff'g on rehearing 38 S. W. Rep. 969.

<sup>77</sup> This section is cited in §§ 1904, 1958.

<sup>78</sup> *Mahan v. Union Depot St. R. Co.*, 34 Minn. 29.

<sup>79</sup> *Walsh v. Missouri & C. R. Co.*, 102 Mo. 582; s. c. 14 S. W. Rep. 873; rehearing denied 102 Mo. 589; 15 S. W. Rep. 757.

<sup>80</sup> *Ante*, § 1705, *et seq.*

<sup>81</sup> *Louisville & C. R. Co. v. Howard*, 82 Ky. 212.



other than not to run them at a reckless and dangerous speed; and a violation of this duty toward such a trespasser can not be predicated of the insufficiency of its machinery or brakes, or of the fact that a train is improperly manned.<sup>82</sup> So, a city ordinance limiting the speed of trains within the city to six miles an hour, and requiring the bell to be rung while passing through the city, does not impose a liability upon a railroad company for injury to a *trespasser upon its track*, where his danger was not discovered in time to avoid injury, although the train was run in excess of such speed and without ringing the bell.<sup>83</sup>

§ 1888. **Excessive Rate of Speed in Connection with Contributory Negligence of the Person Injured.**<sup>84</sup>—The fact that a railway train approaches a public crossing at a high rate of speed, and also without giving the customary, reasonable, or statutory signals, by ringing its bell, or sounding its whistle, will not excuse contributory negligence on the part of the traveller approaching the crossing, provided his negligence is plain, though it will have an important bearing in the solution of the question whether he was negligent or not. The law will not, on the one hand, excuse him for failing to use his faculties by looking and listening for the approaching train.<sup>85</sup> But, on the other hand, it will, within guarded limits, refuse to impute contributory negligence to him, because of the fact that he relies upon the customary, reasonable, or statutory signals being given, and, after listening for them and failing to hear them, and being unable to see an approaching train, by reason of the fact that the view is obstructed, ventures upon the track and is run over.<sup>86</sup> In other words, the railway

<sup>82</sup> *Brown v. Louisville & C. R. Co.* (Ky.), 30 S. W. Rep. 639; s. c. 17 Ky. L. Rep. 145 (no off. rep.).

<sup>83</sup> *Felton v. Aubery*, 74 Fed. Rep. 350; s. c. 43 U. S. App. 278; 20 C. C. A. 436. It has been held that a person walking upon a railroad track without any right to do so, although it was a common place to walk, can not recover for injuries sustained while a train was passing at the rate of sixty miles an hour while he was standing beside an embankment about breast high, eight or nine feet away, in the absence of any proof as to the cause of the injury, except that he saw the shadow of something and was felled to the ground, and a stick of wood similar to that used on the locomotive was found imbedded in the bank where he was standing: *Lucas v. Richmond & C. R. Co.*, 40 Fed. Rep. 566.

<sup>84</sup> This section is cited in § 1878.

<sup>85</sup> *Ante*, § 1637, *et seq.*; *Louisville & C. R. Co. v. Webb*, 90 Ala. 185; s. c. 11 L. R. A. 674; 43 Alb. L. J. 248; 8 South. Rep. 518; 9 Rail. & Corp. L. J. 244; *Little Rock & C. R. Co. v. Dinseman* (Ark.), 16 S. W. Rep. 169 (no off. rep.); *McCrary v. Chicago & C. R. Co.*, 31 Fed. Rep. 531; *Chicago & C. R. Co. v. Robinson*, 9 Ill. App. 89; *Gardner v. Detroit & C. R. Co.*, 97 Mich. 240; s. c. 56 N. W. Rep. 603; *Texas & C. R. Co. v. Fuller*, 5 Tex. App. 660; s. c. 24 S. W. Rep. 1090; *Highland Ave. & C. R. Co. v. Maddox*, 100 Ala. 618; s. c. 15 S. W. Rep. 615; s. c. on former appeal 90 Ala. 185.

<sup>86</sup> *McNamara v. New York & C. R. Co.*, 136 N. Y. 650; s. c. 49 N. Y. St. Rep. 395; 32 N. E. Rep. 765; *Wright v. Cincinnati & C. R. Co.*, 94 Ky. 114; s. c. 14 Ky. L. Rep. 788; 21 S. W. Rep. 581; *Atchison & C. R. Co. v.*



company will not be upheld in impliedly inviting him to his death or injury by omitting the signals which it ought to give, while at the same time coming upon the crossing, where he has a right to be, at an excessive rate of speed. Moreover, while the traveller will not be justified in recklessly thrusting himself in front of an approaching train, which he can hear or see, or of which he was warned,<sup>87</sup>—yet, when he sees or hears an approaching train, he is entitled, unless the evidence of his senses is to the contrary, to conclude, and to act upon the assumption, that it will not run at a prohibited rate of speed.<sup>88</sup> In all such cases, the most that can be said in favor of the hypothesis of contributory negligence, is that the *question is for the jury*, especially where the facts are complicated, or the evidence conflicting.<sup>89</sup> Nor will the fact of knowledge on the part of the injured traveller, that trains have frequently passed the particular crossing at a rapid and unlawful rate of speed, prevent a recovery, if the traveller used reasonable care and diligence, although he did not use additional and extraordinary care to provide against the possibility of the company continuing its neglect of duty to the public.<sup>90</sup> Nor will the fact that the traveller might have seen the approaching train from another crossing near by, impute contributory negligence to him where, if the train which injured him had been running at the proper speed and giving the proper signals, he could have crossed where he did in safety.<sup>91</sup> If the traveller goes upon the railway crossing, without

Morgan, 43 Kan. 1; s. c. 22 Pac. Rep. 995; 42 Am. & Eng. Rail. Cas. 184; Skinner v. Prospect Park & C. R. Co., 67 Hun (N. Y.) 649, *mem.*; s. c. 51 N. Y. St. Rep. 554; 22 N. Y. Supp. 30; *aff'd* 140 N. Y. 621; s. c. 35 N. E. Rep. 891.

<sup>87</sup> *Ante*, §§ 1666, 1667; Crawley v. Richmond & C. R. Co., 70 Miss. 340; s. c. 13 South. Rep. 74; Craddock v. Louisville & C. R. Co. (Ky.), 13 Ky. L. Rep. 18; s. c. 16 S. W. Rep. 125 (no off. rep.).

<sup>88</sup> Cleveland & C. R. Co. v. Baddeley, 150 Ill. 328; s. c. 35 N. E. Rep. 965; affirming s. c. 52 Ill. App. 94.

<sup>89</sup> Vol. I, § 425; Jones v. East Tennessee & C. R. Co., 128 U. S. 443; Wright v. Cincinnati & C. R. Co., 94 Ky. 114; s. c. 14 Ky. L. Rep. 788; 21 S. W. Rep. 581; Atchison & C. R. Co. v. Morgan, 43 Kan. 1; s. c. 22 Pac. Rep. 995; 42 Am. & Eng. Rail. Cas. 184. See also Louisville & C. R. Co. v. Webb, 97 Ala. 308; s. c. 12 South. Rep. 374; Cleveland & C. R. Co. v. Baddeley, 150 Ill. 328; s. c. 36 N. E. Rep. 965; affirming s. c. 52 Ill. App. 94.

<sup>90</sup> Gulf & C. R. Co. v. Shieder (Tex. Civ. App.), 26 S. W. Rep. 509 (no off. rep.).

<sup>91</sup> Stringer v. Alabama & C. R. Co., 99 Ala. 397; s. c. 13 South. Rep. 75. In Illinois, while the doctrine of "*comparative negligence*" prevailed (Vol. I, §§ 264, 269), a person struck by a train of cars within the limits of a city, at a street crossing, might recover for his injuries, if, at the time of the accident, the train was running at an improper rate of speed, with reference to plaintiff's safety, even if he was guilty of *slight* negligence, provided that the negligence of the company was *gross* when compared with that of the plaintiff: Wabash R. Co. v. Henks, 91 Ill. 406. The Supreme Court of the United States, while not adopting this doctrine of comparative negligence, have applied the rule of contributory negligence in nearly the same manner required by the doctrine of comparative negligence, by holding that, where it is conceded that the defendant railroad company is in fault on account of



exercising his faculties to discover whether a train is approaching, then, according to the doctrine in one jurisdiction, although the railway train may be approaching without giving the proper signals, yet the contributory negligence of the plaintiff will preclude him from recovering damages, unless the negligence of the railway company is so gross as to be characterized as *reckless, wanton or intentional*.<sup>92</sup> And, whether the negligence of the defendant deserves to be thus characterized will often be a *question of fact for a jury*.<sup>93</sup>

§ 1889. **Further of Excessive Speed in Connection with the Contributory Negligence of the Traveller.**<sup>94</sup>—The negligent or unlawful act of the company does not, then, relieve the traveller of the duty of exercising ordinary or reasonable care for his own safety; and if, notwithstanding the negligent or unlawful conduct of the railway company, he might have averted the accident to himself by the exercise of ordinary or reasonable care on his own part, he can not recover damages.<sup>95</sup> It was so held where the negligence of the person killed consisted in walking upon the track, knowing that it was imminently dangerous so to do, although he may not have been a trespasser;<sup>96</sup> and where the person killed had, in consequence of his own negligence, become fastened in the switch so that he could not extricate himself before the train ran over him.<sup>97</sup> The rule under consideration applies as well to cases where the train is running at an excessive speed in violation of a statute or municipal ordinance, which conduct is negligence *per se*, as in other cases: the contributory negligence of the traveller is equally a defense.<sup>98</sup> Whilst this is the general rule, it should be constantly kept in mind that, upon the question whether the traveller was

running its trains at a high rate of speed, and with an imperfect condition of brakes, the court is not justified in refusing to submit to the jury an action for damages by reason of plaintiff's acts, which show in some degree that he was not as careful as the most cautious and prudent man would have been: *Jones v. East Tenn. &c. R. Co.*, 128 U. S. 443; s. c. 32 L. ed. 478; 9 Sup. Ct. Rep. 119. The person injured was not an employé of the railroad company; but that could make no difference in principle, as there was no question of his accepting the particular risk.

<sup>92</sup> *Highland Avenue &c. R. Co. v. Maddox*, 100 Ala. 618; s. c. 13 South. Rep. 615.

<sup>93</sup> *Louisville &c. R. Co. v. Webb*, 97 Ala. 308; s. c. 12 South. Rep. 374.

<sup>94</sup> This section is cited in §§ 1891, 1966, 2315.

<sup>95</sup> *Shirk v. Wabash R. Co.*, 14 Ind. App. 126; s. c. 42 N. E. Rep. 656; *Sullivan v. Missouri &c. R. Co.*, 117 Mo. 214; s. c. 23 S. W. Rep. 149; *Payne v. Chicago &c. R. Co.*, 136 Mo. 562; s. c. 38 S. W. Rep. 308.

<sup>96</sup> *Hoover v. Texas &c. R. Co.*, 61 Tex. 503.

<sup>97</sup> *International &c. R. Co. v. Lee* (Tex. Civ. App.), 34 S. W. Rep. 160 (no off. rep.).

<sup>98</sup> *Reidel v. Philadelphia &c. R. Co.*, 87 Md. 153; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 91; 39 Atl. Rep. 507.



in fact guilty of contributory negligence, the unlawful rate of speed at which the train was running may have an important bearing, at least, so as to take the question to the jury. It may, for example, lead the traveller to misjudge the length of time that it will take the train to reach the crossing, the traveller relying upon the probability that it is not approaching at a prohibited rate of speed.<sup>99</sup> Where there is a statutory rule requiring a train to run slowly at the place of the accident, and the railway company usually complies with this rule, a traveller has the right to expect its observance, unless his senses admonish him to the contrary, in compliance with the general principle that it is not negligence not to anticipate the negligence or wrongdoing of another.<sup>100</sup> On the other hand, it has been reasoned that one who lives near a railroad crossing, and who is hence familiar with the speed at which trains run over the crossing, has no right to presume that the railway company will not run its trains at an unlawful rate of speed, where the ordinance limiting the rate of speed is habitually disregarded by the company:<sup>101</sup> by their habitual disregard of the law, they acquire the right to put the public under a duty of greater care!

§ 1890. **What Rate of Speed is Wanton so as to Render Trespassing or Contributory Negligence Immaterial.**—In considering the principle that contributory negligence is no defense in case of an injury which is the result of *willful* or *wanton* negligence,<sup>102</sup>—it has been held that a jury is warranted in finding a railway company guilty of *wanton negligence* in running a train through a populous portion of a city, where the sides of its right of way are not fenced and persons are accustomed to cross, at greater speed than is allowed by the municipal ordinances and without the signals required thereby, so as to render it liable for the death of a trespasser on its tracks at that point.<sup>103</sup> So, it has been held that to run a wrecking train at twenty or thirty miles an hour through depot grounds filled with men, women and children, invited there by a railroad company to view an exhibition train, is gross negligence, amounting to a wanton and reckless disregard of public safety, which will render the company liable, notwithstanding the want of merely ordinary care on the part of one killed by such train while

<sup>99</sup> Cleveland &c. R. Co. v. Baddeley, 150 Ill. 238; s. c. 36 N. E. Rep. 965; aff'g 52 Ill. App. 94.

<sup>100</sup> International &c. R. Co. v. Gray, 65 Tex. 32; Missouri &c. R. Co. v. Chick, 6 Kan. App. 480; s. c. 50 Pac. Rep. 605. For discussions of this principle, see Vol. I, § 191; *ante*, §§ 1448, 1612, 1653, 1699.

<sup>101</sup> Payne v. Chicago &c. R. Co., 129 Mo. 405; s. c. 31 S. W. Rep. 885; aff'g on rehearing 30 S. W. Rep. 148.

<sup>102</sup> Vol. I, §§ 206, 207, 208, 265, 226, 247; 276, 948; *ante*, §§ 1606, 1627, 1713, 1714, 1747, 1760.

<sup>103</sup> Lake Shore &c. R. Co. v. Bodermer, 33 Ill. App. 479.



crossing its track.<sup>104</sup> The act of running a railway train at night, at an excessive rate of speed, within the limits of a city, where persons are likely to be crossing the track, without ringing the bell or having a headlight on the engine, has been judicially characterized as *wanton* and *willful* negligence, although not actuated by a specific ill-will toward the plaintiff.<sup>105</sup>

§ 1891. **Right to Assume that the Traveller will Take Care of Himself.**<sup>106</sup>—A principle which we have already had occasion to consider<sup>107</sup> justifies the engineer in charge of a railway train in assuming, until his senses admonish him to the contrary, that a traveller ahead of him, about to cross the tracks, will take the usual precautions for his own protection; but it has been held that this principle does not apply where the engineer is driving his train at a rate of speed prohibited by law, but that in such a case he has no right to assume that a person ahead of him on the track will get out of the way before the engine is upon him.<sup>108</sup>

§ 1892. **Relevancy of Evidence as to the Speed of Trains.**—In almost every railway accident to a person on the track, the speed of the train is a part of the collection of facts to which the jury are to look for the purpose of determining whether the railway company was guilty of negligence. The general rule must therefore be that, in such cases, evidence of the speed of the train at the time of the accident, is admissible as part of the *res gestae*.<sup>109</sup> Thus, where the injury complained of was received in consequence of the *fall of a railroad bridge* while a train was running over it, and where the complaint predicated a right of recovery upon the ground that it was dangerous to run over the bridge on account of its defective condition, evidence of the rate of speed of the train was held admissible.<sup>110</sup> With regard to the manner of proving the rate of speed, it has been held that evidence of the speed of a train, *as judged by the sound*, is admissible.<sup>111</sup> It has

<sup>104</sup> Chicago &c. R. Co. v. Johnson, 53 Ill. App. 478.

<sup>105</sup> East St. Louis &c. R. Co. v. O'Hara, 150 Ill. 580; s. c. 37 N. E. Rep. 917; aff'g 49 Ill. App. 282.

<sup>106</sup> This section is cited in § 1966.

<sup>107</sup> Vol. I, §§ 1336, 1337; *ante*, §§ 1601, 1782, 1883.

<sup>108</sup> Lake Shore &c. R. Co. v. O'Connor, 115 Ill. 254; s. c. 3 West. Rep. 465.

<sup>109</sup> Illinois &c. R. Co. v. Slater, 129 Ill. 91; s. c. 21 N. E. Rep. 575; 6 L. R. A. 418; aff'g s. c. 28 Ill. App. 73; Martin v. New York &c. R. Co., 27 Hun (N. Y.) 532. Compare Palmer v. Platt, 27 Hun (N. Y.) 554; Savannah &c. R. Co. v. Flanagan, 82 Ga. 579; s. c. 9 S. E. Rep. 471.

<sup>110</sup> Louisville &c. R. Co. v. Pedigo, 108 Ind. 481.

<sup>111</sup> Van Horn v. Burlington &c. R. Co., 59 Iowa 33.



also been held that evidence of the *customary speed* at which locomotives of the defendant are run under like circumstances as the one doing the injury, is admissible as corroborative evidence, to support other evidence of the speed of the engine in the particular case.<sup>112</sup>

## ARTICLE II. UNDER STATUTES AND ORDINANCES.

| SECTION  | SECTION   |
|--|---|
| 1895. Constitutional validity of statutes and municipal ordinances regulating rate of speed.               | 1901. Doctrine that the violation of such statutes and ordinances is merely evidence of negligence. |
| 1896. Reasonableness of ordinances regulating speed of trains.   | 1902. Statutes and ordinances limiting rates of speed do not license dangerous rates of speed.      |
| 1897. What ordinances limiting speed have been held reasonable and valid.                                  | 1903. Construction of various statutes and ordinances limiting the speed of trains.                 |
| 1898. What ordinances limiting speed have been held unreasonable, and hence void.                          | 1904. Further of the construction of such statutes and ordinances.                                  |
| 1899. Validity of statutes requiring trains to come to a full stop on approaching crossings.               | 1905. Miscellaneous holdings relating to the prohibited speed of trains.                            |
| 1900. Doctrine that violation of statute or ordinance limiting rate of speed is negligence <i>per se</i> . |   |

§ 1895. **Constitutional Validity of Statutes and Municipal Ordinances Regulating Rate of Speed.**<sup>113</sup>—Police regulations, prescribing precautions for the safety of passengers and of the general public, in the running of railway trains, are generally upheld as constitutional;<sup>114</sup> though it is plain that such regulations may be so unreasonable as to involve an infringement of the chartered rights of railroad companies, and confiscate *pro tanto* their franchises for the public use without compensation, and to take their property without due process of law. Within reasonable limits, then, a State Legislature, or a municipal corporation under a grant of power from such Legislature, may enact statutes or ordinances prescribing the maximum limit of speed at

<sup>112</sup> *Shaber v. Minneapolis &c. R. Co.*, 28 Minn. 103. A rule of a railroad company requiring wild engines to be run on crossings at not more than fifteen miles an hour unless a red flag has been sent out on the preceding train, may be proved, in an action for injuries by

such an engine where the rule was violated: *Lyman v. Boston &c. R. Co.*, 66 N. H. 200; s. c. 20 Atl. Rep. 976; 11 L. R. A. 364; 45 Am. & Eng. Rail. Cas. 163.

<sup>113</sup> This case is cited in § 2031.

<sup>114</sup> 4 Thomp. Corp., § 5507.



which railway trains may be run, especially when passing through populous cities and towns.<sup>115</sup> There is State judicial opinion to the effect that where a railroad is an instrument of interstate commerce, it does not deprive the Legislature of the State, through which it passes, of the power to limit its rate of speed to six miles an hour across a highway in or near the compact part of a town;<sup>116</sup> nor to make the proprietors of such a railroad *insurers* against damage done by fire from their locomotives.<sup>117</sup>

§ 1896. **Reasonableness of Ordinances Regulating Speed of Trains.**—There is less difficulty in dealing with this subject, in the case of a municipal ordinance, than there is in the case of an act of the State Legislature; the courts have the power to set aside a municipal ordinance on other grounds than the infringement of a constitutional right. They may, for example, set it aside because of its being *unreasonable*,<sup>118</sup> or in *restraint of trade*.<sup>119</sup> Recognizing this doctrine, it has been held that a municipal ordinance, limiting the rate of speed at which cars of any kind shall be run within the limits of the city of St. Paul to *four miles an hour*, is in restraint of commerce, unreasonable and hence void.<sup>120</sup> Again, such an ordinance has been held void in its application to that portion of a railroad *securely fenced on both sides* and running through the suburbs of the same city, where the settlement is sparse and the country comparatively unimproved, and there is but one street crossing in the whole district.<sup>121</sup> So, it has been held, that a general power, granted to the council of a city to declare nuisances and provide for their removal, does not authorize them to pass an ordinance prohibiting the running of railway trains *upon any track*, street, or thoroughfare, at a greater rate of speed than six miles an hour.<sup>122</sup> On the other hand, an ordinance of the city of St. Louis

<sup>115</sup> Chicago &c. R. Co. v. Haggerty, 67 Ill. 113; Toledo &c. R. Co. v. Deacon, 63 Ill. 91; Mobile &c. R. Co. v. State, 51 Miss. 137; Knobloch v. Chicago &c. R. Co., 31 Minn. 402; s. c. 18 N. W. Rep. 106.

<sup>116</sup> Clark v. Boston &c. R. Co., 64 N. H. 323; s. c. 5 N. Eng. Rep. 48; 10 Atl. Rep. 676.

<sup>117</sup> Smith v. Boston &c. R. Co., 63 N. H. 25. As to *fire*, see *post*, § 2337, *et seq.* As to the validity and effect of such ordinances, consult, generally, Whelan v. New York &c. R. Co., 38 Fed. Rep. 15; Bluedorn v. Missouri &c. R. Co., 108 Mo. 439; Larkin v. Burlington &c. R. Co., 85 Iowa 492; Buffalo v. New York &c. R. Co., 54 N. Y. St. Rep. 150, 156;

Gratiot v. Missouri &c. R. Co., 116 Mo. 450; s. c. 16 L. R. A. 189. A city ordinance limiting the speed of railroad trains within the city is none the less effective as evidence of negligence because no penalty is prescribed for its violation: Chicago &c. R. Co. v. Hines, 82 Ill. App. 488. <sup>118</sup> 1 Thomp. Corp., & 1021; Zumault v. Kansas City &c. Air Line, 71 Mo. App. 670.

<sup>119</sup> 1 Thomp. Corp., § 1028.

<sup>120</sup> Knobloch v. Chicago &c. R. Co., 31 Minn. 402; s. c. 18 N. W. Rep. 106.

<sup>121</sup> Evison v. Chicago &c. R. Co., 45 Minn. 370; s. c. 11 L. R. A. 434; 48 N. W. Rep. 6.

<sup>122</sup> State v. Jersey City, 29 N. J. L.



prohibiting railway trains from being run within the corporate limits at a greater rate of speed than six miles an hour, has been upheld as reasonable, and commended—mistakenly, it seems to the author—for its humane character and object in the protection of life and property.<sup>123</sup> On a familiar principle,<sup>124</sup> the penal provisions of such ordinances may be enforced against the railway company, although its trains are run at the prohibited rate of speed *in violation of its express orders*.<sup>125</sup>

**§ 1897. What Ordinances Limiting Speed have been Held Reasonable and Valid.**—On the other hand, the following ordinances have

170. An ordinance of a village in Illinois limiting the speed of trains to eight miles an hour is void, because conflicting with the statute (Chap. 114, Par. 87), providing "that no ordinance shall limit the rate of speed in case of passenger trains to less than ten miles per hour, nor in other cases to less than six miles per hour": *Duggan v. Peoria & C. R. Co.*, 42 Ill. App. 536.

<sup>123</sup> *Gratiot v. Missouri & C. R. Co.*, 116 Mo. 450, 466; s. c. 21 S. W. Rep. 1094. The learned judge, who wrote the otherwise satisfactory opinion in this case, was not a resident of the city of St. Louis, and possibly overlooked the fact that its corporate limits extended some thirteen miles in length and six miles in width at the widest part, and that a considerable portion of the territory within those limits is sparsely settled suburban country. He possibly was not aware of the fact that one of the cable roads, occupying the surface of some of the streets of that city, ran, presumably under municipal sanction, at a speed reaching eight miles an hour, and that some of the electric roads attain, in the suburbs of the city, and within the corporate limits, a speed of twelve miles an hour. To limit the speed of a railway passenger train, which does not occupy the surface of the streets, except where it crosses them, to six miles an hour, without reference to location, or the danger to the public, seems arbitrary, unreasonable, and in restraint of commerce; and, in the case of interstate express and passenger trains, it seems to infringe upon the power of Congress

to regulate *interstate commerce*. But see on this last point, *Smith v. Boston & C. Railroad*, 63 N. H. 25, and *Clark v. Boston & C. Railroad*, 64 N. H. 323; s. c. 10 Atl. Rep. 676; 5 N. Eng. Rep. 48. The *president of a village* has no authority to regulate or control the speed of railway trains within the limits of the village, until the village has taken action by ordinance in relation thereto: *Partlow v. Illinois & C. R. Co.*, 150 Ill. 321; s. c. 37 N. E. Rep. 663; aff'g 51 Ill. App. 597. That the common council of Buffalo have this power,—see *Buffalo v. New York & C. R. Co.*, 152 N. Y. 276; s. c. 46 N. E. Rep. 496. That the commissioners of the District of Columbia have this power,—see *Baltimore & C. R. Co. v. District of Columbia*, 25 Wash. L. Rep. 118; s. c. 10 App. (D. C.) 111. An ordinance of the city of Buffalo, restricting the speed of railway trains crossing the public streets at grade to six miles an hour, except "passenger trains running on the Belt Line of the New York Central & Hudson River Railroad," is not invalid as making an unreasonable discrimination between roads, where it is shown that the Belt Line is not a railroad company, but merely a particular train run around the city for local passenger traffic only, and not competing with any other road: *Buffalo v. New York & C. R. Co.*, 23 N. Y. Supp. 303; s. c. 54 N. Y. St. Rep. 150, 156.

<sup>124</sup> Vol. I, § 530.

<sup>125</sup> *Buffalo v. New York & C. R. Co.*, 54 N. Y. St. Rep. 150; s. c. 23 N. Y. Supp. 303; following and applying the doctrine of *Davis v. Bemis*, 40 N. Y. 453.



been held not unreasonable under the circumstances in which they were applied:—An ordinance limiting speed to ten miles an hour, when applied to a crossing three-quarters of a mile from a station, beyond which the land is used for agricultural purposes, where the crossing is dangerous when passed by trains at a high rate of speed;<sup>126</sup> requiring trains to cross the streets of a populous city, at a rate not to exceed six miles an hour;<sup>127</sup> limiting speed within the limits of a city to six miles an hour, when applied to the running of trains on a street along one side of a public square,—the same not being invalid because other ordinances required *flagmen* to be stationed at the crossing of the square.<sup>128</sup> An ordinance limiting the speed at which railway trains may cross the streets of a populous city, is not unfair, discriminatory or unreasonable, because it excepts from its operation trains established for the convenience of local traffic, the fare upon which is limited to five cents between any points on the line.<sup>129</sup>

§ 1898. **What Ordinances Limiting Speed have been Held Unreasonable, and hence Void.**—Municipal ordinances of the following character have been held unreasonable, and hence void:—Prohibiting railway trains from running at a greater speed than four miles an hour within city limits, which included much farming land;<sup>130</sup> limiting the rate of speed of trains in one part of the city only, where there is no material difference in the character of such part, and of another part, through which a competing line runs;<sup>131</sup> limiting speed to six miles an hour, as applied to a place which includes an extension made to the city limits after the passage of the ordinance, where the right of way is fenced for a space of two miles on both sides of the track, although there is a platted addition near the track, the streets of which do not, however, cross the right of way;<sup>132</sup> fixing the maximum rate of speed within city limits at six miles per hour, the same being unreasonable and void as applied to a part of the street occupied only by

<sup>126</sup> *Larkin v. Burlington &c. R. Co.*, 85 Iowa 492; s. c. 52 N. W. Rep. 480.

<sup>127</sup> *Buffalo v. New York &c. R. Co.*, 152 N. Y. 276; s. c. 46 N. E. Rep. 496.

<sup>128</sup> *Lake Erie &c. R. Co. v. Noblesville*, 15 Ind. App. 697; s. c. 44 N. E. Rep. 651.

<sup>129</sup> *Buffalo v. New York &c. R. Co.*, 152 N. Y. 276; s. c. 46 N. E. Rep. 496. That an ordinance prohibiting a greater rate of speed than four miles an hour by railroad trains within a city's limits is *not so palpably and manifestly unreasonable*

as to justify evidence to show whether the locality was or was not sparsely settled,—see *Weyl v. Chicago &c. R. Co.*, 40 Minn. 350; s. c. 42 N. W. Rep. 24.

<sup>130</sup> *White v. St. Louis &c. R. Co.*, 44 Mo. App. 540. Especially where there are no streets crossing the track for about two miles: *Schulz v. Chicago &c. R. Co.*, 57 Minn. 271; s. c. 59 N. W. Rep. 192.

<sup>131</sup> *Lake View v. Tate*, 130 Ill. 247; s. c. 6 L. R. A. 268; 39 Am. & Eng. Rail. Cas. 703; 22 N. E. Rep. 791.

<sup>132</sup> *Burg v. Chicago &c. R. Co.*, 90 Iowa 106; s. c. 57 N. W. Rep. 680.



agricultural lands;<sup>133</sup> and under the facts of the cases cited in the margin.<sup>134</sup>

§ 1899. **Validity of Statutes Requiring Trains to Come to a Full Stop on Approaching Crossings.**—In a few instances, statutes and municipal ordinances have been enacted requiring railway trains to be *brought to a full stop* on approaching highway crossings. It is believed that these statutes and ordinances can not be upheld as valid police regulations, unless in cases of crossings where the danger is exceptional. Railway trains could not be run at any considerable rate of speed if they were obliged to come to a full stop at every highway grade crossing. Such a statutory requirement, unless embodied in the charter of the company, or in an applicatory statute existing at the time of its creation, would plainly have the effect of impairing the obligation of the contract created between the corporation and the State by the grant of its franchises by the State and their acceptance by the corporators. It would be destructive of its business, and, as business is property, it would hence operate to deprive it of its property without due process of law. As applied to interstate trains, it would constitute such an embargo upon interstate commerce, as the commerce clause of the constitution of the United States, according to its interpretation by the Supreme Court of the United States, has placed outside the power of the States. Aside from this, it would be an intolerable burden upon the public entitled to the benefit of rapid transit. Such provisions are more apt to be found in local municipal ordinances, whose authorities, in enacting them, look primarily to the protection of the inhabitants of the particular municipality, than in general statutes, enacted by legislatures, which may be supposed to have some regard to the general public interest. Such an ordinance, requiring of railroad companies crossing specified streets of a city, to first come to a full stop, has been held to operate unreasonably against a particular company, where its road was the only one which crossed such streets, and where there were other streets more frequented by travellers, which were crossed by the roads of other companies, as to which there was no such restriction.<sup>135</sup>

<sup>133</sup> *Zumault v. Kansas City &c. Air Line*, 71 Mo. App. 670.

<sup>134</sup> *White v. St. Louis &c. R. Co.*, 44 Mo. App. 540; *Duggan v. Peoria &c. R. Co.*, 42 Ill. App. 536; *Schultz v. Chicago &c. R. Co.*, 57 Minn. 271; *Burg v. Chicago &c. R. Co.*, 90 Iowa 106; *Weyl v. Chicago &c. R. Co.*, 40 Minn. 350; *Lake View v. Tate*, 130 Ill. 247; s. c. 6 L. R. A. 268; *Evison*

*v. Chicago &c. R. Co.*, 45 Minn. 370; s. c. 11 L. R. A. 434.

<sup>135</sup> *Buffalo v. New York &c. R. Co.*, 152 N. Y. 276; s. c. 46 N. E. Rep. 496. Where there is an ordinance requiring trains to come to a full stop at a crossing, the neglect to do so has been regarded as an *evidentiary fact*, having some bearing on the question of the speed at which



§ 1900. **Doctrine that Violation of Statute or Ordinance Limiting Rate of Speed is Negligence per se.**—In conformity with a principle already explained,<sup>136</sup> many courts hold that the violation by a railway company of a statute or municipal ordinance regulating the speed of its trains is *negligence per se*.<sup>137</sup>

§ 1901. **Doctrine that the Violation of such Statutes and Ordinances is merely Evidence of Negligence.**—In conformity with another doctrine already explained,<sup>138</sup> other courts hold that the violation by a railroad company of a statute or municipal ordinance limiting the speed of its trains is not negligence as matter of law, but is merely *evidence of negligence* to be considered by the jury.<sup>139</sup> In a jurisdiction where the doctrine is held that the violation of such a statute or ordinance is negligence *per se*, it has always been held that such ordinance may be *put in evidence* to prove negligence in connection with evidence that the train was in fault in moving at a greater speed, *although the ordinance is not pleaded*, and negligence is not predicated

the train was running near such a crossing: *Staal v. Grand Rapids & C. R. Co.*, 57 Mich. 239; s. c. 23 N. W. Rep. 795.

<sup>136</sup> Vol. I, § 10, and other sections there referred to.

<sup>137</sup> *Schlereth v. Missouri & C. R. Co.*, 96 Mo. 509; s. c. 10 S. W. Rep. 66; *South & C. R. Co. v. Donovan*, 84 Ala. 141; s. c. 4 South. Rep. 142; *Dull v. Cleveland & C. R. Co.*, 21 Ind. App. 571; s. c. 1 Repr. 676; 52 N. E. Rep. 1013; *Gulf & C. R. Co. v. Pendery*, 14 Tex. Civ. App. 60; s. c. 35 S. W. Rep. 793; *Gratiot v. Missouri & C. R. Co.*, 116 Mo. 450; s. c. 21 S. W. Rep. 1094; *Neier v. Missouri & C. R. Co.*, 12 Mo. App. 25; *Sullivan v. Missouri & C. R. Co.*, 117 Mo. 214; s. c. 23 S. W. Rep. 149; *Chicago & C. R. Co. v. Gunderson*, 65 Ill. App. 638; *Skiry v. Wabash R. Co.*, 14 Ind. App. 126; s. c. 42 N. E. Rep. 656; *Prewitt v. Missouri & C. R. Co.*, 134 Mo. 615; s. c. 36 S. W. Rep. 667; *Easley v. Missouri & C. R. Co.*, 113 Mo. 236; s. c. 20 S. W. Rep. 1073; *Piper v. Chicago & C. R. Co.*, 77 Wis. 247; s. c. 46 N. W. Rep. 165; *Tobin v. Missouri & C. R. Co. (Mo.)*, 18 S. W. Rep. 996; *Dahlstrom v. St. Louis & C. R. Co.*, 108 Mo. 525; s. c. 18 S. W. Rep. 919; *Pennsylvania Co. v. Horton*, 132 Ind. 189; s. c. 31 N. E. Rep. 45; *Keim v. Union & C. R. Co.*, 90 Mo. 314; s. c. 7 West. Rep. 144.

<sup>138</sup> Vol. I, § 11, and other sections there referred to.

<sup>139</sup> *Beck v. Vancouver & C. R. Co.*, 25 Or. 32; s. c. 34 Pac. Rep. 753; *Driver v. Atchison & C. R. Co.*, 59 Kan. 773; s. c. 3 Am. Neg. Rep. 550; 10 Am. & Eng. Rail. Cas. (N. S.) 98; 52 Pac. Rep. 79; *Clark v. Boston & C. R. Co.*, 64 N. H. 323; s. c. 10 Atl. Rep. 676; 5 N. Eng. Rep. 48; *Nutter v. Boston & C. Railroad*, 60 N. H. 483; *Chicago & C. R. Co. v. Fell*, 79 Ill. App. 376; *Chicago & C. R. Co. v. Argo*, 82 Ill. App. 667; *Wabash R. Co. v. Zerwick*, 74 Ill. App. 670; *Chicago & C. R. Co. v. Winter*, 175 Ill. 293; s. c. 51 N. E. Rep. 901; *aff'g* 65 Ill. App. 435; *Stoltz v. Baltimore & C. R. Co.*, 7 Ohio C. D. 435; *Mahan v. Union Depot & C. Co.*, 34 Minn. 29. In Illinois, the fact that a street car collided with a railroad train while it was going at a speed in excess of that prescribed by city ordinance, in violation of a statute (Ill. Rev. St., ch. 114, par. 62), taken in connection with testimony that the car would have passed the railroad track in safety if the train had been going at lawful rate of speed, is sufficient to support a finding that the negligence of the railroad company was the proximate cause of an injury to a passenger in the street car when the collision occurred: *Chicago & C. R. Co. v. Hines*, 183 Ill. 482; s. c. 56 N. E. Rep. 177; *aff'g* s. c. 82 Ill. App. 488.



upon it in the plaintiff's petition as the foundation of his right of recovery;<sup>140</sup> and the rule in that jurisdiction seems to be that a violation of such an ordinance is negligence *per se* where the ordinance is pleaded, and that the ordinance may be given in evidence and may constitute evidence of negligence where it is not pleaded; though where it is not pleaded, the violation of it does not constitute *negligence per se*.<sup>141</sup> In such a case, it is proper to instruct the jury that running at a speed in violation of a city ordinance, is evidence of negligence.<sup>142</sup> It seems that in Illinois the violation of the ordinance resulting in an accident raises a statutory presumption<sup>143</sup> of the negligence of the railway company, which it is required to rebut.<sup>144</sup>

§ 1902. **Statutes and Ordinances Limiting Rates of Speed do not License Dangerous Rates of Speed.**<sup>145</sup>—It must also be kept in mind that, although there may be a statute or municipal ordinance limiting the speed at which railway trains may be run, within the limits of a town or city, or at other places,—yet this does not license the railroad company to run its trains at such rate of speed at all such places, and under all circumstances; but the duty may rest upon it, in the exercise of reasonable care for the safety of travellers upon the roads and streets, to run its trains at a less rate of speed than that prescribed by statute or ordinance.<sup>146</sup>

§ 1903. **Construction of Various Statutes and Ordinances Limiting the Speed of Trains.**—An ordinance limiting the speed of railroad trains within city limits has been held operative in the *yards* of the

<sup>140</sup> *Robertson v. Wabash &c. R. Co.*, 84 Mo. 119.

<sup>141</sup> *Windsor v. Hannibal &c. R. Co.*, 45 Mo. App. 123. The soundness of this distinction is very questionable.

<sup>142</sup> *McMarshall v. Chicago &c. R. Co.*, 80 Iowa 757; s. c. 45 N. W. Rep. 1065.

<sup>143</sup> *Under Rev. Stat. Ill.*, ch. 114, § 87.

<sup>144</sup> *Atchison &c. R. Co. v. Feehan*, 47 Ill. App. 66, 71; s. c. affirmed on other grounds, 149 Ill. 202; 36 N. E. Rep. 1036. More or less opposed to the doctrine of the text is a decision of the Court of Appeals of New York (*Maynard, J.*, dissenting) to the effect that the failure of an engineer to give signals required by statute at a highway crossing does not, as matter of law, make the railroad

company liable for neglect of duty, where the provisions of the statute impose the duty *upon the engineer* and make him liable for a *misdeemeanor* if he fails to comply therewith: *Vandewater v. New York &c. R. Co.*, 135 N. Y. 583; s. c. 18 L. R. A. 771; 49 N. Y. St. Rep. 55; 32 N. E. Rep. 636.

<sup>145</sup> This section is cited in §§ 1946, 1949.

<sup>146</sup> *Wabash R. Co. v. Henks*, 91 Ill. 406; *Alabama &c. R. Co. v. Phillips*, 70 Miss. 14; s. c. 11 South. Rep. 602; *Whalen v. New York &c. R. Co.*, 38 Fed. Rep. 15; *Blackenstoe v. Wabash &c. R. Co.*, 25 Mo. App. 148; *Chicago &c. R. Co. v. Dougherty*, 12 Ill. App. 181; *ante*, §§ 1494, 1555, 1873.



company,<sup>147</sup> situated within a city;<sup>148</sup> and to be applicable to a freight engine carrying employes to their dinners, although the maximum speed allowed to passenger trains and cars was ten miles an hour.<sup>149</sup> A statute requiring the engineer before entering "any curve crossed by a public street in a cut where he can not see at least one-quarter of a mile ahead," to reduce the speed of his train, etc., is limited to such crossings as are particularly described therein, and leaves his duty at other crossings to be determined by the common law.<sup>150</sup> A statute requiring the speed of trains to be checked on approaching *road* crossings, has been held to apply to crossings of *streets* in a city.<sup>151</sup> An ordinance limiting the rate of speed within a city applies in the case of a train run upon a track laid upon the "city side" of a street forming the boundary line of the city.<sup>152</sup> An ordinance limiting the speed of any passenger or freight train or cars, is applicable to a locomotive engine when running alone, as well as when drawing a train.<sup>153</sup> But an ordinance limiting the speed of "passenger trains" does not apply to an engine and tender.<sup>154</sup> A statute providing that, in all cities and villages no train or locomotive shall go faster than six miles an hour "until having passed all travelled streets," prohibits the driving of a train faster than this limit, after entering the city limits and just before coming to a travelled street.<sup>155</sup>

§ 1904. Further of the Construction of such Statutes and Ordinances.<sup>156</sup>—An ordinance limiting the speed of railway trains in the city will not be construed as applying only to those portions of the city used by the public.<sup>157</sup> An ordinance thus limiting the rate of speed of railway trains applies not only in the case of an injury to persons produced by running the train at the prohibited rate of speed, but also in the case of *damages done to real estate* and from the same

<sup>147</sup> East St. Louis & C. R. Co. v. Eggman, 170 Ill. 538; s. c. 48 N. E. Rep. 981; 9 Am. & Eng. Rail. Cas. (N. S.) 438; aff'g 71 Ill. App. 32; Bluedorn v. Missouri & C. R. Co., 108 Mo. 439; Grube v. Missouri & C. R. Co., 98 Mo. 330; s. c. 4 L. R. A. 776; Crowley v. Burlington & C. R. Co., 65 Iowa 658.

<sup>148</sup> Houston & C. R. Co. v. Powell (Tex. Civ. App.), 41 S. W. Rep. 695 (no off. rep.).

<sup>149</sup> East St. Louis & C. R. Co. v. Reames, 173 Ill. 582; s. c. 51 N. E. Rep. 68; aff'g 75 Ill. App. 28.

<sup>150</sup> East Tennessee & C. R. Co. v. Deaver, 79 Ala. 216.

<sup>151</sup> Central R. Co. v. Russell, 75 Ga. 810. Somewhat to the same effect,

see Northern & C. R. Co. v. Herckis-  
kel, 38 U. S. App. 659; s. c. 20 C. C.  
A. 593; 74 Fed. Rep. 460.

<sup>152</sup> Lake Erie & C. R. Co. v. Norris,  
60 Ill. App. 112.

<sup>153</sup> East St. Louis & C. R. Co. v.  
O'Hara, 150 Ill. 580; s. c. 37 N. E.  
Rep. 917; aff'g s. c. 49 Ill. App. 282.  
*Contra*, Lake Shore & C. R. Co. v.  
Probeck, 38 Ill. App. 145.

<sup>154</sup> Lake Shore & C. R. Co. v. Pro-  
beck, 38 Ill. App. 145.

<sup>155</sup> Hooker v. Chicago & C. R. Co.,  
76 Wis. 542; s. c. 41 Am. & Eng. Rail.  
Cas. 498; 44 N. W. Rep. 1085.

<sup>156</sup> This section is cited in § 1875.  
<sup>157</sup> Crowley v. Burlington & C. R.  
Co., 65 Iowa 658.



cause,<sup>158</sup>—as where a train runs off the track into a building.<sup>159</sup> An ordinance authorizing passenger trains to run at a higher rate of speed than that allowed to freight trains does not allow the higher speed to freight trains merely because they carry passengers in their caboose.<sup>160</sup> The words “city, town or village” in a statute restricting the rate of speed of railway trains, are construed as referring only to *incorporated* cities, towns or villages, and as applying to all violations of the statute which occur within the corporate limits, without regard to the irregular and variable lines of settlements and improvements.<sup>161</sup> Upon a view already considered,<sup>162</sup> a city ordinance does not merely operate to raise a duty in behalf of the city, to be redressed in case of a breach by the imposition of a fine in the police court; but, although it imposes a fine for its violation, the violation of it is either negligence *per se*, or evidence of negligence, according to the theory which prevails on the question in the particular jurisdiction, and in either case supports a right of action against the railroad company, on behalf of the person injured through its violation.<sup>163</sup>

**§ 1905. Miscellaneous Holdings Relating to the Prohibited Speed of Trains.**—The fact that a railroad company had *instructed its employes* not to run trains of the road through a city at a speed greater than that provided by the city ordinance will not excuse it for violation of such ordinance;<sup>164</sup> since, when acting within the scope of their employment, the fact that they act contrary to orders is immaterial.<sup>165</sup> It has been held not necessarily negligence for those in charge of a

<sup>158</sup> *Porterfield v. Bond*, 38 Fed. Rep. 391.

<sup>159</sup> *Post*, § 1958; *ante*, § 1886.

<sup>160</sup> *Chicago & C. R. Co. v. Thorson*, 68 Ill. App. 288, 292.

<sup>161</sup> *Illinois & C. R. Co. v. Jordan*, 63 Miss. 458. That unincorporated villages are not within such statute,—see *Nolan v. Milwaukee & C. R. Co.*, 91 Wis. 16; s. c. 64 N. W. Rep. 319. That the failure of a railroad company to obey its own instructions as to the rapidity of trains, would not render it liable for an injury to a traveller unless such failure was *gross* negligence, was the railroad-manipulated law of Texas prior to the act of March 25, 1887: *International & C. R. Co. v. Kuehn*, 11 Tex. Civ. App. 21; s. c. 31 S. W. Rep. 322. The failure of a city to enforce an ordinance against certain railroad companies, prohibiting trains from crossing city streets above the prescribed rate of speed,

has been held no defense to an action against *another company* to recover penalties for a violation of such provision: *Buffalo v. New York & C. R. Co.*, 152 N. Y. 276; s. c. 46 N. E. Rep. 496. Construction of the *rule* of a railroad company that the speed of trains must not exceed fifteen miles an hour, exclusive of stops, except in cases where schedules are run faster than fifteen miles an hour: *Sutherland v. Troy R. Co.*, 54 Hun (N. Y.) 639; *aff'g* s. c. 46 Hun (N. Y.) 372; 28 N. Y. St. Rep. 201; 8 N. Y. Supp. 83; s. c. *rev'd*, 125 N. Y. 737.

<sup>162</sup> Vol. I, § 12.

<sup>163</sup> *Wabash & C. R. Co. v. Backenstoe*, 23 Mo. App. 148; s. c. *aff'd* in 1 West. Rep. 743; s. c. 86 Mo. 492.

<sup>164</sup> *Hammond v. New York & C. R. Co.*, 5 Ind. App. 526; 31 N. E. Rep. 817.

<sup>165</sup> Vol. I, § 530.



train of cars to proceed at the usual speed after passing a wagon seat and box on the way.<sup>166</sup> A railroad company is not excused from the consequences of running a train at a great speed through a station or in the street of a populous city, because the engineer was temporarily disabled from controlling his engine by an accident received from the lever, which, after it was reversed to shut off steam, slipped from its position and struck him a violent blow.<sup>167</sup> It seems that it is not essential to a right of recovery from a railway company for injuries due to running a train at a *prohibited rate of speed*, that the injury should have been caused by *actual collision* with the train, if the accident would not have occurred except for the prohibited rate of speed.<sup>168</sup>

<sup>166</sup> McDonald v. Chicago &c. R. Co., 75 Wis. 121; s. c. 43 N. W. Rep. 744.

<sup>167</sup> Parsons v. New York &c. R. Co., 113 N. Y. 355; s. c. 3 L. R. A. 683; 22 N. Y. St. Rep. 697; 21 N. E. Rep. 145. *One railroad company can not recover from another for injury to property in a collision which would not have occurred but for its own train running at a rate of speed*

prohibited by a valid city ordinance, when the defendant could not have avoided the collision after becoming aware of the speed of plaintiff's train: Central R. &c. Co. v. Brunswick &c. R. Co., 87 Ga. 386; s. c. 13 S. E. Rep. 520.

<sup>168</sup> Illinois &c. R. Co. v. Crawford, 68 Ill. App. 355; s. c. aff'd 169 Ill. 554; s. c. 48 N. E. Rep. 679.



## CHAPTER LXI.

FRIGHTENING THE HORSES OF TRAVELLERS IN RAILWAY OPERATION.<sup>1</sup>

## SECTION

- 1908. Railway companies not liable for frightening horses by their usual and necessary operations.
- 1909. But are liable for frightening horses negligently, wantonly, or without necessity.
- 1910. Frightening horses by conduct which is unnecessary and wanton.
- 1911. Negligence or misconduct must have been the proximate cause of the horse taking fright.
- 1912. What if several causes concur in frightening the traveller's horse.
- 1913. Not so liable where their tracks occupy the public highway.
- 1914. Duty to keep a lookout so as to avoid frightening the horses of travellers.
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- 1921. Frightening horses by the operation of hand-cars.
- 1922. Frightening horses by the emission of steam.
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- 1925. Frightening horses by blowing the steam whistle.
- 1926. Frightening horses through failure to give the statutory signals.
- 1927. Frightening horses through failure to give signals on approaching overhead crossings.
- 1928. Frightening horses through sounding whistle at overhead bridges.
- 1929. Contributory negligence of the traveller whose horses are frightened.
- 1930. Cases where contributory negligence has been ascribed to the traveller as matter of law.
- 1931. Cases where contributory negligence was not imputed to the traveller as matter of law.
- 1932. Duty of engineer on seeing horses frightened.
- 1933. Stopping team unhitched near by railroad track.
- 1934. Frightening horses through driving trains at an unlawful rate of speed.

<sup>1</sup> As to frightening horses in street railway operation, see *ante*, § 1417, *et seq.*



## SECTION

1935. Flagman waving lantern in front of horses.
1936. Frightening horses by the unlawful use by railway companies of public landings.
1937. Other instances of horses being frightened by ordinary operation of railways where the company was exonerated.

## SECTION

1938. Questions of pleading in actions against railway companies for frightening travellers' horses.
1939. Questions of evidence in such actions.
1940. Questions for the jury and instructions in these cases.

§ 1908. **Railway Companies not Liable for Frightening Horses by their Usual and Necessary Operations.**<sup>1a</sup>—Recurring to the familiar principle that damages can not be recovered for a loss happening to one through the doing of an act lawful in itself, unless there is something wrongful in the *manner* of doing the act, we find that railway companies, running their trains in a lawful and usual manner, without negligence or a wanton disregard of the rights of others, are not responsible to travellers for damages which may happen to them in consequence of their horses taking fright at the noises made by the running of such trains.<sup>2</sup> The franchise granted by the State of operating a railroad, by necessary implication, carries with it the right to make whatever noise and to display whatever objects may be reasonably necessary in exercising the powers so granted and in discharging the public duties annexed thereto; and this includes the right, under reasonable conditions, to make noises by the escape of steam, the rattling of cars, the ringing of the locomotive bell, and the sounding of the steam whistle.<sup>3</sup> The test of liability is whether, in doing what the railway company did, it acted reasonably through its servants, having regard to the time, the place and the situation of the parties,—whether it exercised that degree of care which a reasonable man would have exercised under like circumstances;<sup>4</sup> and this, as a general rule, within limits which can be more easily suggested than defined, presents a *question of fact* for a jury.<sup>5</sup> It is only where the railway company,

<sup>1a</sup>This section is cited in §§ 1795, 1849, 1945, 2114, 2127, 2230.

<sup>2</sup>*Ante*, § 1417, *et seq.*; *Favor v. Boston & C. R. Co.*, 114 Mass. 350; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Hall v. Brown*, 54 N. H. 495; *Coy v. Utica & C. R. Co.*, 23 Barb. (N. Y.) 643; *Culp v. Atchison & C. R. Co.*, 17 Kan. 475; *Philadelphia & C. R. Co. v. Stinger*, 78 Pa. St. 219; s. c. 2 Cent. L. J. 555; *Abbot v. Kalbus*, 74 Wis. 504; s. c. 39 Am. & Eng. Rail. Cas. 594; 43 N. W. Rep. 367; *Indianapolis & C. R. Co. v. Boettcher*, 131 Ind. 82; s. c. 28 N. E.

Rep. 551; *Chicago & C. R. Co. v. Cummings*, 24 Ind. App. 192; s. c. 53 N. E. Rep. 1026; *Whitney v. Maine & C. R. Co.*, 69 Me. 208; *Riley v. New York & C. R. Co.*, 90 Md. 53; s. c. 44 Atl. Rep. 994; *Walters v. Chicago & C. R. Co.* 104 Wis. 251; s. c. 80 N. W. Rep. 451.

<sup>3</sup>*Abbot v. Kalbus*, 74 Wis. 504; s. c. 39 Am. & Eng. Rail. Cas. 594; 43 N. W. Rep. 367.

<sup>4</sup>*Omaha & C. R. Co. v. Brady*, 39 Neb. 27; s. c. 57 N. W. Rep. 767.

<sup>5</sup>*Omaha & C. R. Co. v. Brady*, 39 Neb. 27; s. c. 57 N. W. Rep. 767.



through its servants, does something which is both *unusual* and *unnecessary* in the conduct of its business, that it is liable to one whose horse takes fright thereat.<sup>6</sup>

§ 1909. **But are Liable for Frightening Horses Negligently, Wantonly, or without Necessity.**—Whilst no liability attaches for damages arising from the doing of these acts, under proper circumstances, yet it will be different if they are done without necessity, negligently, or wantonly.<sup>7</sup>

§ 1910. **Frightening Horses by Conduct which is Unnecessary and Wanton.**—Accordingly, it has been held that if such a servant, while in charge of the company's engines and machinery, and engaged about its business, willfully perverts such agencies to purposes of wanton mischief, the company must respond in damages. This doctrine has been applied where the person in charge of a railway locomotive frightened a traveller's horse by blowing off steam, and sounding the steam-whistle with a loud noise, when it was wholly unnecessary.<sup>8</sup> But in one case, where the act was done negligently,<sup>9</sup> and in another, where it was done in a spirit of playful wantonness,<sup>10</sup> it was held error to award *exemplary damages*. Accordingly, it has been well held that where the engineer in charge of a locomotive, without necessity or reasonable cause, *sounds the whistle* while his engine is standing in close proximity to a street crossing, upon which vehicles composing a

<sup>6</sup> Morgan v. Central R. Co., 77 Ga. 788; Lamb v. Old Colony R. Co., 140 Mass. 79; s. c. 1 N. E. Rep. 76. Compare Texas &c. R. Co. v. Giddings (Tex. Civ. App.), 24 S. W. Rep. 1125 (no off. rep.). That a statute (Gen. Stat. S. C., § 1529) giving right of action for injuries by *collision* with engines or cars does not give an action for damages caused by frightening horses without collision,—see Kinard v. Columbia &c. R. Co., 39 S. C. 514; s. c. 18 S. E. Rep. 119.

<sup>7</sup> Wabash R. Co. v. Speer, 156 Ill. 244; s. c. 40 N. E. Rep. 835; Chicago &c. R. Co. v. Cummings, 24 Ind. App. 192; s. c. 53 N. E. Rep. 1026; Petersburg R. Co. v. Hite, 81 Va. 767; Culp v. Atchison &c. R. Co., 17 Kan. 475; Borst v. Lake Shore &c. R. Co., 4 Hun (N. Y.) 346; Hill v. Portland &c. R. Co., 55 Me. 438; Manchester &c. R. Co. v. Fullarton, 14 C. B. (N. S.) 53; Pennsylvania R. Co. v. Barnett, 59 Pa. St. 259; Philadelphia &c. R. Co. v. Stinger, 78 Pa. St. 219;

Stamm v. Southern R. Co., 1 Abb. N. C. 438; Chicago &c. R. Co. v. Dunn, 52 Ill. 451; Toledo &c. R. Co. v. Harmon, 47 Ill. 298; Nashville &c. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52; Toledo &c. R. Co. v. Crittenden, 42 Ill. App. 469.

<sup>8</sup> Toledo &c. R. Co. v. Harmon, 47 Ill. 298; Nashville &c. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52. Similarly, see Texas &c. R. Co. v. Scoville, 62 Fed. Rep. 730; s. c. 27 L. R. A. 179; 10 C. C. A. 479; 59 Am. & Eng. Rail. Cas. 619. In Hahn v. Southern Pacific R. Co., 51 Cal. 605, the application of the old rule to such a case was admitted; but as the point that the act of the servant, was *malicious* had not been raised in the proper manner, the plaintiff recovered damages. As to liability for malicious acts of servant, see Vol. I, § 552, *et seq.*

<sup>9</sup> Chicago &c. R. Co. v. Dunn, 52 Ill. 451.

<sup>10</sup> Nashville &c. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52.



*funeral procession* are passing, the railway company is guilty of negligence as matter of law.<sup>11</sup> If the engineer of a locomotive engine unnecessarily and wantonly sounds the whistle near a highway, and thus frightens a team of horses on the highway, causing it to *run away and kill another horse*, the owner of the latter may recover therefor from the railroad company.<sup>12</sup> It has been held *reckless, wanton, and willful* negligence for the engineer of a railroad train approaching a crossing, who has sounded the whistle at a whistling post five hundred feet away and rung the bell, to give sharp, shrill whistles of alarm when close to several teams employed in working along the road, in plain view of such engineer.<sup>13</sup> Nor was it deemed necessary that the engineer should have seen such team, where he saw men and teams at work on the opposite side of the track, and intended to frighten them.<sup>14</sup> If the conduct of the servants of the railway company, whereby the horse of a driver is frightened, is *intentional, malicious, or wanton*, then, on a principle already considered,<sup>15</sup> the *contributory negligence* of the driver in getting himself into a position where his horse is liable to be frightened, is no defense.<sup>16</sup>

§ 1911. **Negligence or Misconduct must have been the Proximate Cause of the Horse Taking Fright.**—The negligence, malice, or wantonness of the company, whatever form it may take, must, of course, be the *proximate cause* of the horse of the traveller taking fright.<sup>17</sup> If the negligence of the railway company, in the manner in which it drove its trains upon a crossing, was the proximate cause of the death of a person at such crossing, it is not relieved from liability on the ground that the team which the decedent was driving was *frightened and unmanageable*, and that such fright was a *concurring cause*.<sup>18</sup> Where the horse of a traveller was frightened through the lowering of a gate at a railway crossing so as to strike him, the fact that a *rein broke* while the driver was attempting to control him, was not sufficient

<sup>11</sup> Northern &c. R. Co. v. Sullivan, 10 U. S. App. 473; s. c. 3 C. C. A. 506; 53 Fed. Rep. 219.

<sup>12</sup> Billman v. Indianapolis &c. R. Co., 76 Ind. 166; s. c. 40 Am. Rep. 230.

<sup>13</sup> Chicago &c. R. Co. v. Yorty, 56 Ill. App. 242; s. c. aff'd 158 Ill. 321; 42 N. E. Rep. 64.

<sup>14</sup> Chicago &c. R. Co. v. Yorty, 158 Ill. 321; s. c. 42 N. E. Rep. 64; aff'g s. c. 56 Ill. App. 242.

<sup>15</sup> Vol. I, §§ 206, 207, 265, 266, 276.

<sup>16</sup> Texas &c. R. Co. v. Syfan (Tex. Civ. App.), 43 S. W. Rep. 551 (no off. rep.); s. c. aff'd in 91 Tex. 562; 44 S. W. Rep. 1064; Wabash R. Co. v.

Speer, 156 Ill. 244; s. c. 40 N. E. Rep. 835. The presumption of negligence created by § 3033 of the Georgia code, in a railroad company from the careless or improper conduct of its employes, is not rebutted by proof that a locomotive engineer blew the whistle through a spirit of revenge towards a traveller, to frighten his horse: Georgia R. Co. v. Newsome, 60 Ga. 492.

<sup>17</sup> Wakefield v. Connecticut &c. R. Co., 37 Vt. 330. Compare Vol. I, § 91, *et seq.*

<sup>18</sup> Pratt v. Chicago &c. R. Co., 107 Iowa 287; s. c. 77 N. W. Rep. 1064.



to arrest the chain of causation and relieve the railway company from liability for the resulting damages, in the absence of proof that the rein was defective, although no injury would have resulted to the driver if it had not broken.<sup>19</sup> Upon the question of the remoteness of damages it has been held that damages which consist in *rendering a horse vicious* and unsafe as a result of his becoming frightened at the buggy to which he was hitched catching upon the head of a large spike at a railroad crossing and being thrown to one side, are not too speculative or remote to be recoverable from the company.<sup>20</sup>

§ 1912. **What if Several Causes Concur in Frightening the Traveler's Horse.**—On the principle that where two concurring causes result in an injury, one of which is imputable to the negligence of the defendant, and the other to mere accident or the negligence of some third person for which neither the plaintiff nor the defendant is responsible,<sup>21</sup> the defendant will be liable in damages,—it has been held that a railroad company is liable for the damages resulting from the frightening of a team on a highway, caused partly by a *box-car* partially obstructing the highway and partly by a *noise* for which the company was not responsible.<sup>22</sup> If *two lines* of railroad are operated by *the same company*, and a team is frightened by a train on *one track*, and is struck by a train on the other not far away, the management of the trains on *both tracks* may be considered in determining the company's liability.<sup>23</sup> So, if the proximate cause of the frightening of the horse was the *unlawful speed of the train*, and the *failure to ring the bell*, as required by a city ordinance, by reason of which the plaintiff approached too near the track with the horse, and also the *escape of steam* from the engine, the mere fact that *one* of these causes, namely, the escape of the steam, was necessary and lawful, did not exonerate the defendant.<sup>24</sup> So, where the highway was *unlawfully obstructed* by a freight train standing across it, detaining the plaintiff, who was driving an omnibus, it was held a question for the jury whether the presence of the obstructing train did not give a different color and character to the passing of a passenger train on the other side of it, so as to convert the obstructing train into a fear-excit-

<sup>19</sup> Phillips v. New York &c. R. Co., 127 N. Y. 657; s. c. 38 N. Y. St. Rep. 675; 27 N. E. Rep. 978.

<sup>20</sup> English v. Missouri &c. R. Co., 73 Mo. App. 232; s. c. 1 Mo. App. Rep. 135.

<sup>21</sup> Vol. I, §§ 68, 70.

<sup>22</sup> Cleveland &c. R. Co. v. Wynant,

134 Ind. 681; s. c. 34 N. E. Rep. 569.

<sup>23</sup> Pence v. Chicago &c. R. Co., 79 Iowa 389; s. c. '42 Am. & Eng. Rail. Cas. 126; 44 N. W. Rep. 686.

<sup>24</sup> Louisville &c. R. Co. v. Davis, 7 Ind. App. 222; s. c. 33 N. E. Rep. 451.



ing agency, producing the effect which caused the fright of the plaintiff's horses, their running away, and his injury.<sup>25</sup>

§ 1913. **Not so Liable where their Tracks Occupy the Public Highway.**—If a railroad company has the lawful right to occupy a portion of a public street or highway with its tracks or to lay its tracks near a public street or highway,—then it follows that the company will not be blamable for using the track thus laid *in the ordinary way*, having reference to the rights of the travelling public.<sup>26</sup>

§ 1914. **Duty to Keep a Lookout so as to Avoid Frightening the Horses of Travellers.**—If it be the law that railroad companies are not at liberty to conduct their operations in total disregard of the safety of travellers driving upon adjacent highways, then it must follow, by parity of reasoning, that they are bound to *keep a reasonable lookout* to the end of *discovering* such travellers and of adjusting their operations so as to minimize the danger of frightening their horses. It was so held where the horse of the plaintiff was frightened by a train of the defendant while driving along a public road, which, for a short distance, was upon the defendant's right of way, which road had been used by the public for more than ten years without objection on the part of the defendant. Here it was held that the defendant was under the duty of exercising ordinary care to ascertain the situation of the plaintiff upon the road, so as to avoid, as far as consistent with the proper operation of its train, the doing of acts which might result in frightening his horse.<sup>27</sup> Contrary to the foregoing, one court has held that a railroad company is not liable to one whose horses were frightened by the sight and sound of an engine, for the failure of a *flagman* at a crossing to *notify him*, when he was about to cross the tracks, that there was an engine switching in the vicinity, when it was apparent it was not going to run over the crossing.<sup>28</sup> The propriety of this holding may be doubted; but there can be no doubt as to the impropriety of the decision of another court to the effect that

<sup>25</sup> *Selleck v. Lake Shore &c. R. Co.*, 93 Mich. 375; s. c. 18 L. R. A. 154; 53 N. W. Rep. 556.

<sup>26</sup> *Whitney v. Maine &c. R. Co.*, 69 Me. 208; *Cohoon v. Chicago &c. R. Co.*, 85 Wis. 570; s. c. 55 N. W. Rep. 900; *Omaha &c. R. Co. v. Clark*, 35 Neb. 867; s. c. 53 N. W. Rep. 970; *Leavitt v. Terre Haute &c. R. Co.*, 5 Ind. App. 513; s. c. 12 Rail. & Corp. L. J. 246; 31 N. E. Rep. 860; rehearing denied 5 Ind. App. 521; 32 N. E. Rep. 866 (emission of steam frightening a horse at a crossing);

*Louisville &c. R. Co. v. Schmidt*, 134 Ind. 16; s. c. 30 N. E. Rep. 774; *Omaha &c. R. Co. v. Brady*, 39 Neb. 27; s. c. 57 N. W. Rep. 767; *Oxford Lake Line v. Steadman*, 101 Ala. 376; s. c. 13 South. Rep. 553 (blowing off steam while slowing up in rounding a curve).

<sup>27</sup> *Missouri &c. R. Co. v. Bellew* (Tex.), 54 S. W. Rep. 1079.

<sup>28</sup> *Walters v. Chicago &c. R. Co.*, 104 Wis. 251; s. c. 80 N. W. Rep. 451.



the servants in charge of a train in a city were not required to keep a lookout on adjacent premises; and owed no duty to one who was in charge of a team near the track to avoid usual and proper noises, *until they perceived his danger*.<sup>29</sup> This holding assimilates the legal status of persons driving in the vicinity of railway tracks to that of trespassers upon such tracks,<sup>30</sup> and absolves the railway corporation from any duty of looking out for their presence so as to take such measures as it properly can to avoid frightening their horses.

§ 1915. **Frightening Horses by Leaving Cars Standing on or near the Highway.**—While such a company is, on general principles, like any other person or corporation, liable for leaving on or near the public highway an object, the natural tendency of which will be to frighten the horses of travellers,<sup>31</sup> yet it can not be pronounced negligence as matter of law for such a company to leave a car standing upon its track, near, but not upon a highway crossing, provided it is not so near the highway as to frighten ordinarily quiet and roadwise horses;<sup>32</sup> but it may be negligence for it to do so, as matter of fact, under particular circumstances.<sup>33</sup> Another court, proceeding upon the obvious principle that if a railroad company has the right to extend a *switch track* into the highway, it is bound to use such track in such a manner as not unnecessarily to interfere with public travel over the highway,—has held that the right so to extend this *switch track* gives it no right to *stand its cars there*, but that it may be answerable for negligence at the suit of a traveller injured by his horse taking fright at such cars.<sup>34</sup> And generally, it may be said that a railway company which *unnecessarily obstructs* any portion of a highway at a crossing by leaving cars thereon in such manner as to frighten teams of ordinary docility, is guilty of actionable negligence, whether the obstruction is in the travelled part of the road or not.<sup>35</sup> It was so held where the plaintiff's horse and carriage were detained at a *crossing unlawfully obstructed* by the defendant's freight train, and the horse became frightened by a passenger train passing on the other side of the freight train.<sup>36</sup> The mere fact, however, that a railway train was suffered

<sup>29</sup> Louisville &c. R. Co. v. Penrod (Ky.), 56 S. W. Rep. 1.

<sup>30</sup> *Ante*, § 1705, *et seq.*

<sup>31</sup> *Ante*, § 1257, *et seq.*; Kyne v. Wilmington &c. R. Co., 8 Houst. (Del.) 185; s. c. 14 Atl. Rep. 922; 13 Cent. Rep. 391.

<sup>32</sup> Kyne v. Wilmington &c. R. Co., 8 Houst. (Del.) 185; s. c. 14 Atl. Rep. 922; 13 Cent. Rep. 391.

<sup>33</sup> Galveston &c. R. Co. v. Michalke,

90 Tex. 276; s. c. 38 S. W. Rep. 31; denying writ of error in 37 S. W. Rep. 480.

<sup>34</sup> Bussian v. Milwaukee &c. R. Co., 56 Wis. 325.

<sup>35</sup> Missouri &c. R. Co. v. Jones, 13 Tex. Civ. App. 376; s. c. 35 S. W. Rep. 322.

<sup>36</sup> Selleck v. Lake Shore &c. R. Co., 93 Mich. 375; s. c. 18 L. R. A. 154; 53 N. W. Rep. 556.



to *stand across a highway* for more than two minutes, in violation of a statute imposing a penalty for so doing, so that a traveller's horse, after he had been compelled to wait for the train to get out of the way, took fright when the train began to move, and was killed, did not entitle the owner of the horse to recover damages. The statute was designed merely to prevent travellers being *delayed* at the crossing, and the injury did not, therefore, flow from the violation of the statute, but was collateral to it.<sup>37</sup> It was held that there was evidence of negligence for the jury, where a railway company left a box car within the limits of a highway longer than the law permitted, which frightened a horse, causing him to run away, thereby injuring his driver;<sup>38</sup> where a railway company left a car standing within the limits of the highway, though not on the travelled part of it, in such a position that it was likely to frighten horses, and a horse took fright at it and ran away, doing damage;<sup>39</sup> but not where a railway company left a car in such a position as partially to obstruct a highway crossing for five minutes, while a freight engine was engaged in switching in the yard, taking in and setting out cars, and the horse of a traveller attempting to drive past the car, became frightened, doing damage.<sup>40</sup> Nor is it material to the liability of the railway company that the highway should have been lawfully established as a public highway by prescription or dedication. But it may become liable if its employés leave objects which a reasonably prudent person should know would frighten horses, near a road which has been used by the public to the knowledge of the railroad company and without protest on its part.<sup>41</sup>

<sup>37</sup> Hall v. Brown, 54 N. H. 495.

<sup>38</sup> Peterson v. Chicago & C. Co., 64 Mich. 621; s. c. 7 West. Rep. 854.

<sup>39</sup> Baltimore & C. R. Co. v. Faith, 71 Ill. App. 59. See also Pittsburgh & C. R. Co. v. Kitley, 118 Ind. 152, 155.

<sup>40</sup> Chicago & C. R. Co. v. Kenyon, 70 Ill. App. 567.

<sup>41</sup> Texas & C. R. Co. v. McManus, 15 Tex. Civ. App. 322; s. c. 38 S. W. Rep. 241. While a railroad train occupied a crossing on a highway, leaving only an opening between cars less than the width of the highway, for the passage of teams, and the horse of a passing traveller was frightened by the *shifting of brakes*, a verdict for the plaintiff was sustained: Pennsylvania R. Co. v. Horst, 110 Pa. St. 226; s. c. 1 Cent. Rep. 95. In an action to recover

for personal injuries caused by allowing a car to stand in a street crossing, and by the blowing off of steam from an engine, also standing in the street, it was held that the plaintiff could recover, though the escape of the steam was not negligence, provided the leaving of the car in the street crossing was negligence, and was the proximate cause of the injury: Galveston & C. R. Co. v. Simon (Tex. Civ. App.), 54 S. W. Rep. 309. A railroad company has been held liable for damages caused by a *horse's taking fright at a car* which it has placed on a bridge over a public street so as to be partly in the limits of the street, and allowed to remain there for several days in a position calculated to frighten horses: Harrel v. Albemarle R. Co., 110 N. C. 215; s. c. 14 S. E. Rep. 687.



§ 1916. **Frightening Horses by Leaving Unusual Objects upon or near the Highway.**—On the other hand, a railroad company is no more privileged than a natural person is to deposit or leave something on or near the highway which is *very unusual*, and the obvious tendency of which is to frighten ordinarily gentle horses, especially where it is not necessary for the proper operation of the railroad so to do. For example, a railway company was held liable for personal injuries suffered by one who was thrown from a wagon because the horse became frightened at the *dead body of a steer* negligently removed by railway employes from the railway track, where it was killed, to the side of the highway, where it would not be seen by horses until they had nearly reached it.<sup>42</sup> Again, the right of a railroad corporation to use a portion of the highway for the purpose of *loading and unloading its freight* (if such a right exists at all) is so far subordinate to the lawful use of the highway for the general purposes of travel, that it will be responsible for an injury happening to a traveller by his horse taking fright at a *derrick* employed in thus handling freight.<sup>43</sup>

§ 1917. **Frightening Horses by Leaving Hand-Cars Standing Near the Highway.**—For example, it is not negligence as matter of law to leave a *hand-car* at a highway crossing for a long period of time, although many horses have been frightened by it; but whether this is a proper use of the privileges of the railroad company will be a question of fact for a jury.<sup>44</sup> So, a railroad company is not liable for leaving its cars standing on a side track, *loaded with slabs of wood* in the usual way, and for leaving a *hand-car bottom side up*, according to the usual custom, although it may thereby produce a “scare-crow” with “a horrid and frightful appearance,” frightening a traveller’s horse and injuring the traveller.<sup>45</sup> It has been held that a railway *hand-car* left on a public highway in such a position as to increase the danger of travelling is such an *unlawful obstruction* as will render the railroad company liable to a traveller injured by being thrown from her horse, which became frightened by the car.<sup>46</sup> We have already

<sup>42</sup> *Baxter v. Chicago & C. R. Co.*, 87 Iowa 488; s. c. 54 N. W. Rep. 350. The fact that the railway employes merely removed the animal from the track, and then entrusted it to the son of the owner, was held not to exonerate the railroad company: *Baxter v. Chicago & C. R. Co.*, 87 Iowa 488; s. c. 54 N. W. Rep. 350.

<sup>43</sup> *Jones v. Housatonic R. Co.*, 107 Mass. 261.

<sup>44</sup> *Texas & C. R. Co. v. Hill*, 71 Tex. 451; s. c. 9 S. W. Rep. 351.

<sup>45</sup> *Atchison & C. R. Co. v. Loree*, 4 Neb. 446.

<sup>46</sup> *Ohio & C. R. Co. v. Trowbridge*, 126 Ind. 391; s. c. 26 N. E. Rep. 64; 45 Am. & Eng. Rail. Cas. 200. That leaving a hand-car on or near the public highway presents a *question of fact* on the issue of negligence,—see *Meyers v. Richmond & C. R. Co.*, 87 N. C. 345; *Texas & C. R. Co. v. McManus*, 15 Tex. Civ. App. 122; s. c. 38 S. W. Rep. 241.



seen,<sup>47</sup> that where a railroad company, for its own purposes, *obstructs the public highway* by excavating or throwing up an embankment therein, it is bound, as soon as it reasonably may, to restore the highway to its previous condition, and is liable for any damages happening to travellers without their fault, for its failure in the performance of this duty. If, therefore, the horse of a traveller, while on a portion of the highway which has been thus left negligently disrupted by the railroad company, takes fright at a *passing hand-car*, and injury ensues to the traveller by reason of the dangerous condition of the highway, he may have an action on this ground, although he might not have had an action for the frightening of his horse by the hand-car if the highway had been in good condition.<sup>48</sup> Evidence of negligence has been discovered in the act of a gang of section hands in leaving a hand-car on a crossing filled with articles of a character to frighten horses of ordinary gentleness.<sup>49</sup>

**§ 1918. Duty to Remove Other Objects Calculated to Frighten Horses.**—It is the plain duty of a railway company to remove any other object unnecessarily existing on its right of way, near the public highway, or near a highway crossing, having a tendency to frighten ordinarily gentle and roadwise horses; and if a horse takes fright at such an object and runs away, doing damage, the railway company may become liable to pay such damage. It was so held concerning a *pile of cinders* left near the railway track, partially within the limits of the highway, and so close to the travelled part of it that travellers sometimes drove over it, the cinders being darker than the adjacent soil and hidden from view by weeds until a traveller would be very close to them.<sup>50</sup> On the other hand, it was held that a railroad company was not liable to a traveller for injuries sustained by his *mule* taking fright at a *hole in some rotten planks* in a bridge on a highway

<sup>47</sup> Vol. I, § 1190, *et seq.*; *ante*, § 1498.

<sup>48</sup> *Evansville &c. R. Co. v. Crist*, 116 Ind. 446; s. c. 19 N. E. Rep. 310; 2 L. R. A. 450. In this case the railroad company was under a *statutory* duty to restore the highway to its former condition; but, as we have already seen (*ante*, § 1498), such statutes are merely in affirmance of the common law.

<sup>49</sup> *Sherman &c. R. Co. v. Bridges*, 16 Tex. Civ. App. 64; 40 S. W. Rep. 536.

<sup>50</sup> *Illinois &c. R. Co. v. Griffin*, 184 Ill. 9; s. c. 56 N. E. Rep. 337; aff'g s. c. 84 Ill. App. 152. The court also

held that *cinders* piled and left in this way were a *public nuisance*, and that the railroad company was liable upon this ground: *Illinois &c. R. Co. v. Griffin*, 184 Ill. 9; s. c. 56 N. E. Rep. 337; aff'g s. c. 84 Ill. App. 152. Street railway company liable for permitting *black coats* to be hung on the rear end of one of its cars, so as to be swayed by the motion of the car, frightening a well trained horse of gentle disposition,—negligence a question for the jury: *McCann v. Consolidated Traction Co.*, 59 N. J. L. 481; s. c. 38 L. R. A. 236; 7 Am. & Eng. Rail. Cas. (N. S.) 280; 36 Atl. Rep. 888.



which the company was bound to keep in repair, unless it should be found as a fact that such defects were calculated to frighten *horses (sic)* of ordinary gentleness.<sup>51</sup>

**§ 1919. No Duty to Erect Barriers to Prevent Frightening Horses.**—While railroad corporations are bound to use ordinary care in the operations of their roads, yet the failure to erect fences, screens, or guards between their tracks and contiguous highways is not negligence, so as to charge them with liability for damages produced by a horse taking fright at their cars while travelling on the highway.<sup>52</sup>

**§ 1920. Not Liable for Acts of Trespassers.**—Although negligence may be imputed to a railroad company for leaving its cars standing upon that portion of its track which is a public highway, and although the railroad company is undoubtedly under an obligation to maintain a reasonable inspection and supervision, to the end that its cars shall not be placed there,—yet it can not, under all circumstances, be answerable for the *acts of trespassers*. Accordingly, it has been held that where a box car, placed at a point so as not to obstruct a highway, is moved into the highway by *third parties*, the railroad company is not liable for injuries caused by horses taking fright at it, unless it was negligently permitted to remain there an *unreasonable length of time*.<sup>53</sup>

**§ 1921. Frightening Horses by the Operation of Hand-Cars.**—The use of hand-cars in conveying gangs of men to and fro engaged in repairing railway tracks, and in other railway operations, is customary and necessary, and therefore lawful and proper. It follows that no liability will attach to a railway company from the fact that a traveller's horse becomes frightened through the usual and necessary operation of its hand-cars, provided its servants proceed with reasonable care and caution, having reference to the rights of the travelling public.<sup>54</sup> It has been well held that, where the employés of a railway company drive a hand-car at great speed upon a highway crossing, and see that the horse of a traveller has taken fright at their approach, but make no effort to stop the car, where, if they had done so, the driver

<sup>51</sup> Northern Alabama R. Co. v. Sides, 122 Ala. 594; s. c. 26 South. Rep. 116.

<sup>52</sup> Coy v. Utica & C. R. Co., 23 Barb. (N. Y.) 643; denying Moshier v. Utica & C. R. Co., 8 Barb. (N. Y.) 427.

<sup>53</sup> Cleveland & C. R. Co. v. Wynant, 114 Ind. 525; s. c. 14 West. Rep. 512; 17 N. E. Rep. 118.

<sup>54</sup> Lake Erie & C. R. Co. v. Juday, 19 Ind. App. 436; s. c. 49 N. E. Rep. 834.



could have recovered control of his horse and escaped injury, the company will be liable.<sup>55</sup>

§ 1922. **Frightening Horses by the Emission of Steam.**—A railway company is not liable for allowing the escape of steam from the valves of an engine, causing the frightening of a horse, unless the opening of the valves is unnecessary, and is done under circumstances implying a lack of the care which a prudent and reasonable man would exercise under similar circumstances.<sup>56</sup> It was not liable where a horse was frightened by the escape of steam from a dummy engine permitted by law to be used in a public street;<sup>57</sup> nor where a horse crossing the track was frightened by the sudden escape of steam from a train standing near by,—and this although there was no “muffler” upon the engine to suppress the noise produced by such an escape of steam;<sup>58</sup> nor where, after the defendant’s train had passed near the plaintiff’s horse without frightening it, and after the horse had crossed the track, the engine started to return, when the horse became frightened at the escape of steam and backed the wagon against the train,—since the defendant’s engineer was not guilty of negligence in failing to anticipate that the horse would thus act;<sup>59</sup> nor by reason of the failure of the engineer to *draw the fire* from his engine, or *inject cold water* into the boiler, or *turn the steam into the water tank*, where experts testify that none of these methods would have been practicable, and the drawing of the fire would have delayed and embarrassed the operation of the train, and would not have given immediate relief from the *pressure of the steam*;<sup>60</sup> nor on the ground that the company’s employes told the person injured that she could cross when the steam pressure was at the point of escaping through the safety valve, if they did not know and were not chargeable with the knowledge that the steam would escape as she was crossing the track.<sup>61</sup> But a railroad company was held liable for frightening a horse by steam discharged from a locomotive while it was being run back and forth on its track

<sup>55</sup> *Lake Erie &c. R. Co. v. Juday*, 19 Ind. App. 436; s. c. 49 N. E. Rep. 843.

<sup>56</sup> *Omaha &c. R. Co. v. Clarke*, 39 Neb. 65; s. c. 23 L. R. A. 504, 507; 57 N. W. Rep. 545; *Hahn v. Southern Pac. R. Co.*, 51 Cal. 605; *Philadelphia &c. R. Co. v. Burkhardt*, 83 Md. 516; s. c. 34 Atl. Rep. 1010; 5 Am. & Eng. Rail. Cas. (N. S.) 189; *O’Dair v. Missouri &c. R. Co.*, 14 Tex. Civ. App. 539; s. c. 38 S. W. Rep. 242; *Riley v. New York &c. R. Co.*, 90 Md. 53; s. c. 44 Atl. Rep. 994.

<sup>57</sup> *Howard v. Union Freight R. Co.*, 156 Mass. 159; s. c. 30 N. E. Rep. 479.

<sup>58</sup> *Duvall v. Baltimore &c. R. Co.*, 73 Md. 516; s. c. 21 Atl. Rep. 496.

<sup>59</sup> *Richmond &c. R. Co. v. Yeamans*, 90 Va. 752; s. c. 83 Va. 861; 19 S. E. Rep. 787.

<sup>60</sup> *Louisville &c. R. Co. v. Schmidt*, 134 Ind. 16; s. c. 33 N. E. Rep. 774.

<sup>61</sup> *Louisville &c. R. Co. v. Schmidt*, 134 Ind. 16; s. c. 33 N. E. Rep. 774.



near a highway, for the purpose of limbering it;<sup>62</sup> for the continuous blowing off of steam from an engine, after it has come into plain view of a team frightened and running away, if the blowing off of the steam was not necessary, but was imprudent and careless;<sup>63</sup> for the unnecessary blowing off of steam when the engineer saw that the horse of a driver in the vicinity was likely to be frightened thereby;<sup>64</sup> for the frightening of a team by the escape of steam from an engine standing on a side track adjoining the highway, just as the team was passing, where such engine was permitted to stand under steam for more than eight hours on such side track, and it could, without any inconvenience, have been placed where there would have been no danger of frightening horses;<sup>65</sup> and for unnecessarily permitting steam to escape from a rapidly moving engine immediately after a team had been driven over a crossing, where they knew of such fact and that the escape of the steam would probably frighten the horses.<sup>66</sup>

### § 1923. Further of Frightening Horses by Blowing Off Steam.—

In the application of the foregoing rules, it has been held negligence to blow off the mud-cocks of an engine at the crossing of a highway where there is considerable traffic, and where (in England) teams wait to cross until the gates in charge of the companies' servants are opened;<sup>67</sup> or for an engineer of a dummy railway engine to discharge a sudden jet of steam upon a passing team;<sup>68</sup> or suddenly to emit from an engine standing near a crossing an increased quantity of steam, so as to frighten a traveller's horses after the flagman on duty has beckoned him to cross;<sup>69</sup> or to blow off steam from an engine within the yard of the company at a point unnecessarily near the public highway;<sup>70</sup> or where the engineer, after discovering that the plaintiff's

<sup>62</sup> *Terre Haute & c. R. Co. v. Doyle*, 53 Ill. App. 78.

<sup>63</sup> *St. Louis & c. R. Co. v. Lewis*, 60 Ark. 409; s. c. 30 S. W. Rep. 765.

<sup>64</sup> *Houston & c. R. Co. v. Abrahams* (Tex. Civ. App.), 40 S. W. Rep. 1034 (no off. rep.).

<sup>65</sup> *Dunn v. Wilmington & c. R. Co.*, 124 N. C. 252; s. c. 32 S. E. Rep. 711.

<sup>66</sup> *Missouri & c. R. Co. v. Cloninger* (Tex. Civ. App.), 42 S. W. Rep. 632 (no off. rep.). See also *Manchester & c. R. Co. v. Fullarton*, 14 C. B. (N. S.) 54; *Jones v. Housatonic R. Co.*, 107 Mass. 261; *Pennsylvania R. Co. v. Barrett*, 59 Pa. St. 259; *Tinker v. New York & c. R. Co.*, 157 N. Y. 312; s. c. 51 N. E. Rep. 1031.

<sup>67</sup> *Manchester & c. R. Co. v. Fullarton*, 14 C. B. (N. S.) 53. See also *Toledo & c. R. Co. v. Harmon*, 47 Ill. 298.

<sup>68</sup> *Stamm v. Southern R. Co.*, 1 Abb. N. C. (N. Y.) 438.

<sup>69</sup> *Borst v. Lake Shore & c. R. Co.*, 4 Hun (N. Y.) 346.

<sup>70</sup> *Petersburg R. Co. v. Hite*, 81 Va. 767. The court, speaking through Hinton, J., said: "It did not appear that the engine might have been stopped at a much greater distance from the street and where the steam might have been blown off, without the danger of frightening horses lawfully upon its track."



team was about to cross the track, ordered the driver to stop, and the driver obeyed, and turned his horses' heads to one side, and the engineer continued to back his train, the engine emitting large quantities of steam and smoke, frightening the horses so that they ran away, while the train might have gone ahead and got out of the way in less than the length of a car;<sup>71</sup> where the engineer in charge of an engine standing upon a side track near a street in a populous town, needlessly and unnecessarily opened the valves of the engine and blew off steam, thereby frightening the horses of a traveller;<sup>72</sup> and where, after a train which had blocked a public crossing had moved forward, and before teams which had gathered and been compelled to wait for the train to pass on, had gotten across the track, after being signaled to cross,—an engine near the crossing, and which was obscured from view, approached the crossing, blowing off large volumes of steam and making a great noise calculated to frighten horses.<sup>73</sup>

§ 1924. **Frightening Horses by Letting Off Steam from Automatic Safety Valves.**—So, a railway company is not liable for personal injuries caused by a horse becoming frightened, at or near a street crossing or highway, by the escape of steam from an *automatic safety valve* in an engine, rightfully at the particular place, which is a safe and necessary device, properly constructed and in good repair, and such as is generally used in the best engines.<sup>74</sup> But it has been held negligence for the servants of a railroad company unnecessarily to permit the escape of steam from and the making of noises by an engine in their charge, so as to frighten a person's horse, after informing him that it is safe to cross the track, though such steam and noises proceed from the *automatic operation* of the engine.<sup>75</sup> The railway company was held liable where the horses of the plaintiff were frightened by the escape of steam from an automatic valve, it appearing that the pressure of steam could be controlled by those in charge of the engine, and that valves of a higher pressure could be used.<sup>76</sup> But the engineer of a locomotive standing at a crossing was not negligent for

<sup>71</sup> Illinois &c. R. Co. v. Larson, 42 Ill. App. 264.

<sup>72</sup> Omaha &c. R. Co. v. Clarke, 35 Neb. 867; s. c. 53 N. W. Rep. 970. But not where there was no unusual escape of steam from the cylinder cocks while the engine was lawfully moving: Cohoon v. Chicago &c. R. Co., 85 Wis. 570; s. c. 55 N. W. Rep. 900.

<sup>73</sup> Kalbus v. Abbot, 77 Wis. 621; s. c. 46 N. W. Rep. 810.

<sup>74</sup> Louisville &c. R. Co. v. Schmidt,

134 Ind. 16; s. c. 33 N. E. Rep. 774; Duvall v. Baltimore &c. R. Co., 73 Md. 516; s. c. 21 Atl. Rep. 496; Scaggs v. Delaware &c. Canal Co., 145 N. Y. 201; s. c. 64 N. Y. St. Rep. 594; 39 N. E. Rep. 716.

<sup>75</sup> Keech v. Rome &c. R. Co., 59 Hun (N. Y.) 617, *mem.*; s. c. 13 N. Y. Supp. 149.

<sup>76</sup> Presby v. Grand Trunk R. Co., 66 N. H. 615; s. c. 22 Atl. Rep. 554. Compare Duvall v. Baltimore &c. R. Co., 73 Md. 516.



failing to inject water into the boiler to prevent the escape of steam from an automatic safety valve, the operation of which frightened a horse which was being driven over the crossing.<sup>77</sup>

§ 1925. **Frightening Horses by Blowing the Steam Whistle.**<sup>78</sup>—Negligence or wantonness can not be imputed to a railroad company for sounding a locomotive whistle at a point where it is required to sound it by law, provided it is not done in an unusual manner;<sup>79</sup> or at a point where the statute requires either the blowing of the whistle or the ringing of the bell;<sup>80</sup> though it may be conceded that if the sounding of a whistle, even under these circumstances, is *unnecessarily kept up* after the engineer sees that the horse of a traveller has taken fright and is becoming unmanageable, the company may be liable for any consequent damage to the traveller. Thus, it has been held that a statute requiring the sounding of the whistle of a railway locomotive at a highway crossing does not justify the engineer in sounding it when he sees that it will probably deprive the driver of a frightened team in the highway of their control, and thus endanger the lives of those in the vehicle drawn by such team.<sup>81</sup> So, it has been held that a railway engineer has no right to continue blowing the whistle in a town to signal the train's approach to the station, after he discovers that a horse is being frightened thereby and its driver is having great difficulty in controlling it.<sup>82</sup> But all this implies that the signal is given in a reasonable manner. It has been well held that blowing a locomotive whistle may give a right of action for damages caused by its frightening a horse, although done at a place where the law requires the whistle to be blown, if it is done *negligently, wantonly and maliciously*.<sup>83</sup> In most cases, the question whether the blowing of the steam whistle was a reasonable and proper exercise of the company's rights, is a *question of fact for the jury*. It has been so held where a traveller's horse was frightened by the engineer of a train at a station sounding, according to the company's regulations, two loud and

<sup>77</sup> *Wilson v. New York &c. R. Co.* (N. Y. App. Div.), 58 N. Y. Supp. 617.

<sup>78</sup> This section is cited in § 1926.

<sup>79</sup> *Cohoon v. Chicago &c. R. Co.*, 85 Wis. 570; s. c. 55 N. W. Rep. 900.

<sup>80</sup> *Bailey v. Hartford &c. R. Co.*, 56 Conn. 444. See also *Louisville &c. R. Co. v. Pirschbacher*, 63 Ill. App. 144.

<sup>81</sup> *Louisville &c. R. Co. v. Stanger* (Ind. App.), 32 N. E. Rep. 209 (no off. rep.); rehearing denied 7 Ind. App. 179; s. c. 34 N. E. Rep. 688.

<sup>82</sup> *Akridge v. Atlanta &c. R. Co.*, 90 Ga. 232; s. c. 16 S. E. Rep. 81.

<sup>83</sup> *Bittle v. Camden &c. R. Co.*, 55 N. J. L. 615; s. c. 23 L. R. A. 283; 28 Atl. Rep. 305. Where a locomotive whistle was blown *at an unusual place*, for the purpose of frightening horses, which are being watered in a stream at one side, and thereby caused injury to one with the horses, the company was held liable therefor: *Brendle v. Spencer*, 125 N. C. 474; s. c. 34 S. E. Rep. 634.



sharp notes of the whistle, to warn persons that the train was about to start;<sup>84</sup> where the engineer whistled in the suburbs of a city, so as to frighten a traveller's horse, which was in sight;<sup>85</sup> where the engineer of a train approaching the public crossing *blew the whistle* and continued to blow it after he became aware that a team near by had taken fright at it;<sup>86</sup> and where the engineer of a freight train obstructing a crossing, being requested by the plaintiff to move the train so as to let him pass, blew his whistle several times to call the yard-master, frightening the plaintiff's mules and causing him damage;<sup>87</sup> and it is said to be the duty of the engineer of a train approaching a railroad crossing, to give the statutory signal in such manner as not to frighten a team employed by the railroad company at work in close proximity to its track, where it is apparent that the signal can be so given.<sup>88</sup> Another court has held that the engineer should change, suspend, or stop the sound of signals, as the circumstances seem reasonably to require, when he sees that a team on a highway is frightened by it, endangering the safety of an individual.<sup>89</sup> A jury may be authorized to infer negligence from the act of sharply sounding the whistle immediately before colliding with a team at a railroad crossing;<sup>90</sup> and from the act of sounding the whistle before starting a locomotive which has been stopped at a highway crossing while a team is being driven in front of it.<sup>91</sup> But, as between the danger of running over a traveller at a crossing and of frightening his horse on an adjacent highway, the engineer must manifestly choose the latter. Negligence will not, therefore, be imputed to him because he blows the whistle when he sees a wagon rapidly approaching the track behind trees which might obscure the driver's view, although the horses are thereby frightened and rendered unmanageable.<sup>92</sup> It has been held not negligence on the part of an engineer to sound a whistle while the locomotive is *passing under a bridge*, although a horse is frightened thereby and runs away; but it must be shown that the whistle was *purposely blown* at a conjuncture which made it dangerous to the traveller above.<sup>93</sup> Nor is he negligent by reason of the fact that,

<sup>84</sup> Hill v. Portland R. Co., 55 Me. 438.

<sup>85</sup> Philadelphia &c. R. Co. v. Stinger, 78 Pa. St. 219.

<sup>86</sup> Gulf &c. R. Co. v. Box, 81 Tex. 670; s. c. 17 S. W. Rep. 375.

<sup>87</sup> Gibbs v. Chicago &c. R. Co., 26 Minn. 427.

<sup>88</sup> Chicago &c. R. Co. v. Yorty, 56 Ill. App. 242.

<sup>89</sup> St. Louis &c. R. Co. v. Lewis, 60 Ark. 409; s. c. 30 S. W. Rep. 765.

<sup>90</sup> Pratt v. Chicago &c. R. Co., 107 Iowa 287; s. c. 52 N. W. Rep. 1064.

<sup>91</sup> Southern R. Co. v. Torian, 95 Va. 453; s. c. 28 S. E. Rep. 569.

<sup>92</sup> Pepper v. Southern &c. R. Co., 105 Cal. 389; s. c. 38 Pac. Rep. 974.

<sup>93</sup> Farley v. Harris, 186 Pa. St. 440; s. c. 42 W. N. C. 474; 40 Atl. Rep. 798. No liability for frightening a team on an *overhead bridge* by sounding the whistle, under a statute making it a misdemeanor not



at a dangerous place, he blows one long blast of five or six seconds, instead of the statutory requirement, which is three distinct sounds;<sup>94</sup> nor in whistling the usual signal for "off-brakes," although he knows that a team is near by on a public highway, where the horses appear gentle and were not frightened by a previous whistle;<sup>95</sup> nor in sounding the whistle near a crossing in a manner not unusual where he has sounded it at the whistling post and from there on at intervals, and does not see the horse which is frightened thereat.<sup>96</sup> But where a driver was passing over a bridge, it was held negligence on the part of the engineer of a train passing under the bridge to sound the whistle.<sup>97</sup>

§ 1926. **Frightening Horses through Failure to Give the Statutory Signals.**<sup>98</sup>—While, as already seen,<sup>99</sup> a railroad company may be liable under exceptional circumstances, for frightening the horse of a traveller by giving the statutory signals,—yet the general rule is that the failure to give such signals, whereby a traveller, having a right to expect them, *drives too near the crossing* at the time a train is approaching, in consequence of which his horses take fright, and injure him, gives a right of action on the part of the traveller;<sup>100</sup> or, at least, the failure to give the statutory signal at the required distance will take the question of negligence on the part of the defendant, and of contributory negligence on the part of the driver, to the jury.<sup>101</sup> The duty imposed upon railway companies *by statute*, of giving signals when their trains approach highway crossings, is exacted from them not merely to protect travellers from actual collision with passing trains but also to enable them to secure their horses against taking fright at the trains when they pass.<sup>102</sup> When, therefore, a traveller,

to do so, especially where the engineer did not see the team: *Phillips v. New York & C. R. Co.*, 84 Hun (N. Y.) 412; s. c. 65 N. Y. St. Rep. 534; 32 N. Y. Supp. 299.

<sup>94</sup> *Cincinnati & C. R. Co. v. Gaines*, 104 Ind. 536; s. c. 3 West. Rep. 721.

<sup>95</sup> *Ochiltree v. Chicago & C. R. Co.*, 93 Iowa 628; s. c. 62 N. W. Rep. 7, 11.

<sup>96</sup> *Heininger v. Great Northern R. Co.*, 59 Minn. 452; s. c. 61 N. W. Rep. 558.

<sup>97</sup> *Lehigh Valley & C. R. Co. v. Greiner*, 113 Pa. St. 600; s. c. 4 Cent. Rep. 902.

<sup>98</sup> This section is cited in §§ 1823, 1858.

<sup>99</sup> *Ante*, § 1925.

<sup>100</sup> *Terre Haute & C. R. Co. v. Bruner*, 128 Ind. 542; s. c. 26 N. E. Rep. 178; *Green v. Eastern R. Co.*, 52

Minn. 79; s. c. 53 N. W. Rep. 808; *Bowen v. Gainesville & C. R. Co.*, 95 Ga. 688; s. c. 22 S. E. Rep. 695. Compare *Chicago & C. R. Co. v. Toellen*, 77 Ill. App. 650 (where the train was standing still).

<sup>101</sup> *Schermerhorn v. New York & C. R. Co.*, 33 App. Div. 17; s. c. 53 N. Y. Supp. 279. Compare *Bailey v. Hartford & C. R. Co.*, 56 Conn. 444; s. c. 16 Atl. Rep. 234; *Philadelphia & C. R. Co. v. Hogeland*, 60 Md. 149; s. c. 5 Cent. Rep. 587. Circumstances under which a railway company may become liable for *killing colts* running at large through a failure to frighten them away by giving the statutory signals: *McCormick v. Kansas City & C. R. Co.*, 50 Mo. App. 109.

<sup>102</sup> *Norton v. Eastern R. Co.*, 113 Mass. 366; *Wakefield v. Connecticut*



expecting the statutory signals, had approached very near the crossing, and was suddenly surprised by a passing train, at which his horses began to kick, and broke his leg, it was held error to exclude evidence of these facts.<sup>103</sup> The doctrine was also applied in a case where there was evidence tending to show that the plaintiff had *passed the crossing*, after which his horse took fright at the noise and appearance of a train which approached without the statutory signals, in consequence of which damage ensued to the plaintiff.<sup>104</sup> A railway express train drove toward a *bridge* without sounding the usual whistle at a post one hundred yards distant. A traveller, not aware that a train was approaching, drove upon the bridge. While thus upon the bridge, the train passed under it, and in passing under it the steam whistle was sounded, whereat the traveller's horse took fright and ran away, and he was injured. Whether the company was negligent in not sounding the whistle on approaching the bridge, was properly submitted to the jury, and a judgment for damages was affirmed.<sup>105</sup> The omission to ring the bell and sound the whistle must, however, have taken place while the train was *approaching* the crossing, and not after it had *passed* it; and, where the injury arose from the plaintiff's horses taking fright, an omission to aver with sufficient certainty that the train was approaching was held bad on demurrer.<sup>106</sup> There must be a causal connection between the circumstance of the traveller's horse taking fright, and the failure of the company's servants to give the required signal; but whether the catastrophe was produced by the company's failure of duty must ordinarily be left to the jury.<sup>107</sup> It has been held that a railway company is liable to a traveller injured for want of the proper signals, though his horse, frightened by the sudden approach of the engine, starts forward, and, getting beyond control, draws the wagon upon the track. It was reasoned that there is no legal inference that he heard the approach of the train because his horse heard it.<sup>108</sup>

&c. R. Co., 37 Vt. 330; Pennsylvania R. Co. v. Barnett, 59 Pa. St. 259. That such a statute was not intended for the protection of a traveller passing along a street parallel with the railroad track and with no intention of crossing,—see Louisville &c. R. Co. v. Lee, 47 Ill. App. 384.

<sup>103</sup> Norton v. Eastern R. Co., 113 Mass. 366.

<sup>104</sup> Wakefield v. Connecticut &c. R. Co., 37 Vt. 330.

<sup>105</sup> Pennsylvania R. Co. v. Barnett, 59 Pa. St. 259.

<sup>106</sup> Wilson v. Rochester &c. R. Co., 16 Barb. (N. Y.) 167.

<sup>107</sup> As in Wakefield v. Connecticut &c. R. Co., 37 Vt. 330. See Pittsburgh &c. R. Co. v. Karns, 13 Ind. 87.

<sup>108</sup> Cosgrove v. New York &c. R. Co., 87 N. Y. 88; s. c. 41 Am. Rep. 355. Negligent failure to sound bell or whistle immaterial when horses take fright while the train is standing on the track: Chicago &c. R. Co. v. Toellen, 77 Ill. App. 650. Section 1529 of the South Carolina statutes provides: "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing,



§ 1927. **Frightening Horses through Failure to Give Signals on Approaching Overhead Crossings.**—A class of cases has narrowly construed such statutes by holding that they *apply only to grade crossings*, and are not intended to warn travellers at *overhead crossings*, so as to keep their teams away from the track while trains pass.<sup>100</sup> From this construction the conclusion has been deduced that if, by reason of not receiving the statutory warning, the traveller drives so near the railroad at an *overhead crossing* that his horses become frightened, he has no right of action against the company.<sup>110</sup> It is respectfully submitted that this construction is too narrow.

§ 1928. **Frightening Horses through Sounding Whistle at Overhead Bridges.**—It has been held negligence for a railway company to sound a steam whistle without necessity, while its locomotive is passing under a bridge and a driver is passing over it.<sup>111</sup>

§ 1929. **Contributory Negligence of the Traveller whose Horses are Frightened.**—The correlative proposition is that travellers driving teams which are easily frightened and which are unaccustomed to the noise of railway trains, should exercise such care in approaching railroad trains or crossings, as is commensurate with the risk to be run, and should not unnecessarily stop their teams in close proximity to railway trains; and further, that the railway company is not under the legal obligation of taking steps to provide against the consequences of a failure to exercise such reasonable precautions on the part of the traveller.<sup>112</sup> For example, one who drives a horse in front of a locomotive, standing at a crossing, assumes the risk of his animal taking fright at the escape of steam from the automatic safety valve, and if his horse takes fright thereat, no action can be maintained for his consequent death or injury.<sup>113</sup> Where a railroad company is required by statute to keep its highway crossings and the approaches thereto in a condition safe to persons and property, persons driving upon such

and it appears that the corporation neglected to give the signals required by this chapter, - the corporation shall be liable," etc. The court held that this statute was in derogation of the common law and should, therefore, receive a strict construction; that this section applies solely to injuries from collisions with cars at crossings, and that, as the injury in question was not of that class, the plaintiff could not recover: *Whilton v. Richmond &c. R. Co.*, 57 Fed. Rep. 551.

<sup>100</sup> *Jenson v. Chicago &c. R. Co.*,

86 Wis. 589; s. c. 22 L. R. A. 680; 57 N. W. Rep. 359.

<sup>110</sup> *Jenson v. Chicago &c. R. Co.*, 86 Wis. 589; s. c. 22 L. R. A. 680; 57 N. W. Rep. 359.

<sup>111</sup> *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259.

<sup>112</sup> *Hargis v. St. Louis &c. R. Co.*, 75 Tex. 19; s. c. 12 S. W. Rep. 953; *Atlanta &c. R. Co. v. Durham*, 108 Ga. 547; s. c. 34 S. E. Rep. 332.

<sup>113</sup> *Wilson v. New York &c. R. Co.*, 58 N. Y. Supp. 617; *Duvall v. Baltimore &c. R. Co.*, 73 Md. 516; s. c. 21 Atl. Rep. 496.



crossings are justified in presuming that the company has discharged its duty, and are not imputable with negligence because they fail to look for or to anticipate dangers calculated to frighten their horses, other than those arising from the operations of the engines and trains.<sup>114</sup> So, where a horse became frightened at the noise of steam escaping from a locomotive, and the owner of the horse, instead of leading it away, led it toward the engine, and the horse became unmanageable and reared and fell backwards and broke its neck, the owner failed to recover damages because of his own contributory negligence.<sup>115</sup>

§ 1930. **Cases where Contributory Negligence has been Ascribed to the Traveller as Matter of Law.**—Contributory negligence has been ascribed to the traveller where, knowing that his horse was afraid of the cars, he turned his team up to a station platform to unload freight, at the invitation of the station agent, who did not know the infirmity of the horse;<sup>116</sup> where a traveller observed a car 325 feet away, descending an incline toward a crossing, while the traveller was at such a distance that he might have safely stopped his horse or turned it around, but nevertheless whipped it up and drove it across the track, and it became frightened at the noise made by the car after it had got across;<sup>117</sup> where one riding a horse, with whose disposition he was not acquainted, approached within forty paces of a railroad crossing, the view of which was not obstructed, when looking for a train, although he was familiar with the crossing, and knew that a train was nearly due, and the horse became frightened at the train;<sup>118</sup> where a woman, in a wagon behind a four-year-old colt at a railway station, after seeing that the colt had become frightened at an approaching train, kept her seat in the wagon, relying on the ability of persons on the ground to hold the colt;<sup>119</sup> where a traveller, knowing that his

<sup>114</sup> *Illinois &c. R. Co. v. Griffin*, 184 Ill. 9; s. c. 56 N. E. Rep. 337; aff'g s. c. 84 Ill. App. 152.

<sup>115</sup> *Louisville &c. R. Co. v. Schmidt*, 81 Ind. 264. But contributory negligence has not been imputed to the owner of a team by reason of his failure to warn a person in charge of it against the liability of the horses taking fright from the sounding of a steam whistle near the place where it was necessary to unload: *Miller v. Rochester Vulcanite Pav. Co.*, 66 Hun (N. Y.) 634; s. c. 21 N. Y. Supp. 651; 49 N. Y. St. Rep. 856. Where the wife of the plaintiff was holding the team when it took fright, it was held a

question for the jury whether the husband was guilty of contributory negligence in leaving her so to hold it: *Toledo &c. R. Co. v. Crittenden*, 42 Ill. App. 469.

<sup>116</sup> *Morgan v. Central R. Co.*, 77 Ga. 788.

<sup>117</sup> *Stephens v. Omaha &c. R. Co.*, 41 Neb. 167; s. c. 59 N. W. Rep. 557.

<sup>118</sup> *Heininger v. Great Northern R. Co.*, 59 Minn. 458; s. c. 61 N. W. Rep. 558.

<sup>119</sup> *Flagg v. Chicago &c. R. Co.*, 96 Mich. 30; s. c. 55 N. W. Rep. 444. This case does not seem to have been well decided. But see also *Geist v. Detroit &c. R. Co.*, 91 Mich. 448.



horses were afraid of cars, and that a train was likely to come along at any time in the street on which he was driving, failed to turn them a safe distance from the track, although he had time and opportunity so to do;<sup>120</sup> where a traveller attempted to drive over a crossing in front of an approaching train, and his horse balked on the track, and the train ran over him;<sup>121</sup> where a person drove past a locomotive in a vehicle drawn by horses which he knew to be afraid or shy of railroad engines, and failed to keep a tight hold of the reins, so as to keep the horses under control in case of their becoming frightened;<sup>122</sup> where a driver, knowing that his horses were likely to be frightened by railway trains, and knowing that a train was about due, wrapped his lines around the front of the wagon, and went to the back part of it and commenced shoveling coal into a house near the railroad track, when the train came up, frightening his horses, and causing them to run away;<sup>123</sup> where a traveller, knowing that a train was approaching, drove so near the crossing that his horses were frightened by the headlight of the engine, the special findings returned by the jury showing that, although the train approached the crossing without giving the statutory signals, at a rate of speed in excess of that fixed by ordinance, yet such negligence was not the proximate cause of the accident;<sup>124</sup> and under the circumstances of the other cases noted in the margin.<sup>125</sup>

§ 1931. **Cases where Contributory Negligence was not Imputed to the Traveller as Matter of Law.**—On the other hand, courts have refused to impute contributory negligence as matter of law to the traveller in the following cases of injuries through horses taking fright at railway trains:—Where the driver drove within thirty-five feet of the track without stopping to listen for the approach of a train, and, seeing an engine approaching less than three hundred feet from the crossing, endeavored to turn around, but his horse became frightened and upset the vehicle;<sup>126</sup> where a driver attempted to drive his horse through a space about ten feet wide, between cars which were standing upon a railway crossing, and the horse shied slightly when

<sup>120</sup> *Moore v. Kansas City &c. R. Co.*, 126 Mo. 265; s. c. 29 S. W. Rep. 9.

<sup>121</sup> *State v. Cumberland &c. R. Co.*, 87 Md. 183; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 511; 39 Atl. Rep. 610.

<sup>122</sup> *Dunn v. Wilmington &c. R. Co.*, 126 N. C. 343; s. c. 35 S. E. Rep. 606.

<sup>123</sup> *Louisville &c. R. Co. v. Penrod* (Ky.), 56 S. W. Rep. 1.

<sup>124</sup> *Baltimore &c. R. Co. v. Musgrave*, 24 Ind. App. 295; s. c. 55 N. E. Rep. 496.

<sup>125</sup> *Louisville &c. R. Co. v. Survant* (Ky.), 27 S. W. Rep. 999; s. c. 16

Ky. L. Rep. 545 (no off. rep.); *Louisville &c. R. Co. v. Survant*, 44 S. W. Rep. 88; s. c. 19 Ky. L. Rep. 1576 (no off. rep.); *Union &c. R. Co. v. Hutchinson* (Kan.), 18 Pac. Rep. 705; *Fort Worth &c. R. Co. v. Taliaferro* (Tex. Civ. App.), 19 S. W. Rep. 432 (no off. rep.); *Hancock v. Lake Erie &c. R. Co.*, 21 Ind. App. 10; s. c. 51 N. E. Rep. 369.

<sup>126</sup> *McCullough v. Minneapolis &c. R. Co.*, 101 Mich. 234; s. c. 59 N. W. Rep. 618.



driving through, which was a short time before the accident;<sup>127</sup> where a traveller drove upon the track with knowledge that a train was approaching, when he would have had ample time to cross in safety if his mule had not taken fright at an excavation made by the railroad company in repairing its road-bed, which excavation the traveller could not see until he came upon the track;<sup>128</sup> where, because of the failure of the engineer in charge of a train approaching a crossing, to blow the whistle or ring the bell, a woman drove her horse very near the track, where it became frightened at the train, although she could have seen the train approaching if she had looked for it there;<sup>129</sup> where a woman, with a baby in her lap, attempted to drive over a railway track in a spring wagon drawn by a three-year-old filly, which became frightened at some cinders piled in the highway, and ran away, injuring the plaintiff, who was an experienced horsewoman, and had ridden behind the filly often before, when she always appeared to be gentle, and no trains were passing, and the pile of cinders was not visible until she was within about ten feet of the crossing, before which time the filly had travelled along quietly as usual;<sup>130</sup> where a traveller drove a "scary" mule within sixty paces of a railroad crossing in a narrow road upon a down grade, without stopping to look and listen for approaching trains at the top of the hill;<sup>131</sup> and also under the facts of the other cases cited in the margin.<sup>132</sup> It may be added that the fact that a team is usually frightened at cars or otherwise, does not make it contributory negligence on the part of the owner to drive it over a railway crossing, unless, under the circumstances of the case, a person of ordinary care would not do so.<sup>133</sup> Nor will contributory negligence in driving such a horse upon a street where there is a railroad track, and where the horse takes fright, causing an accident to the owner, prevent a recovery of damages from the railway company, if those in charge of the train could have prevented the accident by the exercise of ordinary care.<sup>134</sup>

§ 1932. **Duty of Engineer on Seeing Horses Frightened.**—Where the engineer becomes aware that a horse has taken fright, it is his duty to endeavor to prevent the fright of the animal from resulting

<sup>127</sup> *Rusterholtz v. New York & C. R. Co.*, 191 Pa. St. 390; s. c. 43 Atl. Rep. 208.

<sup>128</sup> *Parks v. Southern R. Co.*, 124 N. C. 136; s. c. 32 S. E. Rep. 387.

<sup>129</sup> *Case v. Chicago & C. R. Co.*, 100 Iowa 487; s. c. 69 N. W. Rep. 538.

<sup>130</sup> *Illinois & C. R. Co. v. Griffin*, 84 Ill. App. 152; s. c. aff'd, 184 Ill. 9; 56 N. E. Rep. 337.

<sup>131</sup> *Gilmore v. Cape Fear & C. R. Co.*,

115 N. C. 657; s. c. 20 S. E. Rep. 371.

<sup>132</sup> *Sherman & C. R. Co. v. Bridges*, 16 Tex. Civ. App. 64; s. c. 40 S. W. Rep. 536; *Cleveland & C. R. Co. v. Halbert*, 75 Ill. App. 592.

<sup>133</sup> *Kalbus v. Abbott*, 77 Wis. 621; s. c. 46 N. W. Rep. 810.

<sup>134</sup> *Moore v. Kansas City & C. R. Co.*, 126 Mo. 265; s. c. 29 S. W. Rep. 9.



in damage, by taking such action as reasonable prudence may suggest, with reference to the known habits of such animals.<sup>135</sup> Negligence may be imputed to the railway company if a horse is observed by the engineer on a highway running parallel with the railroad track, frightened and unmanageable, and if the engineer fails to put on the brakes at once, although there is nothing to prevent the driver from turning the horse away from the railroad.<sup>136</sup> If, under such circumstances, the engineer unnecessarily sounds the whistle, allows steam to escape and increases instead of checking the speed of the train, causing the train to reach the crossing ahead of the team and the team to turn aside from the highway,—a verdict that the resulting injuries were caused by the negligence of the engineer will be sustained.<sup>137</sup> If the engineer and fireman fail to keep a reasonable *lookout* which will enable them to see signals made by a person at a crossing, endeavoring to control a frightened horse backing towards the crossing, in season to avoid injury by stopping the engine, they are guilty of negligence which will render the company liable.<sup>138</sup>

§ 1933. **Stopping Team Unhitched near by Railroad Track.**—The driver of a carriage suffers his team to stand unhitched near a railroad track, he at the same time standing near the door of the carriage, without the reins in his hands, reading a newspaper. An engine comes along, driving a *snow-plow*, which throws mud into the carriage and *frightens the horses*, causing them to run away. This negligence of the driver is sufficient to bar an action for damages on the part of the owner of the carriage.<sup>139</sup> Where the evidence showed that the

<sup>135</sup> *Newman v. Vicksburg &c. R. Co.*, 64 Miss. 115.

<sup>136</sup> *Chicago &c. R. Co. v. Prouty*, 55 Kan. 503; s. c. 40 Pac. Rep. 909.

<sup>137</sup> *Louisville &c. R. Co. v. Stanger* (Ind. App.), 32 N. E. Rep. 209 (no off. rep.); rehearing denied in 7 Ind. App. 179; s. c. 34 N. E. Rep. 688.

<sup>138</sup> *Leavitt v. Terre Haute &c. R. Co.*, 5 Ind. App. 113; s. c. 12 Rail. & Corp. L. J. 246; 31 N. E. Rep. 860; rehearing denied 5 Ind. App. 521; 32 N. E. Rep. 866. It has been held that a railroad company is not liable for damages caused by a horse *coming in contact with the rear of a train*, where the accident was due to the *fright of the horse* caused by the negligence of a *third person*, and the employés of the train did not have time, after discovering the perilous situation, to

stop the train: *Louisville &c. R. Co. v. Pool*, 20 Ky. L. Rep. 1737; s. c. 49 S. W. Rep. 1060 (not to be rep.). So, a brakeman on a railway car which is running down an incline towards a crossing, who, when 325 feet from the crossing, sees a person about to drive across the track and observes that the horse is not frightened, has a right to assume that the horse is not afraid of the noise made by the car, and is not, as a matter of law, guilty of negligence in failing to stop the car until the horse has gone a considerable distance beyond the crossing, although after getting across the horse becomes frightened at such noise and runs away: *Stephens v. Omaha &c. R. Co.*, 41 Neb. 167; s. c. 59 N. W. Rep. 557.

<sup>139</sup> *Gray v. Second Avenue R. Co.*, 2 Jones & Sp. (N. Y.) 519.



plaintiff *knew* that some cars had run off the track near the highway, and that a neighbor's horse had been frightened by them, but nevertheless drove his horse along that road, when he could have avoided it by going a short distance through his own field, and the horse took fright and injured him,—it was held that he was guilty of contributory negligence.<sup>140</sup>

**§ 1934. Frightening Horses through Driving Trains at an Unlawful Rate of Speed.**—The driving of a railway train at an unlawful rate of speed may result in frightening the horses of a traveller, so as to give him an action for damages against the railway company. The fright of the horses may, in such a case, be obviously produced by the celerity of the passing train, or by the fact that the coming of the train at an unusual speed puts the driver off his guard, so that he gets too near the track before the train passes, or finds himself unable to cross the track as he might do where the train proceeds at the lawful rate of speed only. In such a case, the traveller may recover damages on the footing of negligence;<sup>141</sup> or he may maintain an action for the penalty imposed by a statute or ordinance for the fast driving of the train, although there has been no actual collision.<sup>142</sup>

**§ 1935. Flagman Waving Lantern in Front of Horses.**<sup>143</sup>—On the principle that one in a sudden emergency is not held bound to exercise the same cool judgment that a person of ordinary care would display under other circumstances,<sup>144</sup> it has been held that, for a railway flagman in a sudden emergency and to prevent an impending collision of a train with a vehicle rapidly approaching a crossing, to wave his lantern in front of the horse, causing him to become frightened and veer off along the track and overturn the wagon, will not render the company liable for personal injuries sustained by the occu-

<sup>140</sup> *Pittsburgh &c. R. Co. v. Taylor*, 104 Pa. St. 306; s. c. 49 Am. Rep. 580.

<sup>141</sup> *Wasmer v. Delaware &c. R. Co.*, 80 N. Y. 212; s. c. 36 Am. Rep. 608.

<sup>142</sup> *Chicago &c. R. Co. v. People*, 120 Ill. 667; s. c. 12 N. E. Rep. 207; 9 West. Rep. 470. In another case, the plaintiff, having business in a mill, near a railroad crossing, hitched his team and left it. He knew that a train was due and intended when he heard it to go to his horses, and to keep them from taking fright. He might have seen the train 100 yards away, but he did not see it until his horses took fright at its

approach, and ran away, coming into collision with the train at the crossing. No whistle was sounded as required by law. It was held that he could not recover: *St. Louis &c. R. Co. v. Payne*, 29 Kan. 166. Circumstances under which the fact that the engine was running faster than allowed by ordinance was immaterial, as that was not the proximate cause of the injury: *Walters v. Chicago &c. R. Co.* (Wis.), 80 N. W. Rep. 451.

<sup>143</sup> This section is cited in §§ 1947, 2315.

<sup>144</sup> Vol. I, § 195; *ante*, §§ 1616, 1624, 1794.



pants, although the flagman may not have adopted the safest method to prevent the threatened accident.<sup>145</sup>

§ 1936. **Frightening Horses by the Unlawful Use by Railway Companies of Public Landings.**—The principles which determine the question of negligence by railway companies in the occupation of highways, apply to railway negligence in the occupation by their trains of *public landings*, which are highways in the fullest sense. As in the case of a public highway, the unauthorized occupation by a railway company, by its trains, of a public landing, is a *nuisance*, and renders the company liable to private persons for such special damages as proximately result to them from such unlawful conduct. A railroad company, unlawfully using a public landing for running a train thereon, is liable in damages for the death of one whose team is frightened by such train, while he is lawfully using the landing, and runs away, fatally injuring him.<sup>146</sup>

§ 1937. **Other Instances of Horses being Frightened by Ordinary Operation of Railways where the Company was Exonerated.**—It has been held that a railway corporation whose road passes over a highway by a bridge is not liable to a traveller in the highway for damages caused by the fright of his horse at the noise made by a *train* of cars *passing over the bridge* in the customary manner, although the corporation knew that, because of special circumstances, accidents of a similar character were peculiarly liable to happen there, and although they gave no warning of the approach of the train.<sup>147</sup> It has been so held where the horse of a traveller took fright from the noise of two trains passing each other at full speed at an overhead crossing.<sup>148</sup> Upon the same principle, a railway company is exonerated from liability for injuries to *animals other than horses* which may happen to take fright at passing trains, or in consequence of the customary and usual operation by the company of its road.<sup>149</sup>

<sup>145</sup> *Floyd v. Philadelphia &c. R. Co.*, 162 Pa. St. 29; s. c. 34 W. N. C. 418; 29 Atl. Rep. 396.

<sup>146</sup> *Pittsburgh &c. R. Co. v. Hood*, 94 Fed. Rep. 618.

<sup>147</sup> *Favor v. Boston &c. R. Co.*, 114 Mass. 350. Compare *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259.

<sup>148</sup> *Ryan v. Pennsylvania R. Co.*, 132 Pa. St. 304; s. c. 25 W. N. C. 465; 19 Atl. Rep. 81.

<sup>149</sup> *Baltimore &c. R. Co. v. Thomas*, 60 Ind. 107; *Peru &c. R. Co. v. Hasket*, 10 Ind. 409; *Ohio &c. R. Co. v. Cole*, 41 Ind. 331; *Indianapolis &c. R. Co. v. McBrown*, 46 Ind. 229. A

*shipper*, in loading an engine on a railway car belonging to a third party, but which the railroad company had placed on its tracks in the street in front of the shipper's place of business, negligently overturned the car, thereby frightening the horses of a traveller so that they ran away, injuring him. It was held that the railroad was not liable for the shipper's negligence; since the statute (Rev. St. Tex., Arts. 4497-4500) sanctioned the commitment by railway companies of the loading of cars to shippers, and it could make no difference that the



§ 1938. **Questions of Pleading in Actions against Railway Companies for Frightening Travellers' Horses.**—Several decisions admonish the practitioner that, in framing a declaration or complaint in an action for damages against a railway company for frightening the horses or team of a traveller, it is necessary carefully to allege what the plaintiff expects to prove, and that if he frames his action upon this theory he can not recover upon some other theory. If, for example, the declaration alleges that the defendant's servants sounded the whistle "willfully, wantonly and maliciously, whereby," etc., no recovery can be had thereunder on mere proof of *negligence*, without proof of *recklessness* or *malice*.<sup>150</sup> So, if the complaint charges the negligence of the defendant to consist of letting off steam from an automatic safety valve in one of its engines, whereby the horse of the plaintiff became frightened, etc., no recovery can be had on the ground, not set up in the complaint, that the defendant was guilty of negligence in stopping its engine near a street crossing frequented by the travelling public.<sup>151</sup> But a petition charging that the defendant was negligently, unlawfully, and wrongfully blowing off steam, whereby plaintiff's horses were frightened, and ran away, implies that the steam was blown off needlessly and unnecessarily, and is sufficient after verdict if not demurred to.<sup>152</sup> But, in drawing his declaration, the plaintiff may characterize any action as being done negligently, without showing all the various facts from which negligence may be deduced.<sup>153</sup>

§ 1939. **Questions of Evidence in such Actions.**—From what has preceded, it must be concluded that *the mere fact that a horse*, driven along a public street, *takes fright* at the sight of a railway car, confers no right of action upon a person injured thereby, against the company operating the car. The rule *res ipsa loquitur* is not applicable to such a case.<sup>154</sup> And so, the mere fact that a horse takes fright at the escape of steam from a locomotive and runs away, does not show negligence on the part of its driver, though the horse has previously been frightened in this way and become unmanageable.<sup>155</sup> In an action for such an injury, taking place at a railway crossing, evidence as to the nature and surroundings of the place is admissible.<sup>156</sup> Upon

car so loaded belonged to a third party: *Washington v. Texas & C. R. Co.*, 22 Tex. Civ. App. 189; s. c. 54 S. W. Rep. 1092.

<sup>150</sup> *Chicago & C. R. Co. v. Dickson*, 88 Ill. 431.

<sup>151</sup> *Louisville & C. R. Co. v. Schmidt*, 134 Ind. 16; s. c. 33 N. E. Rep. 774.

<sup>152</sup> *Omaha & C. R. Co. v. Clark*, 35 Neb. 867; s. c. 53 N. W. Rep. 970.

<sup>153</sup> *Illinois & C. R. Co. v. Larson*, 42 Ill. App. 264.

<sup>154</sup> *Yingest v. Lebanon & C. Street R. Co.*, 167 Pa. St. 438; s. c. 36 W. N. C. 320; 31 Atl. Rep. 687 (street railroad case).

<sup>155</sup> *O'Brien v. Miller*, 60 Conn. 214; s. c. 22 Atl. Rep. 544.

<sup>156</sup> *Indianapolis & C. R. Co. v. Boettcher*, 131 Ind. 82; s. c. 28 N. E. Rep. 551.



the question whether the railway company was in the exercise of ordinary care, it is competent to show the precautions taken by it to warn travellers, and the opportunity of travellers to know whether the engine was standing near the crossing, and to know of the condition of the crossing, and the knowledge of the company of these facts.<sup>157</sup>

§ 1940. Questions for the Jury and Instructions in These Cases.—

Whether the whistle of the locomotive was blown in an unnecessary and unusual manner, whereby the horse of the plaintiff was frightened, is a *question for the jury*,<sup>158</sup> and so was the question whether the driver could have extricated himself from danger before the locomotive which frightened his horse, was seen.<sup>159</sup> Where the negligence averred in the complaint was the making of loud and unnecessary noises by means of the steam whistle and by the escape of steam, frightening the team of the deceased, it was error to submit to the jury the question of negligence in *failing to give proper signals* of the approach of the train.<sup>160</sup> Where there was evidence from which the jury might have found that the cause of the horses taking fright was the escape of steam by the automatic action of the safety valve, it was error to refuse to instruct them that if the noise was automatic, and incident to the use of the defendant's engine while under the proper amount of steam and when used in the ordinary manner,—they should find for the defendant.<sup>161</sup>

<sup>157</sup> Presby v. Grand Trunk R. Co., 66 N. H. 615; s. c. 22 Atl. Rep. 554.

<sup>158</sup> Walker v. Boston &c. R. Co., 64 N. H. 414; s. c. 6 N. Eng. Rep. 199; 13 Atl. Rep. 649; Philadelphia &c. R. Co. v. Killips, 88 Pa. St. 405.

<sup>159</sup> McQuay v. Richmond &c. R. Co., 109 N. C. 585; s. c. 13 S. E. Rep. 944. Under an allegation that the defendant and its employes negligently allowed a car to stand in a street, and caused the steam in an engine, also standing in the street, to be let off, so as to frighten plaintiff's horse and crowd plaintiff's leg against said car, breaking it, it is proper to give an instruction that if, when the plaintiff was crossing the defendant's tracks, there was standing at said crossing one of defendant's engines, and that a car in the street was standing, and that the engine was "popping off" steam,

which frightened plaintiff's horse, and that the horse ran the plaintiff against the car, and he was thereby injured, and if the leaving of the car on the street was negligence on the part of the defendant,—then to find for plaintiff, unless he was guilty of contributory negligence: Galveston &c. R. Co. v. Simon (Tex. Civ. App.), 54 S. W. Rep. 309. In the same case an instruction which withdrew from the jury the issue as to whether or not the defendant was guilty of negligence in permitting the car to stand in the street, and, if negligent, whether such negligence was the proximate cause of plaintiff's injury, was properly refused: Galveston &c. R. Co. v. Simon, *supra*.

<sup>160</sup> Louisville &c. R. Co. v. Penrod (Ky.), 56 S. W. Rep. 1.

<sup>161</sup> Galveston &c. R. Co. v. Simon (Tex. Civ. App.), 54 S. W. Rep. 309.



## CHAPTER LXII.

## RAILWAY INJURIES NOT OTHERWISE CLASSIFIED.

## SECTION

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§ 1945. **Railway Company not Liable for the Exercise of its Franchises without Negligence.**<sup>1</sup>—As a general rule, a railway company is not liable for any damages which may accrue to others in consequence of its exercising its franchises in the usual way and without negligence.<sup>2</sup> This principle is well illustrated by that species of accidents, elsewhere considered,<sup>3</sup> which consists in the *frightening of the horses* of travellers. On the one hand, the mere sounding of the steam whistle is not negligence as matter of law, although in close proximity to a public highway; since it may be reasonably necessary or proper, according to the facts and circumstances.<sup>4</sup> On the other hand, if the act is negligently or wantonly done, the railway company may become liable for damages to a traveller whose horse is thereby frightened, although its engineer, in doing the act, proceeded contrary to the express orders of the company.<sup>5</sup> Upon the same principle, no action lies against a railroad company for the inconveniences necessarily caused to premises in the vicinity of its railroad, by noises, smoke, jarring of the ground, etc., arising from properly and prudently operating its railroad upon its own lands, or upon land in which the party complaining has no interest.<sup>6</sup> So, a railroad company may lay its tracks on any part of its land, and run any of its trains on any of its tracks, according to its own discretion; and it is not an improper or negligent use of its lands to *run freight trains* near the house of an adjacent owner.<sup>7</sup> Nor is it actionable negligence for a railroad company to run *long and heavy freight trains*, sometimes requiring more than one engine, on a track nearest to an adjacent owner's dwelling; nor is the fact that trains are sometimes stalled there, evidence of negligence.<sup>8</sup> So, one who grants to a railway company a right of way over his land, agrees, by necessary implication, to submit to the inconvenience and damage, if any, that will necessarily accrue to him from the building, maintaining and operating of the road through his land, including the necessary interference with *surface drainage* and with the course of *natural streams*.<sup>9</sup> But in dealing with water, a rail-

<sup>1</sup> This section is cited in §§ 1849, 2114, 2230.

<sup>2</sup> *Flinn v. New York & C. R. Co.*, 58 Hun (N. Y.) 230; s. c. 34 N. Y. St. Rep. 451; 12 N. Y. Supp. 341.

<sup>3</sup> *Ante*, § 1908, *et seq.*

<sup>4</sup> *Cincinnati & C. R. Co. v. Gaines*, 104 Ind. 526, 536; s. c. 2 West. Rep. 268.

<sup>5</sup> *Philadelphia & C. R. Co. v. Bran-*  
*nen* (Pa.), 2 Cent. Rep. 33.

<sup>6</sup> *Carroll v. Wisconsin & C. R. Co.*, 40 Minn. 168; s. c. 41 N. W. Rep. 661.

<sup>7</sup> *Flinn v. New York & C. R. Co.*, 58

Hun (N. Y.) 230; s. c. 34 N. Y. St. Rep. 451; 27 N. Y. Supp. 341.

<sup>8</sup> *Flinn v. New York & C. R. Co.*, 58 Hun (N. Y.) 230; s. c. 34 N. Y. St. Rep. 451; 12 N. Y. Supp. 341.

<sup>9</sup> *Harrelson v. Kansas City & C. R. Co.*, 151 Mo. 482; s. c. 52 S. W. Rep. 368 (controversy between land-owner and railway company over the question whether the company was bound to make an outlet for the flow of surface water at a particular point because a small natural stream formerly flowed there—decision in favor of the railway company).



way company, outside of its power of condemning land in the exercise of the right of eminent domain, has no more privilege to injure another land-owner by interfering with the natural flow of water, than a private land-owner has. If it constructs and maintains dykes in a river, changing its current and channel so as to throw the water against and upon the land of a private owner, it will become liable to him for the damages thereby inflicted upon him.<sup>10</sup> And where the railway company *acquires the right of way by deed* from the land-owner for a restricted use, such as the *passing of trains* only, it will make itself liable to him in damages if it subjects the land to a different use, such as *switching and making up trains*.<sup>11</sup> So, if a railroad company fails to provide a place to contain the *water which drips from the spout of its watering tank* when it waters its engines, so that the water flows away and *freezes* upon a sidewalk in a public street, rendering it dangerous to foot passengers thereon, it is liable in damages to one who is injured by slipping and falling upon the *ice*,—just as any other coterminous land-owner, so creating a nuisance in the highway, would be liable.<sup>12</sup> Nor is a railroad company any more privileged to invade the premises of a coterminous land-owner and to inflict damages upon his freehold, than a private coterminous land-owner would be. If it constructs an *embankment* over a marshy place, which *sinks* and spreads and upheaves the land of a coterminous owner, it will have to pay damages to him, and this without regard to the question of negligence, or to the inquiry whether it had knowledge that the manner of its constructing the embankment would cause such an injury.<sup>13</sup>

§ 1946. Degree of Care Required in Running Railway Engines and Cars.—In favor of their *passengers*, the obligation of the railway company—variously expressed—is undoubtedly to use the *highest practicable measure of care and foresight* which can be applied under the circumstances.<sup>14</sup> Toward all other persons, the measure of care demanded in such operations is that care described as *ordinary* or *reasonable care* and diligence, which varies according to the danger of the particular situation.<sup>15</sup> This measure of care, though shifting according to the circumstances, is fixed by law, and consequently can not be varied one way or the other by the private *rules* promul-

<sup>10</sup> Gulf &c. R. Co. v. Clark (I. T.), 51 S. W. Rep. 962.

<sup>11</sup> Backus v. Detroit &c. R. Co., 71 Mich. 645; s. c. 40 N. W. Rep. 60.

<sup>12</sup> McGoldrick v. New York &c. R. Co., 142 N. Y. 640; aff'g s. c. 49 N. Y. St. Rep. 566; 20 N. Y. Supp. 914.

<sup>13</sup> Roushange v. Chicago &c. R. Co., 115 Ind. 106; s. c. 14 West. Rep. 853; 17 N. E. Rep. 198.

<sup>14</sup> This subject is treated in the next volume.

<sup>15</sup> Parvis v. Philadelphia &c. R. Co., 8 Houst. (Del.) 436; s. c. 17 Atl. Rep. 702; Vol. I, § 25.



gated by the railway company for the government of its trainmen. A compliance with such rules does not necessarily constitute reasonable care, nor does a violation of them necessarily constitute negligence.<sup>18</sup>

§ 1947. **Injuries from Collisions between Trains.**<sup>17</sup>— Whatever presumption may arise from the mere fact of the collision of two railway trains in case of an injury to a passenger on one of them,<sup>18</sup> it is plain that, as between the two railway companies, and as between their respective servants who are in control of the train, *the mere fact* of such a collision raises no presumption of negligence in the one in favor of the other. It seems to resemble the case where two vehicles collide on the highway. Any presumption of negligence in such case must arise out of the concrete facts attending the accident, and not out of the bare fact of the accident itself, and must generally address itself to the jury. Where one railway company sues another for damages resulting from a collision between the train of the plaintiff company and the cars of the defendant company negligently left by the defendant on the track of the plaintiff, the fact that the train of the plaintiff was being driven at an *excessive or prohibited rate of speed* will not defeat a recovery, unless it is made to appear that the excessive speed was the *proximate cause* of the collision,—in other words, that the collision could have been prevented if the train of the plaintiff had been run at a proper rate of speed.<sup>19</sup> The doctrine that a person is not imputable with negligence for acting erroneously, under an *impulse of sudden terror* produced by a condition of things for which he is not responsible,<sup>20</sup> ought, it should seem, to apply in the case where a locomotive engineer makes a *mistake of judgment* in the face of an impending collision with another engine or train. But this will obviously present a *question for the jury*: the good faith or honest

<sup>18</sup> *Smithson v. Chicago & C. R. Co.*, 71 Minn. 216; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 726; 73 N. W. Rep. 853. An instruction which told the jury that the engineer "is required to use all means known to skillful engineers, even greater diligence than the requirements laid down in the statute," was held erroneous; since the statute prescribed the rule of diligence, and the court could not add to it, and its requirements were that he should use all means "*within his power*" known to skillful engineers: *Alabama & C. R. Co. v. Chapman*, 80 Ala. 615. But compare the doctrine that statutory precautions do not necessarily exclude com-

mon law rules of care and diligence: *Ante*, §§ 1494, 1555, 1873, 1902. That, under the Kentucky statute (Ky. Gen. Stat., ch. 57, § 1), a railroad company is liable for the death of any person not in its employment, caused by *ordinary negligence*,—see *Louisville & C. R. Co. v. Smith*, 87 Ky. 501; s. c. 10 Ky. L. Rep. 514; 9 S. W. Rep. 493.

<sup>17</sup> This section is cited in § 2315.

<sup>18</sup> A subject considered in the next volume.

<sup>19</sup> *Chicago & C. R. Co. v. Kansas City & C. R. Co.*, 78 Mo. App. 245; s. c. 2 Mo. App. Rep. 204.

<sup>20</sup> Vol. I, § 195; *ante*, §§ 1616, 1624, 1794, 1935.



belief of an engineer in the course of action which he takes to prevent a collision does not show, as matter of law, that he was not guilty of negligence.<sup>21</sup> For example, after moving his train over a grade crossing of another railway, the mere fact that, in an apprehension of a collision with a train in front of him, he backs his train upon the crossing and brings it into collision with another train passing on the other track, does not, as matter of law, relieve the company, whose servant he is, from liability to a fireman on the other train injured in the collision, provided he might, by the exercise of reasonable care and prudence in backing his train, have avoided a collision with either train.<sup>22</sup>

§ 1948. **Statutory Duty to Keep a Lookout on Moving Train or Engine.**—Statutes and municipal ordinances have been frequently enacted, requiring railway companies to keep a *person constantly on the lookout* on a moving locomotive or train, and these have naturally been the subject of judicial construction in many cases. We have had occasion to consider them when dealing with injuries to travellers at highway crossings;<sup>23</sup> and we now note some other decisions of the same nature, arising chiefly in cases of injuries to persons on railway tracks at other places than crossings. Under most judicial conceptions, the failure to comply with a municipal ordinance prescribing this duty is *negligence as matter of law*;<sup>24</sup> but this does not mean that a literal compliance with it will not be excused where it is impracticable, as where, by reason of some unavoidable accident or by the unlooked-for act of some third party, the appliances fail to work;<sup>25</sup> or where a municipal ordinance requires the stationing of a man on the front of locomotives or on the rear of tenders, and literal compliance is rendered impracticable through improvements in locomotive construction.<sup>26</sup> The obligation resting upon a railway company to have a lookout upon an advancing engine is not satisfied by assigning that duty to the *fireman*, who can not discharge it and at the same time keep up the fire

<sup>21</sup> *Highland Ave. &c. R. Co. v. Swope*, 115 Ala. 287; s. c. 22 South. Rep. 174.

<sup>22</sup> *Kansas City &c. R. Co. v. Lackey*, 114 Ala. 152; s. c. 21 South. Rep. 444. It has been held that an instruction, in an action for an injury growing out of a collision with a special train which the defendant company had sent out, to the effect that if the order to "run extra" was not sufficiently definite, taken in connection with the rules of the company, it was negligence on its part,

—was not erroneous: *Nary v. New York &c. R. Co.*, 55 Hun (N. Y.) 612; s. c. 29 N. Y. St. Rep. 630; 9 N. Y. Supp. 153; *aff'd* 125 N. Y. 759, *mem.*

<sup>23</sup> *Ante*, § 1592, *et seq.*

<sup>24</sup> Vol. 1, § 10; *ante*, § 1593. *Central R. &c. Co. v. Smith*, 78 Ga. 694; s. c. 3 S. E. Rep. 397.

<sup>25</sup> *Missouri &c. R. Co. v. Vance* (Tex. Civ. App.), 41 S. W. Rep. 167 (no off. rep.).

<sup>26</sup> *Baltimore &c. R. Co. v. Mali*, 66 Md. 53; s. c. 3 Cent. Rep. 903.



in the engine.<sup>27</sup> Where a statute imposes the duty of keeping the lookout upon the engineer in charge of the locomotive, it seems that the duty imposed upon him is discharged if he maintains a lookout as continuously as the necessary attention to his other duties will permit. But his failure to do this will be negligence, rendering the company liable if an injury results from it, although he is guilty of no negligence in the measures taken by him to prevent a catastrophe after discovering an obstruction in front of him on the track.<sup>28</sup> Under such a statute, the question whether the engineer was guilty of negligence in failing to maintain a lookout for obstructions on the track, is necessarily a question for the jury.<sup>29</sup> The duty imposed by the statute of Tennessee of keeping "a person upon the locomotive always on the lookout ahead," is not performed by keeping a lookout at the head of the train if the engine is in the rear; but there must be a lookout in front when the train is backing, in order to comply with the statute.<sup>30</sup> Under the same statute, the lookout on a locomotive must not only be in his place, but he must be vigilant and watchful. If he does not see what with reasonable vigilance he should have seen, and an accident happens in consequence, the company will be in the wrong and will have to pay damages.<sup>31</sup> In an action for the death of a person in consequence of being run over by a railway train, if the evidence tends to show that the deceased might have been seen by the engineer if the engineer had been properly on the lookout, it is proper to instruct the jury as to the precautions prescribed by this statute.<sup>32</sup> A rule or order of a railway company, directed to its engineers and conductors, to keep a sharp lookout at a particular spot, where an obstruction is apprehended, carries with it, by implication, the duty of checking the speed of the train on approaching such a place, sufficiently to stop it upon short notice.<sup>33</sup>

§ 1949. **Other Statutory Precautions.**—Where precautions are prescribed by statute for the protection of individuals, the failure to ob-

<sup>27</sup> *Northeastern R. Co. v. Martin*, 78 Ga. 603; s. c. 3 S. E. Rep. 701. The court say: "Where it is necessary to have a lookout, the railroad company may rely upon its fireman, if it thinks proper to do so, provided the fireman does look out; but if his duties require him to fire the engine, they had better get somebody else to look out."

<sup>28</sup> *Mobile & C. R. Co. v. Kimbrough*, 96 Ala. 127; s. c. 11 South. Rep. 307. The author assumes that this was

a duty imposed by statute, although the report does not so state.

<sup>29</sup> *East Tennessee & C. R. Co. v. Bayliss*, 74 Ala. 150.

<sup>30</sup> *Little Rock & C. R. Co. v. Wilson*, 90 Tenn. 271; s. c. 16 S. W. Rep. 613.

<sup>31</sup> *East Tennessee & C. R. Co. v. White*, 5 Lea (Tenn.) 540.

<sup>32</sup> *East Tennessee & C. R. Co. v. Winters*, 85 Tenn. 240; s. c. 1 S. W. Rep. 790.

<sup>33</sup> *Louisville & C. R. Co. v. McKenna*, 13 Lea (Tenn.) 280.



serve them will, unless excused, render the company liable for any damages proximately resulting therefrom. For example, a railway company has been held liable to the owner of real estate situated in an incorporated city or town, for damage done to his house and buildings by *vibration* of the soil, where such damage is the direct result of running trains at the rate of speed prohibited by statute at that place.<sup>34</sup> If we may credit a decision of an Appellate Court in Illinois, a statute requiring railway companies to keep a *rear brakeman* at his place on a freight train was not enacted for the benefit of *trespassers*; but they take things as they find them, and a failure to comply with the statute is not evidence of a reckless disregard of human life, such as will render the railway company liable for the killing of a trespasser upon its track.<sup>35</sup> A railroad junction is a "*stopping place*," within the meaning of the Alabama statute requiring the whistle to be blown and the bell to be rung at a stopping place.<sup>35a</sup> But a statute of Texas,<sup>35b</sup> requiring the bell to be rung and the whistle to be blown at a railroad crossing, does not require the performance of those acts *on starting* a train at a place where two lines of railroad cross each other.<sup>36</sup> In the absence of any statutory duty imposed on an engineer to *ring the bell* or *blow the whistle* on approaching a village, a failure to do so will not render the company liable,<sup>37</sup> unless such a precaution is reasonably necessary as a warning to persons who may lawfully be upon the track, in which case the absence of a statute prescribing the duty does not render it any the less incumbent upon the railway company at common law.<sup>38</sup> Under the statute of Alabama, making it the duty of trainmen to keep a proper lookout and give certain warning signals at intervals while running through a town, the company has the *burden of proving* compliance therewith;<sup>39</sup> and there are other like statutes which shift the burden of proof upon the railway company. The statute law of Georgia<sup>40</sup> does not extend so far as to make a railway company liable for an injury received by a person who attempted to cross its right of way upon an errand of his own, received through its failure to *light* or otherwise *guard* the *embankment of a cut* running parallel with the public street.<sup>41</sup>

<sup>34</sup> *Porterfield v. Bond*, 38 Fed. Rep. 391.

<sup>35</sup> *Eggman v. St. Louis & C. R. Co.*, 47 Ill. App. 507.

<sup>35a</sup> *Ensley R. Co. v. Chewning*, 93 Ala. 24; s. c. 9 South. Rep. 458.

<sup>35b</sup> *Tex. Rev. St.*, art. 4232.

<sup>36</sup> *Houston & C. R. Co. v. Brin*, 77 Tex. 174; s. c. 13 S. W. Rep. 886.

<sup>37</sup> *Carrington v. Louisville & C. R. Co.*, 88 Ala. 472; s. c. 6 South. Rep. 910; 41 Am. & Eng. Rail. Cas. 543.

<sup>38</sup> *Ante*, §§ 1494, 1555, 1873, 1902.

<sup>39</sup> *Georgia & C. R. Co. v. Blanton*, 84 Ala. 154; s. c. 4 South. Rep. 621.

<sup>40</sup> *Ga. Civ. Code*, §§ 2220, 2221.

<sup>41</sup> *Kling v. Central & C. R. Co.*, 107 Ga. 754; s. c. 33 S. E. Rep. 839.



§ 1950. **Liability of Railway Company for Trespassing with its Cars upon the Track of Another Company.**—If one railway company, without the permission of another railway company, places its cars upon the track of the latter company, whereby they are brought into collision with a train of the latter company, its legal attitude will be that of a *trespasser* upon the premises of the latter company; and consequently, if it is sued by the latter company for the damages resulting from the collision, and sets up the defense of contributory negligence, it will be subject to the rule that a railway company owes no special or affirmative duty toward a *trespasser*, but only the duty of abstaining from the infliction of wanton, willful, or grossly negligent injuries.<sup>42</sup>

§ 1951. **Contributory Negligence of One Railroad Company as a Defense to an Action against Another Railroad Company.**—This question has arisen in a few cases, where one railroad company has sued another railroad company to recover damages inflicted upon the plaintiff company, through a collision alleged to have been brought about through the fault of the defendant company. It is believed that the principles which determine the question are substantially the same as where an action is brought by an individual against a railroad company to recover damages for an injury inflicted upon the plaintiff, through the alleged negligence of the defendant. In an action by a railroad company against a *partnership* and a *private corporation*, to recover damages visited upon the plaintiff by a collision between one of its trains and several empty cars left standing on a side track by the servants of the defendants, the principle applied with respect to the question of contributory negligence was, that if the empty cars were left standing too near the main track, but if a collision might, nevertheless, have been avoided by the use of reasonable care on the part of the persons who were in charge of the passing train of the plaintiff company, the defense of contributory negligence would be made out; but if the empty cars were not placed too near the main track, but were insecurely "scotched" on the down grade of the side track, and, on being put in motion by the passing train, rolled down upon it at the switch, the speed of the train would be immaterial, and contributory negligence could not be imputed to the plaintiff.<sup>43</sup>

§ 1952. **Various Questions as to Proximate and Remote Cause in Railway Injuries.**—Recurring to principles already discussed,<sup>44</sup> it is plain that, in an action for a railway injury, the plaintiff must not

<sup>42</sup> Chicago &c. R. Co. v. Kansas City &c. R. Co., 78 Mo. App. 245, 253, 255; s. c. 2 Mo. App. Rep. 204.

<sup>43</sup> Montgomery &c. R. Co. v. Chambers, 79 Ala. 338.

<sup>44</sup> Vol. I, § 43, *et seq.*



only show the fact of the injury, and the fact of the negligence of the railway company, but he must show a proximate or juridical connection between the negligent act or omission and the damage or hurt to the plaintiff or other person, which followed; or, expressed in briefer language, he must show that the negligence caused the injury.<sup>45</sup> For example, a man may be injured by a railway train at a time when those in charge of the train are committing a breach of a statute or ordinance in respect of the mode of operating the train; but this will afford no ground for the recovery of damages, unless it is also made to appear that the breach of the regulation produced the injury.<sup>46</sup> So, a railway train may be run through a city at a rate of speed forbidden by ordinance and without the ringing of its bell; but this will not support an action for an injury to a person through a collision with the train, unless it is made to appear that it was in some manner caused by the violation of the ordinance or the failure to ring the bell.<sup>47</sup> The same principle governed the decision of an action to recover damages from a railroad company for the death of a person found mortally injured on the track, under a highway bridge built by the company, and which it was required to maintain, where the negligence of the company was alleged to consist in the unsafe condition of the approach to the bridge. There was, however, no evidence that the deceased was on the bridge, or was seen in that direction before his injury. It was held that there was nothing to connect the injury with the condition of the bridge, or with the failure of the company to perform its duty to restore the highway to a proper state, or to make the passage of the bridge safe; hence, that a verdict against the company could not be sustained.<sup>48</sup> So, a railway company which had lawfully built, and which was, without negligence, operating its road in a public street, was not liable to a pedestrian who, by reason of snowdrifts on the sidewalk, walked along the street immediately adjoining such railway, and was run over by a passing team. Such injury resulted rather from the city's failure to keep its walks and streets passable.<sup>49</sup>

<sup>45</sup> *Baltimore &c. R. Co. v. Young*, 153 Ind. 163; s. c. 54 N. E. Rep. 791; *Missouri &c. R. Co. v. Cardena*, 22 Tex. Civ. App. 300; s. c. 54 S. W. Rep. 312; *Norwood v. Raleigh &c. R. Co.*, 111 N. C. 236; s. c. 16 S. E. Rep. 4; *Gardinier v. New York &c. R. Co.*, 103 N. Y. 674; s. c. 4 Cent. Rep. 785; *McCandless v. Chicago &c. R. Co.*, 71 Wis. 41; s. c. 36 N. W. Rep. 620; *Bluedorn v. Missouri &c. R. Co.*, 121 Mo. 258; s. c. 25 S. W. Rep. 943; *rev'g s. c. 24 S. W. Rep. 57*.

<sup>46</sup> *Bluedorn v. Missouri &c. R. Co.*, 121 Mo. 258; s. c. 25 S. W. Rep. 943; *rev'g s. c. 24 S. W. Rep. 57*.

<sup>47</sup> *Missouri &c. R. Co. v. Cardena*, 22 Tex. Civ. App. 300; s. c. 54 S. W. Rep. 312.

<sup>48</sup> *Gardinier v. New York &c. R. Co.*, 103 N. Y. 674; s. c. 4 Cent. Rep. 785.

<sup>49</sup> *McCandless v. Chicago &c. R. Co.*, 71 Wis. 41; s. c. 36 N. W. Rep. 620.



§ 1953. **Further of Proximate Cause in these Cases.**—As already seen,<sup>50</sup> the principle applies in case of the defense of *contributory negligence*; so that if the negligence of the person injured was the proximate cause of the injury, there can be no recovery. Therefore, in the case of one killed upon a railway track under obscure circumstances, there can be no recovery, even if a presumption of negligence arises from the fact of the killing, in the absence of evidence reasonably tending to show that such negligence—and not the negligence of the deceased—was the proximate cause of the injury;<sup>51</sup> but the presumption will be that the negligence of the deceased in going upon the track was the cause of his death. On the other hand, the negligence of the person injured will not have the effect of barring a recovery of damages by him, unless it contributed as a proximate or efficient cause to bring about the injury,—as where the plaintiff may have been guilty of negligence in using defective stakes and in loading a car with lumber in an improper manner, and yet the breaking of one of the stakes, causing injury to him, was due to the negligence of a servant of the company,—the contributory negligence of the plaintiff being remote.<sup>52</sup> The contributory negligence of the plaintiff in an action for a negligent injury must be something more than a collateral *failure of duty toward third persons*. Thus, in an *action by a railroad company against a gas light company*, grounded upon negligence in allowing cars on a side-track in possession of the defendant to stand too near the main track, thereby causing a collision with a passing train, inflicting damage on the plaintiff, it will be no defense that it was the duty of the plaintiff, as to third persons—for example, as to its passengers or to its servants,—to have removed the cars from the position in which they stood.<sup>53</sup> The negligence which consists in the failure to comply with the provisions of a statute need not, in order to make the railroad liable, be the *sole* cause of the injury; but it will be sufficient if it was one of the efficient causes of it, provided the other *concurring* cause or causes was not the negligence or fault of the plaintiff or person injured.<sup>54</sup>

<sup>50</sup> Vol. I, § 216, *et seq.*

<sup>51</sup> *Norwood v. Raleigh & Co. R. Co.*, 111 N. C. 236; s. c. 16 S. E. Rep. 4.

<sup>52</sup> *Pollard v. Maine & Co. R. Co.*, 87 Me. 51; s. c. 32 Atl. Rep. 735.

<sup>53</sup> *Montgomery Gaslight Co. v. Montgomery & Co. R. Co.*, 86 Ala. 372; s. c. 5 South. Rep. 735.

<sup>54</sup> *Western R. Co. v. Sistrunk*, 85 Ala. 352; s. c. 5 South. Rep. 79. Upon the question of liability for a negligent injury resulting from a *succession of causes*, we have a

curious decision in a case where the plaintiff was struck and injured, while walking along a path by the side of a railway track, by a cow which was *thrown from the track* by a passing locomotive and which fell against him after striking the ground. Here, the injury received by the plaintiff was held to be the proximate consequence of the engine striking the cow; so that if the railroad company was negligent in striking the cow, it became liable



§ 1954. **Failure to Display Lights on Moving Engines or Cars at Night.**—It is easy to conclude that the unexplained failure of a railway company to *display lights* in front of locomotives or cars which are being moved forward at night, is actionable negligence with respect to any person lawfully upon the track and injured in consequence of such failure;<sup>55</sup> but not actionable negligence in case of an injury arising from some other cause.<sup>56</sup> Judicial casuistry has even concerned itself with the question of the *sufficiency of a locomotive head-light*; and we have the conclusion that a railroad company is liable in damages for an injury caused by its failure to use a head-light upon its locomotive powerful enough to show obstructions on the track, within the distance in which the train, running at an average speed, can be stopped.<sup>57</sup> But suppose that a particular head-light is used, when a stronger one might be displayed upon a train running at an extraordinary rate of speed,—as where it is behind time and an additional engine is attached in order to increase speed and catch up with its schedule time? Another court has well reasoned that if, without any defect in the *head-light* or fault on the part of the employés, the light becomes, by rain or other natural causes, so obscure that the lookout can not see ahead, the railroad company is not necessarily liable for consequent damages; that instances may occur in which danger from collisions may imperatively demand that the train proceed at all events; and that it would be difficult to lay down

for the injury inflicted upon the plaintiff, although, in the running of the train, there was no negligence as toward the plaintiff directly: *Alabama &c. R. Co. v. Chapman*, 80 Ala. 615. Liability of railroad company to a person lawfully *near its track*, who is struck by the tools thrown from another person, who is hit by a train, where both he and the railway company were negligent,—a case of injury through the concurring negligence of two persons, in which case either is liable, the negligence of the railway company consisting in its failure to give the proper signals: *Pennsylvania R. Co. v. Hammill*, 56 N. J. L. 370; s. c. 24 L. R. A. 531; 29 Atl. Rep. 151.

<sup>55</sup>*East St. Louis &c. R. Co. v. O'Hara*, 150 Ill. 580; *Zoliewski v. New York &c. R. Co.*, 140 N. Y. 621; aff'g s. c. 1 Misc. 438; *Becke v. Missouri &c. R. Co.*, 102 Mo. 544; s. c. 9 L. R. A. 157.

<sup>56</sup>*Chicago &c. R. Co. v. Bednoz*, 57 Ill. App. 309. As to the necessity

of maintaining *headlights upon street cars*, see note to *McGee v. Consolidated St. R. Co.*, 102 Mich. 107, in 26 L. R. A. 300; *ante*, § 1392. As to the necessity of maintaining lights on moving locomotives and cars for the warning of persons at *highway crossings*, see *ante*, § 1552. A railway company which pushes a car forward in front of an engine at night, without displaying any light or giving any warning signal of its approach, is guilty of negligence rendering it liable for the death or injury of a person caused thereby: *Stanley v. Durham &c. R. Co.*, 126 N. C. 514; s. c. 9 Am. & Eng. Rail. Cas. (N. S.) 208; 27 S. E. Rep. 27. A red lantern hung on the end of a *backing locomotive* does not comply with an ordinance requiring "a brilliant and conspicuous light on the *front end*" of a locomotive: *Chicago &c. R. Co. v. Traves*, 33 Ill. App. 307.

<sup>57</sup>*Alabama &c. R. Co. v. Jones*, 71 Ala. 487.



any rule by which it may be determined how far ahead the light should be thrown, to make it lawful for the train to run.<sup>58</sup> This makes it plain, if anything were needed to make it plain, that in most cases the question of the *sufficiency of the head-light* will be a question of fact *for the jury*. The act of railroad employes in halting their train at night at an unusual place, without setting signals or taking precautions against a *rear-end collision*, constitutes negligence, as matter of law, where the locomotive of another company collides with the train, to the injury of a person lawfully on the train of such other company.<sup>59</sup>

§ 1955. **Liability as against Lessor or Lessee of the Railway Company.**<sup>60</sup>—The principles which underlie the questions here suggested are very simple. 1. For any negligent injury inflicted upon third persons in the operation of a railroad, the corporation owning the railroad is presumptively liable.<sup>61</sup> 2. A railroad company can not devolve the exercise of its franchises upon another person or corporation without the consent of the State; it has no implied power to lease its road and its franchise of operating it; if it does so without the express authorization or consent of the State, it remains responsible for any negligent injuries committed by its lessee in operating it, in like manner as though such injuries had been committed by itself through its own agents or servants.<sup>62</sup> 3. A corporation operating a

<sup>58</sup> *Louisville &c. R. Co. v. Melton*, 2 Lea (Tenn.) 262.

<sup>59</sup> *Smithson v. Chicago &c. R. Co.*, 71 Minn. 216; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 726; 73 N. W. Rep. 853 (the injury was to the fireman of the advancing train).

<sup>60</sup> This section is cited in §§ 2049, 2239.

<sup>61</sup> This will appear from what follows in this paragraph.

<sup>62</sup> *Abbott v. Johnstown &c. R. Co.*, 80 N. Y. 27; s. c. 36 Am. Rep. 572; 4 Thomp. Corp., § 5355; 5 Thomp. Corp., §§ 5854, 5855, 6241, 6293. There are holdings to the effect that a railway corporation which has leased its properties and franchises, and thereby divested itself of all control in respect of its operation, is liable for the torts committed by the lessee, irrespective of the question whether the lease was authorized by the State, or whether its liability in such case was reserved by the governing statute. One court has gone so far as to hold, without the reservations above named, that

a railroad company is liable for any torts committed in the management of its road by any corporation or individual to whom it has voluntarily entrusted such management: *Parr v. Spartanburg &c. R. Co.*, 43 S. C. 197; s. c. 20 S. E. Rep. 1009. Another court has gone to the length of holding, without making the reservation above stated, that the fact that one railroad company permits another railroad company to use its tracks by running its locomotives and cars thereon, the latter company being in control and occupation of the tracks, renders the company owning the railroad liable for the torts of the lessee or licensee: *Pennsylvania Co. v. Ellett*, 132 Ill. 654; s. c. 24 N. E. Rep. 559; 42 Am. & Eng. Rail. Cas. 64. Under this doctrine, in an action against a railroad company grounded upon negligence, the action will be supported, under proper allegations in the declaration or complaint, by proof that the injury was committed by the negligence of the other company while using the



railroad as lessee of its owner is primarily liable to third persons for negligent injuries committed in so operating it.<sup>63</sup> 4. If a corporation is in fact, through its agents and servants, operating a railroad, it is liable to third persons for negligent injuries committed by its agents and servants, without reference to the question in

tracks of the defendant company, with its consent or authorization: *Pennsylvania Co. v. Ellett*, 132 Ill. 654; s. c. 42 Am. & Eng. Rail. Cas. 64; 24 N. E. Rep. 559. Coming back to a decision already cited, we find that a court has gone to the wild length of holding, without either of the foregoing qualifications, that a railroad company is liable for the torts of the receiver of its lessee, committed in the management of its road: *Parr v. Spartanburg & C. R. Co.*, 43 S. C. 197; s. c. 20 S. E. Rep. 1009. But, assuming that the lease has been made with the consent of the State, there is no more propriety in holding the lessor liable for the torts of the lessee, than there would be in applying the same rule to a farmer who has leased his farm to a tenant; nor is there any underlying legal sense in the proposition which makes a railroad company liable for the torts of the servants of a receiver appointed by a court of justice to take charge of and manage the railway property; though there are many cases which go to the length of making the company so liable. The railroad company does not appoint him nor control him, but he is an officer of a court of justice. Between the railroad company, lessor or lessee, and the receiver there is no such connection as exists between principal and agent: the doctrine of *respondet superior* has no just application to such a case; the railway company can not interfere with or control him in the slightest degree in the selection of his servants or in the management of its property; but such property is *in custodia legis*, and any interference with it will be a contempt of the court whose officer he is. The same observations may be made concerning a holding of another court to the effect that a railroad company which leases its road to another company can not release itself from liability to the employes of the lessee company to fur-

nish such trains and other appliances as are necessary to provide for their safety: *Logan v. North Carolina R. Co.*, 116 N. C. 940; s. c. 21 S. E. Rep. 959. If the lease is lawful, there is neither sense nor justice in holding the lessor company liable to the servants of the lessee company, with whom it has nothing to do, for torts committed against them by the lessee company. Another court has held, and seemingly with more propriety, that the mere fact of the ownership of a railroad track does not of itself make the owner company liable for a negligent injury committed by others in operating an engine upon its road. This rule was applied to a case where a *turnpike company* contracted with a third party to pave its road, and an engine, used by the contractor, caused damage to the plaintiff: *City & C. R. Co. v. Moores*, 80 Md. 348; s. c. 30 Atl. Rep. 643. And this would seem to be clear, provided the owner company has the power to give them license to operate it. In such a case there would be no more propriety in holding the railway company liable for the negligence of the licensee, than there would be in holding a farmer liable for a negligent injury committed by a person to whom he had given a license for a private way over his land. It has been held that a railroad company operating a road as lessee is a company "owning the track" within the meaning of the Ohio Revised Statutes (§ 3333), imposing upon railroads whose tracks cross each other at a common grade, the joint duty of repairs and lookout: *Baltimore & C. R. Co. v. Walker*, 45 Ohio St. 577; s. c. 14 West. Rep. 172; 16 N. E. Rep. 475.

<sup>63</sup> *State v. Missouri & C. R. Co.*, 149 Mo. 104; *Pennsylvania Co. v. Greso*, 79 Ill. App. 127; *Thorne v. Lehigh Valley R. Co.*, 88 Hun (N. Y.) 141; s. c. 34 N. Y. Supp. 525; 68 N. Y. St. Rep. 308.



whom the legal title of the railway property and franchises is vested.<sup>64</sup> 5. If a railway company, with the authorization of the State, leases its properties and franchises to another company, and reserves to itself no control in the use of such property or in the exercise of such franchises, but is excluded therefrom by the lessee company,—then it will not be liable for damages inflicted upon third persons through the negligence of the lessee company,<sup>65</sup>—unless the statute authorizing the lease expressly or impliedly reserves a continuing liability in the lessor for the torts of the lessee company.<sup>66</sup> 6. It necessarily follows from the foregoing propositions that, in case of an unlawful or unauthorized lease of a railway and its franchises, there may be a liability in either or both the lessor and the lessee company to the person on whom the injury is inflicted.<sup>67</sup> 7. A railroad company is not discharged from liability for the negligent operation of its road, by the fact that the road is in control of the *trustees* under a deed of trust after default in the payment of the principal or interest thereby secured, unless the road is managed and operated by the trustees to the exclusion of the company, its officers and directors.<sup>68</sup> 8. In case of a *mixed operation* of a railroad by two or more companies,—for example, where two or more companies have the right to operate their trains upon a common track and its sidings,—each company will be liable for its own negligences and torts, not only to strangers, but towards the other companies.<sup>69</sup> But if, in such case, the company owning the road, and in which is vested the franchise granted by the State of operating it, grants a license to other companies to run their trains over it, without the consent of the State, then, on principles already considered, it will be liable to strangers for their negligences and torts.<sup>70</sup>

**§ 1956. Injuries Arising in the Mixed Operation of Railway Properties by Several Companies.**—In this class of cases there is some

<sup>64</sup> *Gramm v. Northern &c. R. Co.*, 1 N. D. 252; s. c. 45 Am. & Eng. Rail. Cas. 544; 46 N. W. Rep. 972.

<sup>65</sup> *Von Steuben v. Central R. Co.*, 4 Pa. Dist. R. 153; *Scziwak v. Philadelphia &c. R. Co.*, 4 Pa. Dist. R. 339.

<sup>66</sup> *Thorne v. Lehigh Valley R. Co.*, 88 Hun (N. Y.) 141; s. c. 34 N. Y. Supp. 525; 68 N. Y. St. Rep. 308 (lessee, and not lessor, liable to the owners of domestic animals for failing to perform statutory duty of fencing track). If the statute provides that where a railroad company leases its road to another company, both roads may be jointly sued for damages caused by the neg-

ligence of the lessee, the rule that joint tort-feasors are liable jointly and *severally* applies, so as to give a right of action against either: *Stoltz v. Baltimore &c. R. Co.*, 7 Ohio N. P. 129.

<sup>67</sup> *Galveston &c. R. Co. v. Garteiser*, 9 Tex. Civ. App. 456; s. c. 29 S. W. Rep. 939.

<sup>68</sup> *Pennsylvania R. Co. v. Jones*, 155 U. S. 333; 39 L. ed. 176; 15 Sup. Ct. Rep. 136.

<sup>69</sup> Examine, with reference to this subject, *Central Trust Co. of New York v. Denver &c. R. Co.*, 97 Fed. Rep. 239,—a case more fully explained in the next section.

<sup>70</sup> *Supra*, sub-sec. 2.



difficulty in stating a general rule. There is authority for the proposition that if a railway company has leased to another company, *without reference to the question whether it is done by authority from the State, or under a statute reserving to it a liability for the torts of the lessee company*, a right to use, in common with itself, a portion of its track, it will, on principles stated in the preceding paragraph, be liable to its own passengers and shippers for injuries inflicted upon them through the negligence of the servants of the lessee in the operation of trains upon such track.<sup>71</sup> The reason is that the lessor company can not in any event escape the consequences of the negligence of its lessee. If one railroad company grants to another company the privilege of operating its trains over the tracks of the grantor company, this fact, it has been held, brings the grantee company into such a relation toward passengers upon the trains of the grantor company, that the grantee is bound to exercise, *in favor of such passengers*, the high degree of care which the law puts upon carriers of passengers, which is nothing less than all reasonable and practicable care and caution as far as human foresight can go under the particular circumstances, to the end of avoiding injury to them.<sup>72</sup> But in respect of the obligation of two railway companies, enjoying a mixed or common occupation of a single track, of avoiding injuries to each other, their duty is measured by the standard of ordinary care. When, therefore, a railroad company leased to another company the right to use a portion of its track, and thereafter each company ran its trains over the track, in charge of its own employés, although under a joint superintendent and a joint train dispatcher, each was liable to the other for any injury inflicted upon that other through the negligence of its own servants; and this liability extended to a *receiver* operating the train of one of the companies under a continuation of the agreement. In such a case, the occupation and operation of the road by the company is deemed to be *common*, and *not joint*. But where there is an arrangement among different railway companies whereby trains are to be run over one road in the interest of all, each contributing to the expense and having such a share in the profits as may be determined by a common agent according to a rule agreed upon among them, the occupation and operation of the road are deemed to be *joint*, in such a sense as to render each or all of the companies liable for an injury inflicted upon a third person by the

<sup>71</sup> Central Trust Co. of New York v. Denver &c. R. Co., 97 Fed. Rep. 239; Illinois &c. R. Co. v. Barron, 5 Wall. (U. S.) 90, 104; Pennsylvania Co. v. Ellett, 132 Ill. 654.

<sup>72</sup> Chicago &c. R. Co. v. Martin, 59 Kan. 437; s. c. 4 Am. Neg. Rep. 266; 12 Am. & Eng. Rail. Cas. (N. S.) 4; 53 Pac. Rep. 461.



negligence of the persons operating any of the trains.<sup>73</sup> In such a case, if an injury is inflicted through the negligence of a *pilot* in actual control of a train belonging to another road, the company whose servant he is will be liable in damages, even if the company owning the train is also liable.<sup>74</sup> In an action against a railroad company for the negligent killing of a person by the train of another company while running on the tracks of the former company, proof that the tracks of the companies were connected by a Y, and that the company whose train did the injury had been in daily use of the track of the defendant company, was held to place upon the defendant company the *burden* of showing that the other company was a *trespasser* upon its tracks,—the court applying the rule of law criticised in a note in the preceding section, that if the train of the other company was lawfully on the track of the defendant company by its consent, the defendant company became liable for a negligent injury committed in its management while there.<sup>75</sup>

§ 1957. **Duty of Lighting Tracks, Crossings, Stations, etc.**—In the absence of a statute or municipal ordinance prescribing this duty, it seems that whether the failure to perform it is negligence will be a *question for a jury*. It was so held where it was shown that *other companies* had adopted a rule requiring a flag by day and a light by night, of a certain color, to be placed upon cars undergoing repairs,—with the conclusion that it was for the jury to say whether, in the particular instance, the defendant railroad company was negligent in not having adopted the rule.<sup>76</sup>

<sup>73</sup> Jones v. Pennsylvania R. Co., 19 D. C. 178; s. c. 18 Wash. L. Rep. 462.

<sup>74</sup> Jones v. Pennsylvania R. Co., 19 D. C. 178; s. c. 18 Wash. L. Rep. 462.

<sup>75</sup> Pennsylvania Co. v. Ellett, 37 Ill. App. 278; s. c. aff'd 132 Ill. 654; 23 N. E. Rep. 559; 42 Am. & Eng. Rail. Cas. 64. Where a person, lawfully on the track, is injured by the engine of a company using the track of another company, the engine being manned by servants of the company owning it, such company will not be relieved from liability by the fact that the general control over all engines at the point of the accident, for the purpose of facilitating traffic, was vested in an agent of the company owning the track, although he had the power of dismissal for disobedience of his orders,—it not appearing that the accident was

brought about through the orders of such agent: Pennsylvania R. Co. v. McHugo (Pa.), 5 Reporter 342; s. c. 35 Phila. Leg. Int. 62.

<sup>76</sup> Abel v. Delaware & C. Canal Co., 103 N. Y. 581; s. c. 57 Am. Rep. 773. A statute of Ohio provides that a municipal corporation may require any railroad company within its limits to light its tracks, and that if, after twenty days' notice, it fails to do so, the municipality may do so at the expense of the company. Under this statute it has been held that a village may impose upon a railway company the expense of maintaining a light not placed above its tracks, but in a place where it would light the tracks as well as the location would permit, though it also incidentally lighted the *streets of the village*: Cleveland & C. R. Co. v. St. Bernard, 10 Ohio C. C. 296; s. c. 10 Ohio C. D. 415. But where the



§ 1958. **Trains Derailing and Running into Adjacent Buildings.**<sup>77</sup>—Injuries of this kind are not uncommon, especially where railroad tracks are laid upon the surface of city streets. The derailing of a freight train and its running into an adjacent building presents a *prima facie* case of negligence demanding an explanation on the part of the railway company consistent with due care, and gives a right of action to the owner or occupier of the building for damages, in the absence of contributory negligence on his part.<sup>78</sup> If the building is erected on the right of way of the company without right, then he is a trespasser, and, on principles already considered,<sup>79</sup> takes the risks attending his trespass and, in the absence of special circumstances, has no right of action against the company.<sup>80</sup>

§ 1959. **Liability for Wrongful Acts of Strangers.**—Whether a railway company will incur a liability for an injury produced by the wrongful act of an *intermeddling stranger*, would seem to depend upon the inquiry whether, prior to the accident, the railway company had time, in the exercise of reasonable care and of a reasonable inspection, to discover the mischief and correct it. Its position in this regard would seem to be analogous to that of a municipal corporation in respect of the reparation of its highways,—a subject intended to be dealt with in the next volume. Whether the railway company has used due care in protecting its properties from interference through malicious acts of third persons, must in general present a question for

municipality had placed lights at or near a railway crossing, sufficient to enable a person driving over the track after dark to distinguish between the railway and the highway and to cross with safety,—this was held to relieve the railway company from the duty of providing any further lights: *Balser v. Chicago & C. R. Co.*, 9 Ohio S. & C. P. Dec. 523. Although this statute confers upon municipal corporations the power to prescribe the kind of light to be used by the railway company, it does not authorize them to impose an unreasonable burden upon the railway company, either in respect of the character or the location of the lights. For example, it can not impose upon a railway company the duty of lighting its tracks with lights of a candlepower so great that the effect of the lights will be to obscure the headlights of locomotives and to render it difficult for the railway company to operate its

trains with safety to its passengers and to travellers approaching street crossings: *Cleveland & C. R. Co. v. St. Bernard*, 15 Ohio C. C. 588; s. c. 8 Ohio C. D. 385.

<sup>77</sup> This section is cited in § 1904.

<sup>78</sup> *Lane v. Illinois & C. R. Co.*, 43 La. An. 833; s. c. 9 South. Rep. 560. Compare *ante*, § 1886.

<sup>79</sup> Vol. I, § 946, *et seq.*; *ante*, § 1705, *et seq.*

<sup>80</sup> *Dillon v. Connecticut & C. R. Co.*, 154 Mass. 478; s. c. 28 N. E. Rep. 899. The railroad company is not liable under a statute (Mass. Pub. Stat., ch. 112, § 212), charging it with liability for loss of life except when the person is upon the road contrary to law, for the death of one killed by the derailing of a train while he was in a building erected without right within the location of its right of way: *Dillon v. Connecticut River R. Co.*, 154 Mass. 478; s. c. 28 N. E. Rep. 899.



a jury.<sup>81</sup> It has been held that a railroad company is not liable to its employes for the wrongful acts of strangers;<sup>82</sup> nor to its passengers for injuries resulting from the wrongful tampering with switches or rails, by third persons.<sup>83</sup> This rule was applied to a case where a fog signal was placed on the defendant's track by a stranger, resulting in damage to the plaintiff;<sup>84</sup> to an injury caused to a passenger by a missile thrown by an unknown person to effect a malicious purpose of his own;<sup>85</sup> and to an injury to a passenger in a collision caused by the defendant's engine, whose fires had been banked, but which were wrongfully started by a stranger.<sup>86</sup> Nor is a railroad company negligent in failing to keep its car windows supplied with wire screens to prevent injuries to its passengers from missiles thrown from outside.<sup>87</sup>

§ 1960. **Allowing Cars to "Run Wild"—Making the "Running" or "Flying" Switch.**—This very great source of public danger has been several times adverted to already.<sup>88</sup> It has been justly held that the same care is necessary in sending a single car in rapid motion on a down grade that would be required in case of a train.<sup>89</sup> To allow a car or cars detached from the engine to run down a grade at the rate of ten or fifteen miles an hour, where people are landing from a steamboat, has been held evidence of negligence.<sup>90</sup> To send a car forward upon a track where it is known that people may be passing, without any brakeman upon it, or any other means of stopping or controlling it, has been held evidence of negligence fit to be submitted to a jury, although there is no public crossing at that place.<sup>91</sup> Evidence of negligence fit to go to the jury has been ascribed to the fact that a car having no brake was allowed to escape and "run wild," notwithstanding further evidence that such a car could have been moved and controlled with the exercise of due care, in the absence of any evidence

<sup>81</sup> *East Tennessee &c. R. Co. v. Kane*, 92 Ga. 187; s. c. 22 L. R. A. 315; 18 S. E. Rep. 18. That the Georgia act of Oct. 12, 1885, making it penal to wreck railroad trains, etc., applies to all railroads whether duly chartered or not,—see *Hodge v. State*, 82 Ga. 643; s. c. 9 S. E. Rep. 676.

<sup>82</sup> *Miller v. Southern &c. R. Co.*, 20 Ore. 285; *East Tennessee &c. R. Co. v. Kane*, 92 Ga. 187.

<sup>83</sup> *Deyo v. New York &c. R. Co.*, 34 N. Y. 9; *Worth v. Chicago &c. R. Co.*, 51 Fed. Rep. 171; *Keeley v. Erie &c. R. Co.*, 47 How. Pr. (N. Y.) 256; *Latch v. Rumner R. Co.*, 3 Hurl. & N. 930.

<sup>84</sup> *Jones v. Grand Trunk R. Co.*, 45 Up. Can. Q. B. 193.

<sup>85</sup> *Pennsylvania R. Co. v. MacKinney*, 124 Pa. St. 462.

<sup>86</sup> *Mars v. Delaware &c. R. Co.*, 54 Hun (N. Y.) 625.

<sup>87</sup> *Missimer v. Philadelphia &c. R. Co.*, 17 Phila. (Pa.) 172.

<sup>88</sup> *Ante*, §§ 1572, 1695, 1696, 1717, 1819, 1820.

<sup>89</sup> *Shelby v. Cincinnati &c. R. Co.*, 85 Ky. 224; s. c. 3 S. W. Rep. 157.

<sup>90</sup> *Malmsten v. Marquette &c. R. Co.*, 49 Mich. 94.

<sup>91</sup> *Lake Shore &c. R. Co. v. Hundt*, 140 Ill. 525; s. c. 30 N. E. Rep. 458; *aff'd* 40 Ill. App. 220.



showing that everything required by the exercise of due care to be done, was done to control it.<sup>92</sup> A railway company has been held liable for the death of one allowed to stay in its yards to do odd jobs without pay, in consequence of being struck by a car "kicked" forward upon him without any warning or without any lookout thereon, the track being one on which the public constantly walked or stood, to the knowledge of those in charge of the train.<sup>93</sup> It has been held that a railroad company, making a "flying switch" at a crossing which it has kept planked many years between shops of a corporation located on both sides of its road for the use of workmen therein, when it knows that this constitutes practically the only entry to the shops on one side of the track and is used by the workmen in crowds at stated hours of the day, must exercise reasonable care toward them, whether they are to be regarded as bare licensees, or as using the track by invitation.<sup>94</sup> But it is suggested that the mere fact of making the "flying switch" at such a place, whereby detached cars are driven forward through crowds, might well be regarded as furnishing evidence of negligence without reference to the care employed in the operation. At all events, in an action against a railroad company for an injury received by being run upon by a detached car in making a "flying switch," the question of negligence will generally be one of fact *for the jury*.<sup>95</sup>

§ 1961. **Allowing Trains to "Run Wild."**—This question is quite different from that of detaching cars from the engine and allowing them to "run wild." A train "running wild," commonly called a "wild train," is understood to be an irregular train, not running upon any schedule time, but required to be run so as to keep out of the way of regular trains. With reference to a "wild train," a "regular train" is a periodical train of the company which runs upon a regular schedule time; and it has been held that it does not cease to be a regular train, so as to dispense with the duty of those in charge of a "wild train" to keep out of the way of it, from the fact that it is an hour *behind time*.<sup>96</sup> Where the special order under which a "wild

<sup>92</sup> *Tennessee Coal & C. R. Co. v. Hayes*, 97 Ala. 201; s. c. 12 South. Rep. 98.

<sup>93</sup> *Hudson v. East Tennessee & C. R. Co.*, 93 Ga. 816; s. c. 21 S. E. Rep. 126.

<sup>94</sup> *Pomponio v. New York & C. R. Co.*, 66 Conn. 528; s. c. 32 L. R. A. 530; 34 Atl. Rep. 491.

<sup>95</sup> *White v. Fitchburg & C. R. Co.*, 136 Mass. 321. *Evidence of a rule of a railroad company, which was a prohibition against making "run-*

*ning switches,"* was properly admitted against the defendant's objection, where plaintiff offered to follow it up by the introduction of evidence showing that, at the time when the injury occurred, the agents of defendant were making a running switch; *Baltimore & C. R. Co. v. Kean*, 65 Md. 394; s. c. 3 Cent. Rep. 716.

<sup>96</sup> *Phillips v. Chicago & C. R. Co.*, 64 Wis. 475.



train" was run, did not enable the conductor and engineer to observe the regular schedule time of reaching and leaving stations, the regular time table of the railroad company was overcome and superseded by the special order. The failure, therefore, of the conductor of the "wild train" to stop his train at a station, not required by his special order, was not negligence.<sup>97</sup>

§ 1962. **Failing to Keep a Watchman at a Switch.**—A railway company is not necessarily chargeable with negligence in failing to keep a watchman at a switch, but this may become a question for a jury.<sup>98</sup>

§ 1963. **Collisions between Railway Trains where the Tracks Cross Each Other.**—In cases of injuries of this kind, the action is usually brought by an employé or other person upon the train of one railway company, against the other company, and is grounded on the negligence of the trainmen of the other company in failing to exercise ordinary or reasonable care on approaching the crossing, or in neglecting some statutory requirement intended to prevent collisions. Negligence has been ascribed to a railroad company, in consequence of a collision at a crossing of its railroad with another railroad, where its own engineer failed to use ordinary care to stop its train before reaching the crossing; or, having stopped it at the proper distance, started it forward, knowing that the train on the other road was entitled to the right of way and was approaching the crossing so near as to render it imprudent for him to attempt to proceed;<sup>99</sup> where, on approaching such a crossing, at which it was required by statute to stop the train, the *air brakes* on the train of the defendant refused to work, and the defendant's servants failed to exercise reasonable care in availing themselves of other means in their power of stopping the train;<sup>100</sup> where, in making up a construction train engaged in building a railroad, the employés of the defendant company left one end of a car projecting over the track of the intersecting railroad, no train running on schedule time being due, and a train "running wild" came into collision with such car.<sup>101</sup> Nor was a railroad company relieved from liability for damages arising from such a collision, by the fact that the view of the signals erected at the crossing for the purpose of warn-

<sup>97</sup> *Albert v. Sweet*, 116 N. Y. 363.

<sup>98</sup> *Sellars v. Richmond & C. R. Co.*, 94 N. C. 654.

<sup>99</sup> *Fort Worth & C. R. Co. v. Mackney*, 83 Tex. 410; s. c. 18 S. W. Rep. 949.

<sup>100</sup> *Missouri & C. R. Co. v. Ransom*,

15 Tex. Civ. App. 689; s. c. 41 S. W. Rep. 826.

<sup>101</sup> *Albert v. Sweet*, 116 N. Y. 363; s. c. 42 Am. & Eng. Rail. Cas. 214; 26 N. Y. St. Rep. 738; 22 N. E. Rep. 762.



ing a train upon one track of the approach of a train on the other, were obscured by an electric light maintained by the city, where the collision could have been avoided by the exercise of a care and caution commensurate with the surroundings.<sup>102</sup> For the engineer of one train to approach a crossing at the rate of thirty or forty miles an hour, instead of stopping as required by statute, where the nature of the locality obscures the view of one road from the other, and all trains upon them until they are very near him, is a fact sufficient to support a finding of *wantonness and reckless indifference to consequences*, although such engineer did not in fact see the train on the other road.<sup>103</sup>

§ 1964. **Considerations Growing out of Precedence in the Right of Way.**—At places where railways intersect each other at grade, law or custom ought always to establish the general right of precedence in the one company or in the other. According to one view, the right of way exists in the company *whose road is first built*, since the other company takes its right of way subject to the pre-existing franchise of the former.<sup>104</sup> According to the view of another court, the right of way is acquired by the *train which first stops* and sounds the whistle as required by statute; so that the engineer in charge of this train may generally (thought not always<sup>105</sup>) act upon the assumption that those in control of the train on the other road will observe the law, and not attempt to cross until the former train has cleared the crossing.<sup>106</sup>

§ 1965. **Right to Assume that the Men in Charge of the Train on the Other Road will Do their Duty.**<sup>107</sup>—This brings us to a question analogous to that which arises in the case of a collision between railway trains and travellers on the track,<sup>108</sup> whether those in charge of

<sup>102</sup> *Cleveland &c. R. Co. v. Gray*, 148 Ind. 266; s. c. 46 N. E. Rep. 675; 8 Am. & Eng. Rail. Cas. (N. S.) 48.

<sup>103</sup> *Richmond &c. R. Co. v. Greenwood*, 99 Ala. 501; s. c. 14 South. Rep. 495. And so, where the defendant railroad company drove its train upon the crossing of another road, whose train had the exclusive right of way, and was heading toward the crossing and but a few yards away: *Chesapeake &c. R. Co. v. McMichael* (Ky.), 15 S. W. Rep. 878 (no off. rep.). And so, where the trainmen of the defendant company, when they see, or by the exercise of ordinary care can see, that

the *target* at the crossing indicates that the track is not clear; or where they see the train upon the other road in time, by the exercise of reasonable and proper care, to avoid colliding: *Moulder v. Cleveland &c. R. Co.*, 1 Ohio N. P. 361; s. c. 2 Ohio Leg. News 540.

<sup>104</sup> *Moulder v. Cleveland &c. R. Co.*, 1 Ohio N. P. 361; s. c. 2 Ohio Leg. News 540.

<sup>105</sup> *Post*, § 1965.

<sup>106</sup> *Missouri &c. R. Co. v. Vance* (Tex. Civ. App.), 41 S. W. Rep. 167.

<sup>107</sup> This section is cited in § 1964.

<sup>108</sup> Vol. I, §§ 191, 1336, 1337; *ante*, §§ 1601, 1782, 1889, 1891.



the train have the right to assume that those in charge of the train on the other road will do their duty, by stopping before reaching the crossing in conformity with law,<sup>109</sup> or by yielding precedence to the former train where it has the so-called "right of way."<sup>110</sup> Clearly, the engineer of the former train will not be justified in driving his train forward upon the crossing, if it becomes reasonably apparent that those in charge of the train approaching on the other road are not going to stop,<sup>111</sup> or are not going to yield to his train its right of way;<sup>112</sup> but in such a case he must stop his own train before it reaches the crossing, if he can do so.<sup>113</sup>

**§ 1966. Contributory Negligence of the Person Injured in such Collisions.**—Where the engineer in charge of the engine of the train of one company, which collides with the train of another company on the other intersecting railroad, brings the action against the other company to recover damages for the injury which he receives in the collision, the question may arise whether, if he himself had managed his own train with reasonable care, the catastrophe might not have been averted; and it is said not to be sufficient that he complied with the statutory duty of stopping and giving the crossing signals before crossing the other railroad. This does not relieve the engineer from the duty of keeping his train under control, where he knows that there are no semaphores, watchmen, or gates at the crossing; and in case he fails in that duty, he can not recover against the other company for an injury sustained by him in a collision with an engine on its road, caused by the negligence of its engineer.<sup>114</sup> It is scarcely necessary to observe that an engineer driving a train toward the crossing of another railroad is bound to keep a vigilant lookout for trains on the other road; and that, if he might have seen a train on the other road approaching the crossing in ample time to enable him, by stopping his train, to avoid colliding with it, he will not be allowed to recover damages from such other railroad company for a hurt which he may have received in the collision.<sup>115</sup> But the fact that the engineer who brings the action was, at the time of the collision, driving a locomotive without a *head-*

<sup>109</sup> *Birmingham Mineral R. Co. v. Jacobs*, 101 Ala. 149; s. c. 13 South. Rep. 408.

<sup>110</sup> *Missouri &c. R. Co. v. Vance* (Tex. Civ. App.), 41 S. W. Rep. 167 (no off. rep.).

<sup>111</sup> *Birmingham Mineral R. Co. v. Jacobs*, 101 Ala. 149; s. c. 13 South. Rep. 408; *Pratt v. Chicago &c. R. Co.*, 38 Minn. 455; s. c. 38 N. W. Rep. 356.

<sup>112</sup> *Missouri &c. R. Co. v. Vance* (Tex. Civ. App.), 41 S. W. Rep. 167 (no off. rep.).

<sup>113</sup> *Pratt v. Chicago &c. R. Co.*, 38 Minn. 455; s. c. 38 N. W. Rep. 356.

<sup>114</sup> *Kelley v. Duluth &c. R. Co.*, 92 Mich. 19; s. c. 52 N. W. Rep. 81.

<sup>115</sup> *Chicago &c. R. Co. v. Chambers*, 68 Fed. Rep. 148.



*light* will not bar his action on the ground of contributory negligence, where his train had the right of way at the crossing, and where the engineer in charge of the other train might, by the exercise of ordinary care, have seen the former train, notwithstanding the want of a head-light.<sup>116</sup> Recurring to the principle that it is not negligence not to anticipate that another person will act negligently or wrongfully,<sup>117</sup> we find a holding to the effect that a fireman who brings an action against another railroad company for an injury received in such a collision, is not imputable with contributory negligence, because of the fact that he had notified his own engineer that the train on the other road had stopped, but then went about his duties and ceased to watch the other train, assuming that those in charge of it would not disregard the rules by starting before his train had passed over the crossing.<sup>118</sup> In like manner, contributory negligence is not shown, as matter of law, on the part of an engineer in charge of a train which has the right of way at a crossing, where, after the train approaching on the other road has stopped, such engineer attempts to make the crossing, upon the assumption that the engineer in charge of the other train will do his duty by waiting until his train has passed, and on the further assumption that his own fireman, who is on the side of the engine toward the train on the other track, will look out for it.<sup>119</sup> In an action by one railroad company against another such company for damages sustained by the plaintiff company by the fact of its train being run into by a train of the defendant company, while the train of the plaintiff company was standing across the railroad of the defendant company at a grade crossing of the two roads, the fact that the train of the plaintiff company had assumed this exposed situation was not deemed contributory negligence as matter of law, where both companies had, by an agreement, acquiesced in this conduct, where there was no statute prohibiting it, but where there was a statute, the operation of which required the train of the defendant company, under a penalty, to come to a full stop fifty feet from the crossing.<sup>120</sup> Whether the engineer in charge of a train is guilty of contributory negligence in attempting to drive his train across a railroad on which another train is approaching, where he knows the length and speed of his own train and the other circumstances,—must generally present a question of fact *for the jury*.<sup>121</sup>

<sup>116</sup> *Chicago & C. R. Co. v. Chambers*, 68 Fed. Rep. 148.

<sup>117</sup> Vol. I, §§ 191, 1336, 1337; *ante*, §§ 1601, 1782, 1889, 1891, 1965.

<sup>118</sup> *Thompson v. Chicago & C. R. Co.*, 71 Minn. 89; s. c. 73 N. W. Rep. 707.

<sup>119</sup> *Chicago & C. R. Co. v. Chambers*, 68 Fed. Rep. 148.

<sup>120</sup> *Louisville & C. R. Co. v. East Tennessee & C. R. Co.*, 60 Fed. Rep. 993; s. c. 22 U. S. App. 102.

<sup>121</sup> *Birmingham Mineral R. Co. v. Jacobs*, 101 Ala. 149; s. c. 13 South. Rep. 408.



§ 1967. **Injuries in Consequence of the Tracks being Out of Repair at the Point of Intersection.**—The obligation to keep the railway tracks in repair at the point of intersection is generally regulated by statute, or by agreement between the intersecting railroad companies. In Ohio it is regulated by a statute,<sup>122</sup> under which the two companies jointly bear the expense of maintaining the crossing and of keeping a watchman there.<sup>123</sup> Under a statute imposing upon both railroad companies, whose tracks cross each other at grade, the duty of keeping the crossing in repair, it was held that if the points of bisection at such a track crossing are allowed to get out of repair, this will be negligence on the part of each company, no matter to which company the defective track belonged.<sup>124</sup>

§ 1968. **Agreements between the Intersecting Railroads.**—As already said, it is customary for railroad companies, whose roads cross each other at grade, to agree between themselves as to the right of way and the precautions which shall be taken to prevent collisions, where the subject is not governed by the statute law. As between the companies themselves, these agreements will be upheld and enforced unless they are opposed to the statute law or to public policy, although they may not be valid as to third persons. It was so held of an agreement between two such companies by which their trains were allowed to stop upon the crossing. This did not prevent one of the companies from recovering damages from the other, whose train had come into collision with a train of the former while standing upon the crossing, in consequence of the train of the latter company being equipped with insufficient brakes.<sup>125</sup> In an action against a railroad company for damages caused by such a collision, there can be no recovery where it appears that the collision was caused solely by the failure of the engineer on the other company's engine to obey the signal established by agreement of the parties, and that its own train was proceeding at its regular time, in strict obedience to the agreed signals, and without negligence on the part of those in charge.<sup>126</sup>

§ 1969. **Duty of those Driving Trains to Stop, Look, and Listen at the Crossings of other Railroads.**—It has been said that the rule to stop, look and listen, is not less imperative when a train approaches a crossing of another railroad track at which no means are provided to

<sup>122</sup> Ohio Rev. Stat., § 3333.

<sup>123</sup> *Baltimore & C. R. Co. v. Walker*, 45 Ohio St. 577; s. c. 14 West. Rep. 172; 16 N. E. Rep. 475.

<sup>124</sup> *Indiana & C. R. Co. v. Barnhart*, 115 Ind. 399; s. c. 13 West. Rep. 425; 16 N. E. Rep. 121.

<sup>125</sup> *Louisville & C. R. Co. v. East Tennessee & C. R. Co.*, 60 Fed. Rep. 993; s. c. 22 U. S. App. 102.

<sup>126</sup> *Grand Rapids & C. R. Co. v. Ellison*, 117 Ind. 234; s. c. 18 N. E. Rep. 507.



render a collision impossible, than when a traveller is approaching a highway crossing.<sup>127</sup> Opposed to this is the conclusion of another court that the engineer in charge of a railroad train is not, as matter of law, imputable with contributory negligence because, on approaching the crossing of another railroad, he fails to stop his train, as well as to look for the approach of a train on the other road.<sup>128</sup> Under a principle already explained,<sup>129</sup> the failure of a railroad company to bring its train to a stop before crossing another railroad at grade as peremptorily required by statute, is *negligence per se*, rendering it liable to a brakeman on a train on the other road for injuries sustained by him in the resulting collision, where he is not guilty of contributory negligence.<sup>130</sup> But the law does not impute to a railway company *negligence per se* in failing to bring its train to a stop, provided its engineer keeps the train under complete control, so that he can properly observe the surroundings and see a train on the other road as readily as though his own train were at a stand-still.<sup>131</sup> Then, as to the place or distance from the crossing at which the train is to be stopped, it has been held that the engineer is not imputable with contributory negligence as matter of law because he stops his engine at a stopping post one hundred feet from the crossing of another railroad, in accordance with the regulations of the company and with the usage which has always prevailed, although from that point a train on the other road can not be seen when behind an intervening building.<sup>132</sup> It is also gratifying to the engineer who gets hurt in such a collision to know that he is not absolutely, and as matter of law, required to know whether or not a train is approaching a crossing on the other railroad, before driving his own train forward in an attempt to cross.<sup>133</sup>

<sup>127</sup> *Cleveland &c. R. Co. v. Gray*, 148 Ind. 266; s. c. 46 N. E. Rep. 675; 8 Am. & Eng. Rail. Cas. (N. S.) 48.

<sup>128</sup> *Kansas City R. Co. v. McDonald*, 51 Fed. Rep. 178; s. c. 2 C. C. A. 153; 4 U. S. App. 563. It has been held that the existence of an interlocking switch system at the crossing of two railroads does not relieve one of the companies from the duty enjoined by Burns' Ind. Rev. Stat., § 2293, to stop and ascertain whether there is any other train or locomotive in sight upon the other track upon approaching the crossing, under the provisions of § 5156, that the former section shall not apply if there is such a system, where the *system is*

*not in use*, so that it does not prevent the meeting of trains at the crossing: *Cleveland &c. R. Co. v. Gray*, 148 Ind. 266; s. c. 8 Am. & Eng. Rail. Cas. (N. S.) 48; 46 N. E. Rep. 675.

<sup>129</sup> Vol. I, § 10.

<sup>130</sup> *Richmond &c. R. Co. v. Freeman*, 97 Ala. 289; s. c. 11 South. Rep. 800.

<sup>131</sup> *Kansas City R. Co. v. McDonald*, 51 Fed. Rep. 178; s. c. 4 U. S. App. 563; 2 C. C. A. 153.

<sup>132</sup> *Fort Worth &c. R. Co. v. Johnson* (Tex. Civ. App.), 26 S. W. Rep. 921 (no off. rep.).

<sup>133</sup> *Fort Worth &c. R. Co. v. Johnson* (Tex. Civ. App.), 26 S. W. Rep. 921 (no off. rep.).



§ 1970. **Injuries through Improper Equipments, Reparations, etc., of Engines or Cars.**—A railway company may become liable for running over a person on its track, by reason of the fact that its train was not equipped with air brakes, by which its speed could be promptly arrested, if this failure is found to be due to a want of ordinary or reasonable care on its part.<sup>134</sup> But a car with defective brakes is not regarded as an instrument so eminently dangerous as to make the railway company liable for the simple act of leaving it upon its track, to one who is injured by it, not being a passenger or employé of the company.<sup>135</sup> Where the evidence tended to show that the injury for which the action was brought was caused by a locomotive moving without human agency; that it was left standing in such a way that, if it had been in good repair, it would not have moved; that it had been known to move in the same way on previous occasions; that those employed about it usually took precautions to prevent it from moving, such as were not taken with engines in good repair; that this defective condition of the engine had existed for a number of months; that frequent repairs had been made upon it; and there was also evidence that it was in good repair at the time of the accident,—it was held that the question of the negligence of the railway company was a question of fact for the jury.<sup>136</sup>

§ 1971. **Injuries from Storing Dynamite in a Car in a Railway Yard.**—A railway company, transporting *dynamite* in the regular

<sup>134</sup> *Chicago &c. R. Co. v. Grablin*, 38 Neb. 90; s. c. 56 N. W. Rep. 796; 57 N. W. Rep. 522.

<sup>135</sup> *Roddy v. Missouri &c. R. Co.*, 104 Mo. 234; s. c. 12 L. R. A. 746; 43 Alb. L. J. 749; 15 S. W. Rep. 1112. In this case the plaintiff was in the employ of the owner of a stone quarry to whom the company was under contract to furnish cars. He mounted one of two cars coupled together, set the brakes on one and pushed the other off, and, while pushing it up to the quarry, was hit by the car he had left standing with the brakes set.

<sup>136</sup> *Hurd v. Union &c. R. Co.*, 8 Utah 241; s. c. 30 Pac. Rep. 982. In another case it appeared that on the line of defendant's railroad, plaintiff owned a lumber and coal yard, in which his son was employed. A siding ran from the railroad to a warehouse in plaintiff's yard. A lumber car was left standing on the siding, beyond the period when the

rules of the company required them to remove it. It had a defective brake, and it was not shown that it had been sufficiently blocked. A number of cars from a freight train were started onto the siding from the main track, and, striking the lumber car, forced it down towards the warehouse, into which it crashed with great violence. There was evidence also that the nearest of these cars had a defective brake. The son of the plaintiff, hearing the sound of the approaching train, hurried towards the warehouse and entered it, and was found crushed to death against the doors. It was held that it was properly left to the jury to determine whether defendant was guilty of negligence, and whether deceased, by his own negligence, contributed to the accident: *North Pennsylvania R. Co. v. Kirk*, 90 Pa. St. 15 (*Sharswood, C. J.*, and *Paxson, J.*, dissenting).



course of its business, has, *prima facie*, the right to store it in its yard. In case of an injury from the explosion of the dynamite in a car stored in a railway yard, where the action is predicated upon negligence in storing it in the particular place where it was when it exploded, the *burden of proof* is upon the plaintiff to show negligence in that particular.<sup>137</sup>

§ 1972. **Negligence in Operation of Elevated Railroads.**—The fall of a *hot cinder* from the locomotive of an elevated railway, injuring a person on the street below, will afford evidence of negligence, such as, unexplained, will justify a recovery of damages, and render it error to set aside a verdict found for the plaintiff.<sup>138</sup> Directly opposed to the principle of this case, is an untenable decision of a higher court in the same State, to the effect that proof of the mere fact of the emission from an engine on an elevated railroad, which is not identified, of a coal smaller than a pin head, which lodged in the eye of a person on the street, without any other evidence of defects in the construction or design or operation of the engine, is not sufficient to show negligence on the part of the railroad company, so as to authorize a recovery of damages by the person injured.<sup>139</sup>

§ 1973. **Various Facts in Railway Operation to which Negligence was and was not Ascribed.**—The owner of a *dog* can not recover damages from a railway company for running over the dog upon its track at an ascending grade, where the animal saw the train approaching, and the engineer blew off steam to frighten it from the track.<sup>140</sup> Negligence has been ascribed to the failure of the trainmen to discover that

<sup>137</sup> Walker v. Chicago &c. R. Co., 71 Iowa 658; s. c. 33 N. W. Rep. 224. Compare Vol. I, § 758, *et seq.*

<sup>138</sup> Weidmer v. New York Elev. R. Co., 41 Hun (N. Y.) 284. See Vol. I, § 15. On the same principle, in an action to recover damages for injuries sustained by being struck by a *hot coal* falling from an engine, proof on the part of plaintiff that a locomotive properly constructed and kept in repair in respect to a wire netting to prevent the escape of cinders and ashes from the ash-pan, would cast out no such pieces of red-hot cinders, unless met by proof on the part of defendant that its engine was free from negligent defects, entitles plaintiff to go to the jury: McNair v. Manhattan R. Co., 46 Hun (N. Y.) 502; s. c. 12 N. Y. St. Rep. 562.

<sup>139</sup> Wiedmer v. New York Elev. R. Co., 114 N. Y. 462; s. c. 23 N. Y. St. Rep. 859; 21 N. E. Rep. 1041. Whether an elevated railroad company was guilty of negligence, in leaving the end of its platform, thirty-one feet above the street, unprotected by a guard rail, such as is in universal use at elevated railroad stations, and contemplated by the plans of the station at which the platform was left unprotected,—has been held a *question for the jury*: Jarvis v. Brooklyn &c. R. Co., 40 N. Y. St. Rep. 825; s. c. 16 N. Y. Supp. 96. For cases of injuries in attempt to board elevated railroad cars, see title Carriers of Passengers in the next volume.

<sup>140</sup> Richardson v. Florida &c. R. Co., 55 S. C. 334; s. c. 33 S. E. Rep. 466.



a portion of the train has *broken loose* and is following a short distance behind, through the fault of not having men on top of the cars;<sup>141</sup> to the failure to send forward a *flagman*, as the rules of the company require;<sup>142</sup> to the act of running a freight train at a high rate of speed past a station, just as a passenger train is approaching, where the track on which the freight train is running is between the station house and the track on which the passenger train is moving.<sup>143</sup> It has been held that the fact that brakes upon cars have been several times taken off, that is to say, loosened, by trespassers, does not of itself charge the railway company with liability for damages on the footing of negligence, because it lets loaded cars go down a grade and bump slightly against other cars standing on the track, without first examining to see whether the brakes are set upon the cars so sent down.<sup>144</sup>

<sup>141</sup> Farley v. Chicago &c. R. Co., 56 Iowa 337.

<sup>142</sup> Texas &c. R. Co. v. Mallon, 65 Tex. 115.

<sup>143</sup> Chicago &c. R. Co. v. Kelly, 75 Ill. App. 490; s. c. on subsequent appeal 80 Ill. App. 675; aff'd 182 Ill. 267; 54 N. E. Rep. 979.

<sup>144</sup> Ebright v. Mineral R. &c. Co. (Pa.), 15 Atl. Rep. 709 (no off. rep.). The reverse ought to have been held. - - - Power of union depot company to grant to a particular transfer company the exclusive privilege of standing its vehicles upon the depot grounds and of soliciting customers thereon: Snyder v. Union Depot Co., 19 Ohio C. C. 368. Power of the commissioners of the District

of Columbia to make police regulations governing the movements of locomotives and trains under acts of Congress: Baltimore &c. R. Co. v. District of Columbia, 25 Wash. L. Rep. 118; s. c. 10 App. D. C. 111. Validity of such regulations where they conflict with each other: Baltimore &c. R. Co. v. District of Columbia, 25 Wash. L. Rep. 118; s. c. 10 App. D. C. 111. Sufficiency of *complaint* before a *police justice* for violation of an ordinance prohibiting a railroad company from obstructing any street longer than necessary for the safe and expeditious discharge of passengers, making up a freight train, etc.: Central R. Co. v. Elizabeth (N. J. L.), 45 Atl. Rep. 978.



TITLE FOURTEEN.

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RAILWAY INJURIES TO ANIMALS.







# TITLE FOURTEEN.

## RAILWAY INJURIES TO ANIMALS.

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## CHAPTER LXIII.

### GENERAL CONSIDERATIONS.

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| 1982. Regard must be had for the safety of persons on the train or elsewhere.     | 1988. When negligence in this relation a question for the court.            |
|   | 1989. When a question for the jury.   |

§ 1977. **General Considerations.**—Whether a railway company will be chargeable on the ground of negligence for killing or injuring animals on its track, where the case is not governed by the direct provisions of some statute, may depend upon a variety of circumstances. These will be best illustrated by enumerating some of the duties a non-performance or an imperfect performance of which, directly contributing to the injury, will render it liable to pay damages.



**§ 1978. Duty to Employ Competent and Suitable Servants.**—The servants of the company employed in the management of their road and the running of their trains must be competent, skillful, and trustworthy men.<sup>1</sup>

**§ 1979. Duty to Comply with Statutory Requirements.**—They must comply strictly with all statutory enactments looking toward the safety of the public and the protection of property.<sup>2</sup>

**§ 1980. Duty to have Proper Appliances for Stopping Train, Signaling, etc.**—The appliances and machinery in use on and about the train must be of a good and sufficient character.<sup>3</sup> The company must use reasonable care to keep its trains properly equipped; but it owes no duty to the owner of cattle to provide the best appliances procurable.<sup>4</sup>

**§ 1981. Injury must have been the Proximate Result of the Negligence Complained of.**—In addition to the element of negligence, it is necessary to a recovery of damages that the injury should be the natural and direct result of the negligence complained of.<sup>5</sup> Although the servants of a railway company have omitted to exercise due diligence and care, it will not be liable unless it appears that such diligence and care would have prevented the accident.<sup>6</sup>

**§ 1982. Regard must be had for the Safety of Persons on the Train or Elsewhere.**<sup>7</sup>—The servants of the company must exercise ordinary diligence and care, in view of the circumstances, to prevent injury to live stock, having a regard, at the same time, for their duty to the public and for the safety of their trains.<sup>8</sup>

**§ 1983. Company not an Insurer, but Liable for Negligence only.**—The company is in no respect an insurer of the animals which

<sup>1</sup> *Parker v. Dubuque &c. R. Co.*, 34 Iowa 399; *Vicksburg &c. R. Co. v. Patton*, 31 Miss. 157.

<sup>2</sup> *Memphis &c. R. Co. v. Dean*, 5 Sneed (Tenn.) 291.

<sup>3</sup> *Atchison &c. R. Co. v. Edwards*, 20 Kan. 531; *Forbes v. Atlantic &c. R. Co.*, 76 Ill. 454; *Bartley v. Georgia &c. R. Co.*, 60 Ga. 182; *Winston v. Raleigh &c. R. Co.*, 90 N. C. 66; *East Tennessee &c. R. Co. v. Selcer*, 7 Lea (Tenn.) 557; *McDonald v. Chicago &c. R. Co.*, 51 Mich. 628.

<sup>4</sup> *Natchez &c. R. Co. v. McNeil*, 61 Miss. 434.

<sup>5</sup> *Gilman &c. R. Co. v. Spencer*, 76

Ill. 192; *Smith v. Hannibal &c. R. Co.*, 47 Mo. App. 546.

<sup>6</sup> *Bellefontaine &c. R. Co. v. Bailey*, 11 Ohio St. 333; *Rockford &c. R. Co. v. Linn*, 67 Ill. 109.

<sup>7</sup> This section is cited in § 2115.

<sup>8</sup> *Trout v. Virginia &c. R. Co.*, 23 Gratt. (Va.) 619; *Coyle v. Baltimore &c. R. Co.*, 11 W. Va. 94; *Proctor v. Wilmington &c. R. Co.*, 72 N. C. 579; *Quimby v. Vermont &c. R. Co.*, 23 Vt. 387; *Mississippi &c. R. Co. v. Miller*, 40 Miss. 45; *Burton v. Philadelphia &c. R. Co.*, 4 Harr. (Del.) 252; *Illinois &c. R. Co. v. Wren*, 43 Ill. 77; *Great Western R. Co. v. Geddis*, 33 Ill. 304.



may get upon its track, although they may be there not in violation of any law.<sup>9</sup> It is liable only when it has failed to use ordinary care to avoid injuring them.<sup>10</sup>

**§ 1984. Not Liable for the Results of Inevitable Accident.**—A railway company is not liable in damages for stock run over and injured through inevitable accident.<sup>11</sup>

**§ 1985. Degree of Care Required of the Company.**—Upon the question, what is the “due diligence and ordinary care” which the company is bound to exercise, it has been held that it is error for the court to instruct the jury that it is such care as a man of ordinary prudence would exercise, who was owner both of the road and the animal. “The company might, as a matter of expediency, choose to endanger the life of their own beast rather than check their train; but if they did that to another’s property, they should make good all loss to the owner, and all others injured by such rashness.”<sup>12</sup>

**§ 1986. Company not Answerable for Negligence of Servant not in Line of Duty.**—A railway company is not answerable for the negligence of its servant, not acting at the time in the line of his duty.<sup>13</sup> It

<sup>9</sup> Great Western R. Co. v. Thompson, 17 Ill. 131; Central &c. R. Co. v. Rockafellow, 17 Ill. 541; Chicago &c. R. Co. v. Patchin, 16 Ill. 198; Turner v. St. Louis &c. R. Co., 76 Mo. 261; Stevenson v. New Orleans &c. R. Co., 35 La. An. 498; Day v. New Orleans &c. R. Co., 35 La. An. 694.

<sup>10</sup> Georgia &c. R. Co. v. Walker, 87 Ga. 204; s. c. 13 S. E. Rep. 511; Lewis v. Fremont &c. R. Co., 7 S. Dak. 183; s. c. 63 N. W. Rep. 781; Jones v. Western R. Co., 95 N. C. 328; Hoffman v. Missouri &c. R. Co., 24 Mo. App. 546; Long v. St. Louis &c. R. Co., 23 Mo. App. 178; Welch v. Hannibal &c. R. Co., 20 Mo. App. 477; s. c. 3 West. Rep. 775; Peoria &c. R. Co. v. Dugan, 10 Ill. App. 233; White v. St. Louis &c. R. Co., 20 Mo. App. 564; International &c. R. Co. v. Dunham, 68 Tex. 231; s. c. 4 S. W. Rep. 472; Richmond &c. R. Co. v. Noell, 86 Va. 19; s. c. 9 S. E. Rep. 473; 13 Va. L. J. 320.

<sup>11</sup> Louisville &c. R. Co. v. Wain-scott, 3 Bush (Ky.) 149; Montgomery v. Wilmington &c. R. Co., 6 Jones L. (N. C.) 464; Louisville &c. R. Co. v. Milton, 14 B. Mon. (Ky.) 75; Raiford v. Mississippi &c. R. Co.,

43 Miss. 234; Georgia R. &c. Co. v. Anderson, 33 Ga. 110; Peoria &c. R. Co. v. Champ, 75 Ill. 578; Garriss v. Portsmouth &c. R. Co., 2 Ired. L. (N. C.) 324. The question what occurrences are inevitable is for the determination of the jury, under the proper instructions from the court. In a case where a horse, feeding near a railroad track, became frightened at the noise of an approaching train, and, jumping upon the track, ran along ahead of the train, until he fell into an open culvert and was killed, and it appeared that all proper means were used by the engineer to prevent a collision, it was held that the court would not disturb a verdict for defendant: Brothers v. South Carolina R. Co., 5 S. C. 55. See also Georgia R. &c. Co. v. Anderson, 33 Ga. 110; Savannah &c. R. Co. v. Gray, 77 Ga. 440; s. c. 3 S. E. Rep. 158; Chicago &c. R. Co. v. Hogan, 27 Neb. 801; s. c. 43 N. W. Rep. 1148; Hawker v. Baltimore &c. R. Co., 15 W. Va. 628.

<sup>12</sup> Quimby v. Vermont &c. R. Co., 23 Vt. 394.

<sup>13</sup> This subject is intended to be discussed in Volume IV.



will not be liable for an injury to cattle from an engine taken out of the round-house by one of its servants, without authority, and for his own purposes.<sup>14</sup>

**§ 1987. Whether Answerable for Willful, Wanton or Malicious Act of Servant.**—Whether it will be answerable for a wanton act of its servant in running down animals seen upon its track is more doubtful. The better opinion is that it will be,<sup>15</sup> though some courts hold otherwise.<sup>16</sup> The development of modern judicial opinion on this branch of the doctrine of *respondeat superior* leaves no doubt that the company will be so liable, providing the servant be acting within the general scope of his authority, and excluding the case where he steps outside the line of his duty and authority to effect some malicious purpose of his own.<sup>17</sup>

**§ 1988. When Negligence in this Relation a Question for the Court.**—If the facts are undisputed and the inferences to be drawn therefrom unequivocal, it will generally be for the court to determine whether or not they constitute negligence.<sup>18</sup>

**§ 1989. When a Question for the Jury.**—But, if the evidence is conflicting, the proper course is, to permit the jury, under proper instructions, to say whether or not there is negligence.<sup>19</sup> Where the evidence is conflicting, and the verdict is not clearly against the weight of evidence, the court will not disturb it.<sup>20</sup>

<sup>14</sup> Cousins v. Hannibal &c. R. Co., 66 Mo. 572.

<sup>15</sup> De Camp v. Mississippi &c. R. Co., 12 Iowa 348; Cooke v. Illinois &c. R. Co., 30 Iowa 202.

<sup>16</sup> Pritchard v. La Crosse &c. R. Co., 7 Wis. 232.

<sup>17</sup> Vol. I, § 522, *et seq.*

<sup>18</sup> Owens v. Hannibal &c. R. Co., 58 Mo. 387; Trow v. Vermont &c. R. Co., 24 Vt. 488; Pittsburg &c. R. Co. v. Fleming, 30 Ohio St. 480. *Contra*, McCormick v. Chicago &c. R. Co., 41 Iowa 194.

<sup>19</sup> Bulkley v. New York &c. R. Co., 27 Conn. 479; Atlantic &c. R. Co. v. Burt, 49 Ga. 606; Selma &c. R. Co. v. Fleming, 48 Ga. 514; Illinois &c. R. Co. v. Gillis, 68 Ill. 317; Edson v. Central R. Co., 40 Iowa 47; Indianapolis &c. R. Co. v. Hamilton,

44 Ind. 76; Alger v. Mississippi &c. R. Co., 10 Iowa 268; Kuhn v. Chicago &c. R. Co., 42 Iowa 420; Estes v. Atlantic &c. R. Co., 63 Me. 309; Trow v. Vermont &c. R. Co., 24 Vt. 488; Morse v. Rutland &c. R. Co., 27 Vt. 49; Rockford &c. R. Co. v. Irish, 72 Ill. 404; Boggs v. Chicago &c. R. Co., 29 Iowa 577; Burton v. Philadelphia &c. R. Co., 4 Har. (Del.) 252.

<sup>20</sup> Burton v. Philadelphia &c. R. Co., 4 Har. (Del.) 252; Chicago &c. R. Co. v. Hutchins, 34 Ill. 108; Pittsburg &c. R. Co. v. Fleming, 30 Ohio St. 480; Jeffersonville &c. R. Co. v. Morgan, 38 Ind. 190; Wilson v. Burlington &c. R. Co., 33 Iowa 591. The province of court and jury in actions for negligence is intended to be discussed in Volume V.



## CHAPTER LXIV.

## CONTRIBUTORY NEGLIGENCE OF THE OWNER OF THE ANIMALS.

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ART. II. Effect of Contributory Negligence of the Land-Owner in Connection with Statutes Requiring Railway Companies to Fence, §§ 2013–2020.

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- 2010. Facts which have been held evidence of contributory negligence.
- 2011. Facts not furnishing conclusive evidence of contributory negligence.

§ 1992. General Application of the Rule of Contributory Negligence.—In this class of cases, as elsewhere,<sup>1</sup> the doctrine of remote

<sup>1</sup>For a general discussion of law of contributory negligence, see proximate and remote cause in the Vol. I, § 168, *et seq.*



and proximate cause is applied to the contributory negligence of the plaintiff as well as to the negligence of the defendant. Under one theory, the plaintiff can not recover for actionable negligence if the injury complained of is the natural and probable consequence of his own want of ordinary care *in any degree*.<sup>2</sup>

§ 1993. **No Recovery where the Parties were in Equal Fault.**—And of course the rule is clearer that where the negligence of each contributed equally to the injury,—where they are *in pari delicto*,—there can be no recovery.<sup>3</sup>

§ 1994. **Illustration of this Rule.**—Thus, where the negligence of the defendant consisted in failing to give the statutory signal upon approaching a highway crossing, and that of the plaintiff in rushing his stock over the railway, though warned by his son that he thought he heard an approaching train, the court held that the parties were equally in fault, and that a verdict for plaintiff was against the evidence, and must be set aside.<sup>4</sup>

§ 1995. **Recovery where Defendant's Negligence Proximate and Plaintiff's Remote.**—But if the negligence of the plaintiff is a *remote* cause or antecedent of the injury, while the negligence of the defendant is the *immediate* or *proximate* cause of it, then the plaintiff will not be debarred from prosecuting his claim by his negligence, nor will the defendant be excused from the consequences of his.<sup>5</sup>

<sup>2</sup> Reeves v. Delaware &c. R. Co., 30 Pa. St. 455; Illinois &c. R. Co. v. Goodwin, 30 Ill. 117; Indianapolis &c. R. Co. v. Wright, 22 Ind. 377; Toledo &c. R. Co. v. Thomas, 18 Ind. 215; Knight v. Toledo &c. R. Co., 24 Ind. 402; Indianapolis &c. R. Co. v. Harter, 38 Ind. 557; Michigan &c. R. Co. v. Fisher, 27 Ind. 97; Terry v. New York &c. R. Co., 22 Barb. (N. Y.) 575; Clark v. Syracuse &c. R. Co., 11 Barb. (N. Y.) 112; Mentges v. New York &c. R. Co., 1 Hilt. (N. Y.) 425; Fisher v. Farmers' &c. Co., 21 Wis. 74; Balcom v. Dubuque &c. R. Co., 21 Iowa 102; Whitbeck v. Dubuque &c. R. Co., 21 Iowa 103; Waldron v. Portland &c. R. Co., 35 Me. 422; Milburn v. Kansas City &c. R. Co., 86 Mo. 104; Guess v. South Carolina R. Co., 30 S. C. 163; s. c. 9 S. E. Rep. 18; 6 Rail. & Corp. L. J. 76; Bunnell v. Rio Grande &c. R. Co., 13 Utah 314; s. c. 44 Pac. Rep. 927; Morse v. Boston &c. R. Co., 66

N. H. 148; s. c. 28 Atl. Rep. 286. As to the "any degree" theory, see Vol. I, § 170, *et seq.*

<sup>3</sup> Ohio &c. R. Co. v. Eaves, 42 Ill. 288; Illinois &c. R. Co. v. Middlesworth, 43 Ill. 65; Knight v. Toledo &c. R. Co., 24 Ind. 402; Trow v. Vermont &c. R. Co., 24 Vt. 488; Haigh v. London &c. R. Co., 1 Fost. & Fin. 646; s. c. 8 Week. Rep. 6.

<sup>4</sup> Ohio &c. R. Co. v. Eaves, 42 Ill. 288.

<sup>5</sup> Stucke v. Milwaukee &c. R. Co., 9 Wis. 204; Galpin v. Chicago &c. R. Co., 19 Wis. 604; Rockford &c. R. Co. v. Irish, 72 Ill. 405; St. Louis &c. R. Co. v. Todd, 36 Ill. 409; Toledo &c. R. Co. v. McGinnis, 71 Ill. 347; Ewing v. Chicago &c. R. Co., 72 Ill. 25; Peoria &c. R. Co. v. Champ, 75 Ill. 578; Searles v. Milwaukee &c. R. Co., 35 Iowa 490; Gates v. Burlington &c. R. Co., 39 Iowa 45; Waldron v. Rensselaer, 8 Barb. (N. Y.) 390; Joliet &c. R. Co. v. Jones, 20 Ill.



§ 1996. **Recovery where Plaintiff Guilty of Some Fault, if not Guilty of Want of Ordinary Care.**—The duty resting on all alike is to use ordinary, not extraordinary, care; consequently an injured party, although in the fault to some extent at the time, may, notwithstanding this, be entitled to reparation in damages for an injury which he has used ordinary care to avoid.<sup>6</sup>

§ 1997. **Recovery where Defendant could have Avoided the Consequences of the Plaintiff's Negligence in Exposing his Animals to Injury.**<sup>7</sup>—The plaintiff, even though guilty of negligence which would otherwise bar his action, may still recover, if the defendant, after discovering the danger, fails to use ordinary care to avoid the injury, or if the circumstances are such as to show a reckless disregard of life and property on his part. Contributory negligence is not a defense to wanton or reckless negligence.<sup>8</sup>

§ 1998. **Statement of the Common Law Rule Requiring the Owners of Animals to Restrain Them.**<sup>9</sup>—By the common law of England, every person is obliged to confine his animals to his own premises. He may

222; *Trow v. Vermont Central R. Co.*, 24 Vt. 488; *Alleghany Valley R. Co. v. Findley*, 6 Cent. L. J. 236; *Central R. Co. v. Davis*, 19 Ga. 437; *Pacific R. Co. v. Houts*, 12 Kan. 328; *Nashville &c. R. Co. v. Anthony*, 7 Reporter 699; *Kerwhacker v. Cleveland &c. R. Co.*, 3 Ohio St. 172; s. c. 1 Thomp. Neg., 1st ed., p. 472; *Sauls v. Alderman & Sons Co.*, 55 S. C. 395; s. c. 33 S. E. Rep. 467.

<sup>6</sup> *Kerwhacker v. Cleveland &c. R. Co.*, 3 Ohio St. 172; s. c. 1 Thomp. Neg., 1st ed., p. 472; *Holstine v. Oregon &c. R. Co.*, 8 Or. 163; *Cleveland &c. R. Co. v. Baker*, 24 Ind. App. 152; s. c. 54 N. E. Rep. 814. This is to be distinguished from the rule of *comparative negligence*, now almost obsolete, a general consideration of which will be found in Vol. I, § 259, *et seq.* Here, if the plaintiff has been guilty of want of ordinary care contributing to the injury, he can not recover, no matter how his negligence compares with that of the defendant. But, under the doctrine of comparative negligence, though the plaintiff may have been guilty of want of ordinary care, contributing to the injury, his recovery will not be barred, if, upon comparison, his negligence is found to be *slight* while that of the defendant is *gross*. Much confusion is caused by using

the same form of words to express both rules. It is often said that the plaintiff may recover, though guilty of slight negligence, if the negligence of the defendant has been gross. In some cases this term "slight negligence" means negligence not amounting to want of ordinary care, while in others it means negligence amounting to want of ordinary care, but slight, when compared with the negligence of the defendant.

<sup>7</sup> This section is cited in § 2107.

<sup>8</sup> Vol. I, § 206, *et seq.*; *ante*, §§ 1606, 1627, 1713, 1747, 1760, 1826, 1848; *Illinois &c. R. Co. v. Baker*, 47 Ill. 295; *Illinois &c. R. Co. v. Wren*, 43 Ill. 77; *Rockford &c. R. Co. v. Irish*, 72 Ill. 405; *Baltimore &c. R. Co. v. Mulligan*, 45 Md. 487; *Cleveland &c. R. Co. v. Ahrens*, 42 Ill. App. 434; *Cleveland &c. R. Co. v. Ducharme*, 49 Ill. App. 520; *Clem v. Wabash R. Co.*, 72 Mo. App. 433; *Little Rock &c. R. Co. v. Finley*, 37 Ark. 562; *Wooster v. Chicago &c. R. Co.*, 74 Iowa 593; s. c. 34 N. W. Rep. 425; *Chicago &c. R. Co. v. Phillips*, 14 Ill. App. 265; *Little Rock &c. R. Co. v. Henson*, 39 Ark. 413; *Toledo &c. R. Co. v. McGinnis*, 71 Ill. 347; *Western Maryland R. Co. v. Carter*, 59 Md. 306.

<sup>9</sup> This section is cited in § 2000.



lawfully drive them from place to place, upon the highway, but if he permits them to roam at large without a keeper, he is guilty of negligence; and if they trespass upon the premises of another, he is a wrong-doer, and liable for the injuries consequent upon their acts.<sup>10</sup> And the owner of trespassing animals is liable for the damage they do, though they escape without his fault, the same as though he had permitted them to go at large without restraint.<sup>11</sup> But if they escape from his control without his fault, while in lawful use of the *highway* and go upon adjoining land before he can retake them, he is not liable for such accidental trespass.<sup>12</sup>

§ 1999. Jurisdictions in which this Common Law Rule Prevails.<sup>12a</sup>—This rule prevails in Indiana,<sup>13</sup> Maryland,<sup>14</sup> Michigan,<sup>15</sup> Minnesota,<sup>16</sup> New Jersey,<sup>17</sup> New York,<sup>18</sup> Pennsylvania,<sup>19</sup> Wisconsin,<sup>20</sup> Kentucky,<sup>21</sup> Massachusetts,<sup>22</sup> New Hampshire,<sup>23</sup> Vermont,<sup>24</sup> and possibly in other States.<sup>25</sup>

<sup>10</sup> *Ricketts v. East and West India Docks & C. R. Co.*, 12 C. B. 160; s. c. 7 Eng. Rail. Cas. 295; 16 Jur. 1072; 21 L. J. (C. P.) 201; *Dickinson v. London & C. R. Co.*, 1 Harr. & R. 399; *Ellis v. London & C. R. Co.*, 2 Hurl. & N. 424; s. c. 26 L. J. (Exch.) 349; 3 Jur. (N. S.) 1008; *Sharrod v. London & C. R. Co.*, 4 Exch. 580; s. c. 14 Jur. 23; 20 L. J. (Exch.) 185; 6 Eng. Rail. Cas. 239; 7 Dow. & L. 213; Vol. I, § 904, *et seq.*

<sup>11</sup> Vol. I, § 904; *Rust v. Low*, 6 Mass. 90; *Jackson v. Rutland & C. R. Co.*, 25 Vt. 150, 161; *Stone v. Kopka*, 100 Ind. 458; *Cox v. Burbridge*, 13 C. B. (N. S.) 430; *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 101; *Price v. New Jersey & C. R. Co.*, 31 N. J. L. 229; *Case v. Central & C. R. Co.*, 59 N. J. L. 471; *Bostwick v. Minneapolis & C. R. Co.*, 2 N. Dak. 440.

<sup>12</sup> *Goodwin v. Cheveley*, 4 H. & N. 631; s. c. 28 L. J. Ex. 298; Vol. I, § 912.

<sup>12a</sup> This section is cited in § 2129.

<sup>13</sup> *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 370; *Lafayette & C. R. Co. v. Shriner*, 6 Ind. 141; *Indianapolis & C. R. Co. v. Harter*, 38 Ind. 558; *Williams v. New Albany & C. R. Co.*, 5 Ind. 111; *Michigan & C. R. Co. v. Fisher*, 27 Ind. 96; *Jeffersonville & C. R. Co. v. Adams*, 43 Ind. 403; *Jeffersonville & C. R. Co. v. Underhill*, 48 Ind. 389; *Cincinnati & C. R. Co. v. Street*, 50 Ind. 225. There is, however, an implication to the contrary in the case of *New Albany & C. R. Co. v. Tilton*, 12 Ind. 3, but the point was not decided.

<sup>14</sup> *Baltimore & C. R. Co. v. Lam-born*, 12 Md. 257; *Keech v. Baltimore & C. R. Co.*, 17 Md. 33.

<sup>15</sup> *Williams v. Michigan & C. R. Co.*, 2 Mich. 260.

<sup>16</sup> *Locke v. First Div. St. Paul & C. R. Co.*, 15 Minn. 351.

<sup>17</sup> *Vandegrift v. Rediker*, 22 N. J. L. 185; *Price v. New Jersey & C. R. Co.*, 31 N. J. L. 229; s. c. 32 N. J. L. 19.

<sup>18</sup> *Halloran v. New York & C. R. Co.*, 2 E. D. Smith (N. Y.) 257; *Marsh v. New York & C. R. Co.*, 14 Barb. (N. Y.) 364; *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.) 255; *Clarke v. Syracuse & C. R. Co.*, 11 Barb. (N. Y.) 112; *Terry v. New York & C. R. Co.*, 22 Barb. (N. Y.) 575.

<sup>19</sup> *Railroad Co. v. Skinner*, 19 Pa. St. 298; s. c. 1 Thomp. Neg., 1st ed., p. 465; *Reeves v. Delaware & C. R. Co.*, 30 Pa. St. 455.

<sup>20</sup> *Chicago & C. R. Co. v. Goss*, 17 Wis. 428; *Stucke v. Milwaukee & C. R. Co.*, 9 Wis. 203; *Bennett v. Chicago & C. R. Co.*, 19 Wis. 145; *Galpin v. Chicago & C. R. Co.*, 19 Wis. 604.

<sup>21</sup> *Louisville & C. R. Co. v. Ballard*, 2 Metc. (Ky.) 177.

<sup>22</sup> *Stearns v. Old Colony & C. R. Co.*, 1 Allen (Mass.) 493; *McDonnell v. Pittsfield & C. R. Corp.*, 115 Mass. 564; *Maynard v. Boston & C. R. Co.*, 115 Mass. 458.

<sup>23</sup> *Giles v. Boston & C. R. Co.*, 55 N. H. 552; *Mayberry v. Concord R. Co.*, 47 N. H. 391.

<sup>24</sup> *Jackson v. Rutland & C. R. Co.*, 25 Vt. 150; *Trow v. Vermont & C. R. Co.*, 24 Vt. 488.

<sup>25</sup> Compare Vol. I, § 904, *et seq.*



§ 2000. Doctrine that there can be no Recovery where Cattle Allowed to Run at Large.<sup>26</sup>—Where the common law rule requiring the owner of animals to restrain their incursions upon the unoccupied lands of others prevails, and where there is no law compelling a railroad company to fence its track, if the owner of cattle suffer them to go at large, and they are killed or injured by the negligent running of the company's trains, he has no recourse upon the company or its servants.<sup>27</sup> The theory of liability in this class of cases is technical trespass, tantamount in theory of the common law, to contributory negligence *per se* on the part of the owner of the cattle. "The degree of care exacted," say the court in a New Jersey case,<sup>28</sup> "is, that it shall be so great that the cattle shall not escape and go upon the land of another. Anything short of this successful vigilance is legal negligence, and the owner of the errant cattle, no matter what his precautions in point of fact may have been, is unavoidably a trespasser, and is liable to be sued as such." In considering the question of contributory negligence, this "legal negligence" is treated as if it were actual negligence, and it is reasoned that the same circumstances which would render the owner of trespassing animals liable for their trespass, will prevent a recovery for negligent injury to them. Consistently with this reasoning, it has been held that the owner of stock must keep it at home at his peril, and if it escapes, though without his fault and from a sufficient enclosure, he is guilty of contributory negligence defeating a common law action for its negligent injury, while trespassing on the land of another,<sup>29</sup> or running at large in the *public high-*

<sup>26</sup> This section is cited in § 2121.

<sup>27</sup> Railroad Company v. Skinner, 19 Pa. St. 298; s. c. 1 Thomp. Neg., 1st ed., p. 465; Illinois &c. R. Co. v. Goodwin, 30 Ill. 117; Chicago &c. R. Co. v. Patchin, 16 Ill. 198; Great Western R. Co. v. Thompson, 17 Ill. 131; Central &c. R. Co. v. Rockafellow, 17 Ill. 541; Illinois &c. R. Co. v. Reedy, 17 Ill. 580; St. Louis &c. R. Co. v. Todd, 36 Ill. 409; Illinois &c. R. Co. v. Phelps, 29 Ill. 447; Michigan &c. R. Co. v. Fisher, 27 Ind. 97; Fisher v. Farmers' &c. Co., 21 Wis. 74; Witherell v. Milwaukee &c. R. Co., 5 Reporter 597; s. c. 6 Cent. L. J. 374; Robinson v. Flint &c. R. Co., 79 Mich. 323; s. c. 44 N. W. Rep. 779; Hanna v. Terre Haute &c. R. Co., 119 Ind. 316; s. c. 21 N. E. Rep. 903; Lyons v. Terre Haute &c. R. Co., 101 Ind. 419; Cincinnati &c. R. Co. v. Hiltzhauer, 99 Ind. 486; Indianapolis &c. R. Co. v. Caudle, 60 Ind. 112; North Pennsylvania R. Co.

v. Rehman, 49 Pa. St. 101; Drake v. Philadelphia &c. R. Co., 51 Pa. St. 240; Wabash &c. R. Co. v. Nice, 99 Ind. 152; Nieman v. Michigan &c. R. Co., 80 Mich. 197; s. c. 44 N. W. Rep. 1049; Schneekloth v. Chicago &c. R. Co., 108 Mich. 1; s. c. 65 N. W. Rep. 663; La Flamme v. Detroit &c. R. Co., 109 Mich. 509; s. c. 67 N. W. Rep. 556; 3 Det. L. N. 182; Case v. Central R. Co., 59 N. J. L. 471; s. c. 37 Atl. Rep. 65; Bennett v. Chicago &c. R. Co., 19 Wis. 145; Knight v. Toledo &c. R. Co., 24 Ind. 402; Halloran v. New York &c. R. Co., 2 E. D. Smith (N. Y.) 257; Fitch v. Buffalo &c. R. Co., 13 Hun (N. Y.) 668; Vandegrift v. Rediker, 22 N. J. L. 185.

<sup>28</sup> Price v. New Jersey &c. R. Co., 31 N. J. L. 229, 237.

<sup>29</sup> Munger v. Tonawanda &c. R. Co., 4 N. Y. 350; aff'g s. c. 5 Denio (N. Y.) 255; Price v. New Jersey &c. R. Co., 31 N. J. L. 229; s. c. 32 N.



way.<sup>30</sup> Also, consistently with this reasoning, it is held that, where an animal escapes from its keeper while in the lawful use of the highway, and is injured before it can be retaken, it does not amount to contributory negligence.<sup>31</sup> In Indiana, the courts have had difficulty in applying this rule to its full extent. They refuse to hold that a mere technical trespass, of itself, constitutes contributory negligence, and distinguish between cases where the owner of cattle has permitted them to roam at large, and cases where they escape from custody. The rule seems to be established in that jurisdiction that, if the owner of stock uses due care to confine it, and it escapes without his fault, he is not guilty of contributory negligence defeating a recovery for negligent injury to it.<sup>32</sup> But, in that State, though not in others,<sup>33</sup> he had the burden of proving the absence of negligence on his part,<sup>34</sup> before the rule was changed by statute. This distinction obtains also in Minnesota.<sup>35</sup> In New Hampshire it has been held that, where a horse escaped onto a highway after being unharnessed and while the owner was reaching for a halter, and was killed on the track at a highway crossing before it could be retaken, the horse was in the rightful use of the highway as far as the railway company was concerned, and the owner was not guilty of contributory negligence.<sup>36</sup> A railway company can not

J. L. 19; *Maynard v. Boston &c. R. Co.*, 115 Mass. 458; *Shanahan v. New York &c. R. Co.*, 10 Abb. Pr. (N. Y.) 398.

<sup>30</sup> *Darling v. Boston &c. R. Co.*, 121 Mass. 118; *Towne v. Nashua &c. R. Co.*, 124 Mass. 101. Compare Vol. I, §§ 849, 851.

<sup>31</sup> *Amstein v. Gardner*, 132 Mass. 28; s. c. 42 Am. Rep. 421; *Richmond &c. R. Co. v. Noell*, 86 Va. 19; s. c. 9 S. E. Rep. 473; 13 Va. L. J. 320.

<sup>32</sup> *Chicago &c. R. Co. v. Nash*, 1 Ind. App. 298; s. c. 27 N. E. Rep. 564; *Chicago &c. R. Co. v. Fenn*, 3 Ind. App. 250; s. c. 29 N. E. Rep. 370; *Ohio &c. R. Co. v. Craycraft*, 5 Ind. App. 335; s. c. 32 N. E. Rep. 297; *Pittsburg &c. R. Co. v. Shaw*, 15 Ind. App. 173; s. c. 43 N. E. Rep. 957; *Louisville &c. R. Co. v. Ousler*, 15 Ind. App. 322; *Childers v. Louisville &c. R. Co.*, 12 Ind. App. 686; *Crum v. Conover*, 14 Ind. App. 264. In the Supreme Court, the question does not seem to have received final adjudication. In a case in that court, prior to the cases above cited, the following language occurs: "It

is very doubtful whether the appellant has a right to recover for his cow in any event, in view of the fact that the cow was at large upon the highway, the plaintiff being required to keep his cattle upon his own land; and the question is presented as to whether or not the cow was not trespassing, even if she escaped without appellant's fault; and if so, whether there can be a recovery even if appellee's negligence caused the injury; but in view of the theory we take of the question presented by the motion, we deem it unnecessary to decide whether this would defeat a recovery or not." *Louisville &c. R. Co. v. Green*, 120 Ind. 367, 374. The common law in regard to trespass under such circumstances is in force in that State. See *ante*, § 1998.

<sup>33</sup> Vol. I, § 366.

<sup>34</sup> *Indianapolis &c. R. Co. v. Caudle*, 60 Ind. 112.

<sup>35</sup> *Hohl v. Chicago &c. R. Co.*, 61 Minn. 321; s. c. 63 N. W. Rep. 742.

<sup>36</sup> *Clark v. Boston &c. R. Co.*, 64 N. H. 323; s. c. 11 Atl. Rep. 676.



escape liability for a *reckless* or *willful injury* to trespassing cattle on the ground of contributory negligence of the owner implied from the trespass.<sup>37</sup> But when the owner has also been reckless in knowingly permitting his cattle to roam upon, or in the immediate vicinity of, a railroad track, his recklessness will offset that of the company, and he can not recover without showing that his cattle have been *willfully* injured.<sup>38</sup>

**§ 2001. American Rule Permitting Cattle to Run upon Uninclosed Lands.**—In many States, a more liberal doctrine has grown up, having its origin in the needs of a thinly settled people, in a new country, where improvements are expensive, and almost unknown. In these States, all the uninclosed lands in the community constitute what is known as the “range,” upon which the inhabitants turn their stock to feed at will. In order to adjust difficulties between the owners of such stock and the owners of inclosed lands upon which it may trespass, most of these States have enacted laws defining a “lawful fence,” and declaring that no one whose close is not surrounded by a “lawful fence” shall recover damages against the owner of stock which should break into his close and damage his crop. In these States, the object of fences has been declared to be to fence one’s neighbor’s cattle out, rather than to fence one’s own in.<sup>40</sup>

**§ 2002. Jurisdictions in which this Rule Prevails.**—Among these States are Missouri,<sup>41</sup> Mississippi,<sup>42</sup> Ohio,<sup>43</sup> South Carolina,<sup>44</sup>

Compare, as to the rights of travelers at railroad crossings, *ante*, § 1485, *et seq.*

<sup>37</sup> *Stucke v. Milwaukee &c. R. Co.*, 9 Wis. 428. See *post*, § 2107; Vol. I, §§ 206, 265; *ante*, §§ 1606, 1627, 1714, 1747, 1760, 1826, 1848.

<sup>38</sup> *Chicago &c. R. Co. v. Goss*, 17 Wis. 428.

<sup>40</sup> See Vol. I, § 906.

<sup>41</sup> *Gorman v. Pacific R. R.*, 26 Mo. 442; *McPheeters v. Hannibal &c. R. Co.*, 45 Mo. 23; *Hannibal &c. R. Co. v. Kenney*, 41 Mo. 271; *Tarwater v. Hannibal &c. R. Co.*, 42 Mo. 193; *Turner v. Kansas City &c. R. Co.*, 78 Mo. 578; *Nolon v. Chicago &c. R. Co.*, 23 Mo. App. 353; *Brown v. Hannibal &c. R. Co.*, 27 Mo. App. 394; *Campbell v. Missouri &c. R. Co.*, 59

Mo. App. 151; s. c. 1 Mo. App. Rep. 3.

<sup>42</sup> *Vicksburg &c. R. Co. v. Patton*, 31 Miss. 157; *Memphis &c. R. Co. v. Blakeney*, 43 Miss. 218; *Raiford v. Mississippi &c. R. Co.*, 43 Miss. 233; *New Orleans &c. R. Co. v. Field*, 46 Miss. 573; *Mobile &c. R. Co. v. Hudson*, 50 Miss. 572.

<sup>43</sup> *Cranston v. Cincinnati &c. R. Co.*, 1 Handy (Ohio) 193; *Kerwhacker v. Cincinnati &c. R. Co.*, 3 Ohio St. 172; s. c. 1 Thomp. Neg., 1st ed., p. 472; *Cleveland &c. R. Co. v. Elliott*, 4 Ohio St. 474; *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 67; *Marietta &c. R. Co. v. Stephenson*, 24 Ohio St. 48.

<sup>44</sup> *Murray v. South Carolina R. Co.*, 10 Rich. L. (S. C.) 227.



'Alabama,<sup>45</sup> Iowa,<sup>46</sup> Montana,<sup>47</sup> Florida,<sup>48</sup> Indian Territory,<sup>49</sup> Oregon,<sup>50</sup> Washington,<sup>51</sup> and Arkansas.<sup>52</sup>

§ 2003. **Mixed Rule in Georgia.**—In Georgia, it seems, there is a mixed rule in force. The language used by the Supreme Court of that State justifies the statement that there is an obligation upon the owner of mules to keep them within his close;<sup>53</sup> but horned cattle are permitted to run at large, and do not, by wandering upon the uninclosed premises of others, become trespassers.<sup>54</sup>

§ 2004. **Under American Rule, not Negligence to Allow Cattle to Stray upon Railway Track.**—In the States where the American rule prevails, it is not a trespass for cattle to wander upon uninclosed lands, and persons whose cattle stray upon an unfenced railroad track are not placed thereby in the position of wrong-doers; hence it follows that railway companies are liable for the ordinary negligence of their servants towards such animals.<sup>55</sup> But cattle in charge of a herder are not running at large, and, if he voluntarily drives and leaves them uncared for in a place of danger along a railway track, and they are killed, his act will be regarded as the proximate cause of the injury and will bar a recovery.<sup>56</sup> And it has been held that, while the owner of cattle may allow them to run at large, he must exercise care to prevent their going upon the track, and, whether he was negligent, under the circumstances, is a question for the jury.<sup>57</sup> An owner of stock may not

<sup>45</sup> *Mobile &c. R. Co. v. Williams*, 53 Ala. 595; *Birmingham Mineral R. Co. v. Harris*, 98 Ala. 326; s. c. 13 South. Rep. 377.

<sup>46</sup> *Alger v. Mississippi &c. R. Co.*, 10 Iowa 268.

<sup>47</sup> *McMaster v. Montana &c. R. Co.*, 12 Mont. 163; s. c. 29 Pac. Rep. 539; 30 Pac. Rep. 268; 49 Am. & Eng. Rail. Cas. 564.

<sup>48</sup> *Savannah &c. R. Co. v. Geiger*, 21 Fla. 669.

<sup>49</sup> *Eddy v. Evans*, 58 Fed. Rep. 151; s. c. 7 C. C. A. 129.

<sup>50</sup> *Moses v. Southern &c. R. Co.*, 18 Ore. 385; s. c. 8 L. R. A. 135; 23 Pac. Rep. 498; 42 Am. & Eng. Rail. Cas. 555.

<sup>51</sup> *Timm v. Northern &c. R. Co.*, 3 Wash. Terr. 299; s. c. 13 Pac. Rep. 415.

<sup>52</sup> *Little Rock &c. R. Co. v. Finley*, 37 Ark. 562.

<sup>53</sup> *Georgia R. &c. Co. v. Anderson*, 33 Ga. 110.

<sup>54</sup> *Macon &c. R. Co. v. Baber*, 42 Ga. 301.

<sup>55</sup> *Searles v. Milwaukee &c. R. Co.*,

35 Iowa 490; *Kuhn v. Chicago &c. R. Co.*, 42 Iowa 420; *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351; *Vicksburg &c. R. Co. v. Patton*, 31 Miss. 157; *Gorman v. Pacific R. R.*, 26 Mo. 442; *Macon &c. R. Co. v. Baber*, 42 Ga. 300; *New Orleans &c. R. Co. v. Field*, 46 Miss. 574; *Alger v. Mississippi &c. R. Co.*, 10 Iowa 268; *Apitz v. Missouri &c. R. Co.*, 17 Mo. App. 419; *Keeney v. Oregon &c. R. Co.*, 19 Or. 291; s. c. 24 Pac. Rep. 233; 42 Am. & Eng. Rail. Cas. 619; *Bethea v. Raleigh &c. R. Co.*, 106 N. C. 279; s. c. 10 S. E. Rep. 1045; *Nolon v. Chicago &c. R. Co.*, 23 Mo. App. 353; *Alabama &c. R. Co. v. Powers*, 73 Ala. 545; *Farmer v. Wilmington &c. R. Co.*, 88 N. C. 564; *Layne v. Ohio &c. R. Co.*, 35 W. Va. 438; *Mobile &c. R. Co. v. Williams*, 53 Ala. 595; *Georgia R. &c. Co. v. Neely*, 56 Ga. 540. But see *Macon &c. R. Co. v. Vaughn*, 48 Ga. 464.

<sup>56</sup> *Keeney v. Oregon &c. R. Co.*, 19 Or. 291; s. c. 24 Pac. Rep. 233.

<sup>57</sup> *Williams v. Northern &c. R. Co.*,



willfully expose them to danger in the exercise of his right to allow them to run at large. But the abandonment of the pursuit of cattle at large near a railway track in the night time, does not constitute a willful exposure preventing a recovery for their negligent injury.<sup>58</sup>

§ 2005. But Owner Assumes Risks of Accidents Unavoidable by the Exercise of Ordinary Care.—It has been held, however, that the owner of the animals, by the act of turning them out upon the range, assumes some of the risks incident to their wandering upon the railroad track,—that is, he assumes the risk of all accidents unavoidable by the exercise of ordinary care. On the other hand, the railroad company, while it has a right to carry on its lawful business upon its own unfenced land, must do so with due care, in view of all of the circumstances, to avoid injury to any cattle which may be straying upon its track. And the presumption is, in the absence of proof to the contrary, that such care is taken.<sup>59</sup>

§ 2006. And Company Liable for Accidents Due to Want of Ordinary Care.—The language of the Mississippi court on this subject is as follows: "Persons living contiguous to railroads have the same right as others, in more remote localities, to turn their cattle upon the ranges; but they assume the risk of their greater exposure to danger. The cattle are liable to go upon the road; the company can not detain them, *damage feasant*, any more than any other land-owner; nor can they treat them as unlawfully there, and therefore relax their care and efforts to avoid their destruction. The only justification of the company for injury to them is that, in the prosecution of their ordinary and lawful business, the act could not have been avoided by the use of such care, prudence, and skill as a discreet man would put forth to prevent or avoid it."<sup>60</sup>

3 Dak. 168; Courson v. Chicago & R. Co., 71 Iowa 28; s. c. 32 N. W. Rep. 8; Hammond v. S. C. & R. Co., 49 Iowa 450. See also Sinking v. Illinois & R. Co., 10 S. Dak. 560; Hindman v. Oregon & R. Co., 17 Or. 614; Dickey v. Northern & R. Co., 19 Wash. 350.

<sup>58</sup> Louisville & R. Co. v. Williams, 105 Ala. 379; s. c. 16 South. Rep. 795.

<sup>59</sup> Kerwhaker v. Cleveland R. Co., 3 Ohio St. 172; s. c. 1 Thomp. Neg., 1st ed., p. 472; Memphis & R. Co. v. Blakeney, 43 Miss. 218; Raiford v. Mississippi & R. Co., 43 Miss. 233; Macon & R. Co. v. Davis, 18 Ga. 680; Central & R. Co. v. Davis, 19

Ga. 437; New Orleans & R. Co. v. Field, 46 Miss. 574; Savannah & R. Co. v. Geiger, 21 Fla. 669; White v. St. Louis & R. Co., 20 Mo. App. 564; s. c. 2 West. Rep. 595; Connyers v. Sioux City & R. Co., 78 Iowa 410; s. c. 43 N. W. Rep. 267; Miller v. Chicago & R. Co., 59 Iowa 707; McDonald v. Great Northern R. Co. (Idaho), 46 Pac. Rep. 766; Memphis & R. Co. v. Lyon, 62 Ala. 71 (where the animal fell into a trestle over a culvert); Little Rock & R. Co. v. Finley, 37 Ark. 563.

<sup>60</sup> New Orleans & R. Co. v. Field, 46 Miss. 573, 579. To the same effect, see Cranston v. Cincinnati & R. Co., 1 Handy (Ohio) 193; Little



§ 2007. **Effect of Statutes or Ordinances Prohibiting Animals from Running at Large.**—This doctrine does not seem to be affected by statutes, or by the regulations of local municipalities, prohibiting stock from running at large. Thus, in Missouri, a statute prohibiting bulls from running at large, under certain circumstances, and pointing out a remedy for persons suffering from its violation, was held to have no other effect than to give the remedy provided.<sup>61</sup> Permitting cattle to run at large, in violation of a statute, is not of itself to be considered contributory negligence;<sup>62</sup> though contrary decisions have been rendered in some States.<sup>63</sup>

§ 2008. **Effect of Local Municipal Corporations Permitting Cattle to Run at Large.**—As to whether or not a local municipal ordinance permitting cattle to run at large will relieve the owner from the imputation of negligence, whose cattle are killed upon a railroad, some division of opinion has arisen. In Minnesota it has been held that it will,<sup>64</sup> but the contrary is the rule in Kentucky<sup>65</sup> and Indiana.<sup>66</sup> In New York it was characterized as gross negligence in the owner of stock to suffer it to go at large upon the highways in the vicinity of a railroad, thus endangering the lives and property of passengers upon the road; and this, too, although permitted to do so by a town ordinance.<sup>67</sup> In Indiana, where stock were allowed to wander unattended

Rock &c. R. Co. v. Finley, 37 Ark. 562; Kerwhaker v. Cleveland &c. R. Co., 3 Ohio St. 172; s. c. 1 Thomp. Neg., 1st ed., 472; Layne v. Ohio &c. R. Co., 35 W. Va. 438; Central &c. R. Co. v. Lawrence, 13 Ohio St. 67; Cleveland &c. R. Co. v. Elliott, 4 Ohio St. 474.

<sup>61</sup> Owens v. Hannibal &c. R. Co., 58 Mo. 387; Schwarz v. Hannibal &c. R. Co., 58 Mo. 207; Mumpower v. Hannibal &c. R. Co., 59 Mo. 245.

<sup>62</sup> Kirkpatrick v. Missouri &c. R. Co., 71 Mo. App. 263. See also Alabama &c. R. Co. v. McAlpine, 71 Ala. 545; Windsor v. Hannibal &c. R. Co., 45 Mo. App. 123; Roberts v. Richmond &c. R. Co., 88 N. C. 560. In the Indian Territory it has been held that the mere fact that cattle are illegally in the territory is not a defense in an action for their negligent killing: Gulf &c. R. Co. v. Washington, 49 Fed. Rep. 347; Gulf &c. R. Co. v. Ellidge, 49 Fed. Rep. 356.

<sup>63</sup> Central Branch R. Co. v. Lea, 20 Kan. 353; Kansas City &c. R. Co. v. McHenry, 24 Kan. 501. See also Houston &c. R. Co. v. Nichols (Tex.

Civ. App.), 39 S. W. Rep. 954; s. c. 2 Am. Neg. Rep. 466; Missouri &c. R. Co. v. Russell (Tex. Civ. App.), 43 S. W. Rep. 576; Johnson v. Minneapolis &c. R. Co., 43 Minn. 207; s. c. 45 N. W. Rep. 152; Denver &c. R. Co. v. Olsen, 4 Colo. 239; International &c. R. Co. v. Cocke, 64 Tex. 151 (stock at large in violation of law entering on track, regarded as trespass); Denver &c. R. Co. v. Stewart, 1 Colo. App. 227.

<sup>64</sup> Fritz v. First Div. St. Paul &c. R. Co., 22 Minn. 404.

<sup>65</sup> Louisville &c. R. Co. v. Ballard, 2 Metc. (Ky.) 177.

<sup>66</sup> Michigan &c. R. Co. v. Fisher, 27 Ind. 97.

<sup>67</sup> Marsh v. New York &c. R. Co., 14 Barb. (N. Y.) 364. See also Halloran v. New York &c. R. Co., 2 E. D. Smith (N. Y.) 257; Louisville &c. R. Co. v. Ballard, 2 Metc. (Ky.) 177; Michigan &c. R. Co. v. Fisher, 27 Ind. 97; Clarke v. Syracuse &c. R. Co., 11 Barb. (N. Y.) 112; Bennett v. Chicago &c. R. Co., 19 Wis. 145; Bowman v. Troy &c. R. Co., 37 Barb. (N. Y.) 516.



upon a highway in the vicinity of a railway crossing, it was held that the owner was guilty of contributory negligence, notwithstanding the existence of a local ordinance permitting animals to run at large.<sup>68</sup> In Illinois, the common law rule has been changed by statute, and the owner of the soil is required to fence against stock, which the law permits to run at large in the highway.<sup>69</sup> A refusal of the court below to charge that railroad companies are not liable for injuries to cattle which have strayed upon the highway, or which have been voluntarily turned upon the highway, and thence get upon the railroad track through the want of proper fences or cattle-guards, which the law has required the road to erect and maintain, is not error.<sup>70</sup> And it has been held that the effect of the law is to bind the servants of the company to the exercise of a higher degree of care at places where the road can not be fenced, and where for that reason the danger of collision with stock is greater.<sup>71</sup> This doctrine, however, is not in entire accord with the earlier decisions in that State, which seem to make a distinction between permitting stock to run at large generally, and allowing them to do so in the immediate neighborhood of a railroad at a place where it is not and can not be fenced. Thus, it was said that the plaintiff might "lawfully permit his stock to run upon the *range*, and browse on uninclosed woodlands," but it was negligence to allow his cattle to frequent a railway track, and graze and lie upon it.<sup>72</sup>

§ 2009. **Constitutionality of Such Regulations.**—Such an ordinance, authorizing cattle to go at large upon the highway, has been unconstitutional, on the ground that everything in the highway (beyond the mere right of way which belongs to the public), including timber, grass, etc., is the property of the adjacent land-owner; and that an ordinance which, in effect, permits cattle to graze by the roadside, is an appropriation of private property to public use; and if done without compensation, it is hence invalid.<sup>72a</sup>

§ 2010. **Facts Which have been Held Evidence of Contributory Negligence.**—The following facts were held to show such contributory

<sup>68</sup> *Hanna v. Terre Haute &c. R. Co.*, 119 Ind. 316; s. c. 21 N. E. Rep. 903. The court in this case say: "The owner of animals thus at large may not be liable as a wrong-doer for injuries done by them while on the public highway and commons; but he may not abandon them to the hazard of being injured on a railroad crossing by permitting them to roam at large in the vicinity of crossings." See also *Chicago &c. R. Co. v. Nash*, 1 Ind. App. 298.

<sup>69</sup> *Headen v. Rust*, 39 Ill. 186; *Seeley v. Peters*, 10 Ill. 130.

<sup>70</sup> *Galena &c. R. Co. v. Crawford*, 25 Ill. 529; *Rockford &c. R. Co. v. Irish*, 72 Ill. 404; *Cairo &c. R. Co. v. Murray*, 82 Ill. 77.

<sup>71</sup> *Chicago &c. R. Co. v. Engle*, 84 Ill. 397; *Toledo &c. R. Co. v. McGinnis*, 71 Ill. 346; *Rockford &c. R. Co. v. Rafferty*, 73 Ill. 58; *Toledo &c. R. Co. v. Furgusson*, 42 Ill. 449.

<sup>72</sup> *Chicago &c. R. Co. v. Patchin*, 16 Ill. 198; *Illinois &c. R. Co. v. Phelps*, 29 Ill. 447; *Chicago &c. R. Co. v. Cauffman*, 28 Ill. 513.

<sup>72a</sup> *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.) 255.



negligence as justified the court in setting aside a verdict for plaintiff: Near where the stock was killed was a small brook, over which the company had built a culvert; below the culvert the plaintiff had a pasture, in which he kept his cattle; across the brook, below the culvert, he had made a fence of long poles. A flood floated driftwood through the culvert and against the fence; to prevent the accumulation of drift above the culvert in such quantities as to endanger its safety, the company aided it through the culvert; at sunset the plaintiff knew of the exposed situation of the fence, but would not remove his cattle, though he had another unexposed pasture, into which he might have put them; at night, the fence being borne away, the cattle passed upon the road, and were killed.<sup>73</sup> If the plaintiff saw his cow upon the track of the railroad about the time the train usually passed, or that his cattle were turned upon land adjoining the track, and were loitering near it, such facts are evidence of contributory negligence which it is competent for the jury to consider.<sup>74</sup> It has been held that it is contributory negligence *per se* to leave a horse untied and unattended, even for a short time in a public street, in dangerous proximity to a railroad track, at a time when he knew a train usually arrived.<sup>75</sup>

**§ 2011. Facts not Furnishing Conclusive Evidence of Contributory Negligence.**—It has been held that evidence that a servant, whom traders employed to deliver goods, upon stopping with his horse and wagon to deliver a parcel at a house, situated at from fifty to a hundred rods from a railroad crossing, left the horse unfastened for four or five minutes while he was in the house, knowing that it was not afraid of cars, and having used it for three or four months without ever hitching it, or knowing it to start, is not conclusive, as a matter of law, of a want of due care on his part. It is a question for the jury.<sup>76</sup> One whose horse has been frightened by a train approaching without giving the required signals, and unnecessarily letting off steam, is not guilty of contributory negligence because he left the animal unhitched in a public street while he was near by at the door of an adjoining house, even though an ordinance is in force making it unlawful to allow any animal to stand unhitched in a street.<sup>77</sup> Where a number of horses and mules are being driven along a highway toward a railroad

<sup>73</sup> Indianapolis &c. R. Co. v. Wright, 13 Ind. 213.

<sup>74</sup> Housatonic R. Co. v. Waterbury, 23 Conn. 101; Hutchinson v. Chicago &c. R. Co., 9 S. D. 5; s. c. 67 N. W. Rep. 853. See also Georgia R. &c. Co. v. Parks, 91 Ga. 71.

<sup>75</sup> Louisville &c. R. Co. v. Eves, 1 Ind. App. 224; s. c. 27 N. E. Rep. 580; Weingartner v. Louisville &c.

R. Co., 19 Ky. L. Rep. 1023; s. c. 42 S. W. Rep. 839. As to negligence in leaving horses or teams unhitched in the streets, see Vol. I, § 1294, *et seq.*

<sup>76</sup> Southworth v. Old Colony &c. R. Co., 105 Mass. 342.

<sup>77</sup> Louisville &c. R. Co. v. Davis, 7 Ind. App. 222; s. c. 33 N. E. Rep. 451.



crossing where the view of the track is obscured, and the driver, knowing that a train is due some time in that part of the day, but not exactly when, fails to go ahead and hold his stock until he ascertains that the track is clear, the facts do not, as matter of law, establish contributory negligence, but should be submitted to the jury, together with the other circumstances of the case.<sup>78</sup> So, also, where the plaintiff and his son were driving cattle through a narrow canyon where the highway and track were close together, and, after hearing the warning signal, did all that they possibly could to get the animals off the track, though it would have been possible at the risk of their lives to run back and flag the train in time to prevent the accident,—the question of contributory negligence should be submitted to the jury.<sup>79</sup>

ARTICLE II. EFFECT OF CONTRIBUTORY NEGLIGENCE OF THE LAND-OWNER IN CONNECTION WITH STATUTES REQUIRING RAILWAY COMPANIES TO FENCE.

| SECTION   | SECTION   |
|---|---|
| 2013. Failure of railway company to erect statutory fence not excused by contributory negligence of cattle-owner. | 2017. Where the common law rule as to restraining animals prevails.   |
| 2014. Failure of railroad company to keep gates closed at highway crossings.                                      | 2018. And where statutes or regulations, making it unlawful to permit stock to run at large, are in force.    |
| 2015. Rule otherwise where plaintiff has been guilty of willful or reckless exposure of his animals.              | 2019. Defense of contributory negligence against liability for failure to maintain statutory fence in repair. |
| 2016. Contrary doctrine that contributory negligence is a defense to a statutory action for a failure to fence.   | 2020. Failure to take advantage of a statutory permission to fence, not contributory negligence.              |

§ 2013. Failure of Railway Company to Erect Statutory Fence not Excused by Contributory Negligence of Cattle-Owner.<sup>80</sup>—In many cases these statutes are regarded as in the nature of police regulations for the purpose of compelling extra precaution for the safety of the public, on the part of those exercising a dangerous occupation, and the payment of damages for stock, injured by reason of the failure to fence, is looked upon rather as a penalty for the violation of the statute, than as compensation, to which the party injured is entitled

<sup>78</sup> *Bates v. Fremont &c. R. Co.*, 4 S. D. 394; s. c. 54 N. W. Rep. 72. See also *Chicago &c. R. Co. v. Bunker*, 81 Ill. App. 616.

<sup>79</sup> *Snook v. Clark*, 20 Mont. 230; s. c. 50 Pac. Rep. 718.

<sup>80</sup> This section is cited in § 2047.



as a matter of abstract right. In such cases these statutes are construed as imposing upon the railway company an absolute liability to the owner of animals injured by a failure to erect the statutory fence, which is not defeated by contributory negligence on his part.<sup>81</sup> In Indiana the doctrine is firmly established. In the case of *Jeffersonville, etc., Railroad Company v. Ross*, Buskirk, J., says: "It has been so repeatedly decided by this court, that it ought now to be regarded as settled and put at rest, that a railroad company is liable for stock killed or injured at a point where it is required to fence its track, and has not done so, without reference to the question of fault on the part of the plaintiff, or negligence on the part of the defendant."<sup>82</sup> In another case the reason for the rule is explained as follows: "The law does not prescribe the payment by the road to the owner of the value of the animal because of his abstract right to that sum where he is thus a wrong-doer, but because it is supposed to be as effectual a mode as any that can as yet be devised to compel the exercise by the road of all reasonable care to insure the safety of passengers."<sup>83</sup> In Michigan the same result is reached by a different course of reasoning:

<sup>81</sup> *Indianapolis &c. R. Co. v. Townsend*, 10 Ind. 38; *Jeffersonville &c. R. Co. v. Applegate*, 10 Ind. 49; *Hart v. Indianapolis &c. R. Co.*, 12 Ind. 478; *New Albany &c. R. Co. v. Tilton*, 12 Ind. 3; *New Albany &c. R. Co. v. Maiden*, 12 Ind. 10; *Indianapolis &c. R. Co. v. McKinney*, 24 Ind. 283; *Gilman v. European R. Co.*, 60 Me. 237; *Rhodes v. Utica &c. R. Co.*, 5 Hun (N. Y.) 344; *McCall v. Chamberlain*, 13 Wis. 640; *Indianapolis &c. R. Co. v. Paramore*, 12 Ind. 406; *Marietta &c. R. Co. v. Stephenson*, 24 Ohio St. 48; *Jeffersonville &c. R. Co. v. Ross*, 37 Ind. 545; *Louisville &c. R. Co. v. Cahill*, 63 Ind. 340; *Louisville &c. R. Co. v. Whitesell*, 68 Ind. 297; *Welty v. Indianapolis &c. R. Co.*, 105 Ind. 55; *Jeffersonville &c. R. Co. v. O'Connor*, 37 Ind. 95; *Baltimore &c. R. Co. v. Evarts*, 112 Ind. 533; s. c. 14 N. E. Rep. 369; 11 West. Rep. 533; *Toledo &c. R. Co. v. Jackson*, 5 Ind. App. 547; s. c. 32 N. E. Rep. 793; *Terre Haute &c. R. Co. v. Schaeffer*, 5 Ind. App. 86; s. c. 31 N. E. Rep. 557; *Anderson v. Chicago &c. R. Co.*, 93 Iowa 561; s. c. 61 N. W. Rep. 1058; *Neversorry v. Duluth &c. R. Co.*, 115 Mich. 146; s. c. 73 N. W. Rep. 125; 4 Det. L. N. 808; *Gillam v. Sioux City &c. R. Co.*, 26 Minn. 268; *Burlington v. Franzen*, 15 Neb. 365; *Corwin v. New York &c. R. Co.*, 13

N. Y. 42; *Burlington &c. R. Co. v. Webb*, 18 Neb. 215; s. c. 53 Am. Rep. 809; *Mead v. Burlington &c. R. Co.*, 52 Vt. 278; *Quimby v. Boston &c. R. Co.*, 71 Vt. 301; s. c. 45 Atl. Rep. 223; *Quackenbush v. Wisconsin &c. R. Co.*, 71 Wis. 472; s. c. 37 N. W. Rep. 834; *Pontiac &c. R. Co. v. Brady*, Montreal L. Rep. 4 Q. B. 346; *Harwood v. Bennington &c. R. Co.*, 67 Vt. 664; s. c. 32 Atl. Rep. 721; *Horan v. Taylor &c. R. Co.*, 3 Wills. (Tex. Civ. App.) 515. Under the Georgia statute contributory negligence may be set up and damages apportioned by the jury: *Central &c. R. Co. v. Hamilton*, 71 Ga. 461; *Yonge v. Kinney*, 28 Ga. 111. In many of the statutes there are provisions allowing contributory negligence to be set up as a defense, but the apportionment of damages is not generally permitted outside of Georgia.

<sup>82</sup> 37 Ind. 549. See also *Indianapolis &c. R. Co. v. McKinney*, 24 Ind. 283; *Bellefontaine R. Co. v. Reed*, 33 Ind. 476; *Indianapolis &c. R. Co. v. Townsend*, 10 Ind. 39.

<sup>83</sup> *New Albany &c. R. Co. v. Maiden*, 12 Ind. 10. See also *Pennsylvania Co. v. Mitchell*, 124 Ind. 473; *Banister v. Pennsylvania Co.*, 98 Ind. 220; *Cincinnati &c. R. Co. v. Ridge*, 54 Ind. 39.



"Indeed," say the court, by Cooley, J., "if contributory negligence could constitute a defense, the purpose of the statute might be in a great measure, if not wholly, defeated; for the mere neglect of the railway company to observe the directions of the statute would render it unsafe for the owner of beasts to suffer them to be at large, or even on his own grounds in the vicinity of the road; so that if he did what, but for the neglect of the company, it would be entirely safe and proper for him to do, the very neglect of the company would constitute its protection, since that neglect alone rendered the conduct of the plaintiff negligent."<sup>84</sup> In *New York, in the case of Corwin v. New York, etc., Railroad Company*,<sup>85</sup> it is distinctly laid down that the railroad company can not avoid liability for injuries to stock in consequence of their failure to comply with the provisions of the statute, on the ground that the owner of the stock has been guilty of negligence in permitting it to stray at large, because the statute imposes a public duty which is superior to any individual interest. The statute provided that, until the statutory fence was built, the delinquent railway company should be liable for all injuries to stock due to the failure to fence. This provision was construed as imposing an absolute liability only so long as the statutory fence had not been built, and as leaving the liability of the company to be determined by the rules of negligence and contributory negligence, when once the fence had been properly constructed. It was therefore held, in the case of *Hance v. Cayuga, etc., Railroad Company*,<sup>86</sup> that the owner of cattle, who permitted them to escape from his yard and go upon the track of a railroad company, where they were injured, was chargeable with contributory negligence, though guilty of no actual negligence, and could not recover for the injury, notwithstanding the fact that the railroad company had failed in its duty to maintain the fence and the cattle-guards.

**§ 2014. Failure of Railroad Company to Keep Gates Closed at Highway Crossings.**—In a case in England, where live stock, straying in the highway, were injured at a railway crossing, in consequence of a failure of the company to keep the gates required by statute at the

<sup>84</sup> *Flint &c. R. Co. v. Lull*, 28 Mich. 510, 515.

<sup>85</sup> 13 N. Y. 42. This case is followed in *Munch v. New York &c. R. Co.*, 29 Barb. (N. Y.) 647; *Duffy v. New York &c. R. Co.*, 2 Hilt. (N. Y.) 496; *McDowell v. New York &c. R. Co.*, 37 Barb. (N. Y.) 195; *Sheaf v. Utica &c. R. Co.*, 2 N. Y. S. C. (T. & C.) 388; *Fanning v. Long Island R. Co.*,

2 N. Y. S. C. (T. & C.) 585; *Rhodes v. Utica &c. R. Co.*, 5 Hun (N. Y.) 344; *Waldron v. Rensselaer &c. R. Co.*, 8 Barb. (N. Y.) 390. See also *Labussiere v. New York &c. R. Co.*, 10 Abb. Pr. (N. Y.) 398, note.

<sup>86</sup> 26 N. Y. 428. See also *Murray v. New York &c. R. Co.*, 4 Keyes (N. Y.) 274.



highway crossing closed, it was held that the company were liable, notwithstanding the fact that, as to the public, the cattle were unlawfully in the highway. As to the defendant, they were lawfully there, and they escaped upon the railway in consequence of failure of the defendant to keep the gates closed.<sup>87</sup> In another case, it appeared that a colt strayed from the field of the owner into the highway, abutting upon which was a yard, not fenced from the railway track, the gate of which was left open through the neglect of defendant's servants; that while the colt was being driven back to the field by the servants of the owner, it escaped into the yard, and thence to the track, where it was killed by a passing train. The court held that the colt was in lawful use of the highway while being driven home, and that the defendant was liable.<sup>88</sup>

§ 2015. **Rule Otherwise where Plaintiff has been Guilty of Willful or Reckless Exposure of his Animals.**—Where, however, the owner of stock purposely exposes it to danger,<sup>89</sup> or needlessly abandons it to certain destruction, public policy requires that he should be left remediless.<sup>90</sup> Any other course would open the door to fraud. "But, in order to deprive the owner of his rights under the statute, there must be something more than mere contributory negligence; there must be a voluntary abandonment of his property, or an intentional exposure of it to danger."<sup>91</sup>

§ 2016. **Contrary Doctrine that Contributory Negligence is a Defense to a Statutory Action for a Failure to Fence.**—In some States, however, a different view is taken of such statutes. They are looked upon as providing compensation for injuries caused by neglect of the duty imposed; and recovery is therefore refused, where the injury is caused partially by the fault of the plaintiff. In such States, contributory negligence is a defense to the statutory action for a failure

<sup>87</sup> *Fawcett v. York &c. R. Co.*, 16 Q. B. 610; s. c. 15 Jur. 173; 20 L. J. (Q. B.) 222.

<sup>88</sup> *Midland R. Co. v. Daykin*, 17 C. B. 126; 25 L. J. (C. P.) 73. Where plaintiff's cattle have escaped onto the track through open gates or bars, which he is under the duty of keeping shut, he can not recover for their injury. This, however, is not a matter of contributory negligence on his part, because his neglect is not merely the contributing, but the sole cause of the accident. See *post*, §§ 2059, 2106, 2107.

<sup>89</sup> *Welty v. Indianapolis &c. R. Co.*, 105 Ind. 55; s. c. 2 West. Rep. 652; *Ft. Wayne &c. R. Co. v. Woodward*, 112 Ind. 118; s. c. 13 N. E. Rep. 260. See also *Davidson v. Central &c. R. Co.*, 75 Iowa 22; *Nashville &c. R. Co. v. Spence*, 99 Tenn. 218; *Marsh v. New York &c. R. Co.*, 14 Barb. (N. Y.) 364; *Missouri &c. R. Co. v. Roads*, 33 Kan. 640.

<sup>90</sup> *Moody v. Minneapolis &c. R. Co.*, 77 Iowa 29; s. c. 41 N. W. Rep. 477.

<sup>91</sup> *Welty v. Indianapolis &c. R. Co.*, 105 Ind. 55, 58; s. c. 2 West. Rep. 652.



to fence, both under the common law rule as to restraining animals, and under statutes prohibiting them from running at large. In some States, the fence required by statute is regarded as a division fence, and the company is obliged to fence only against cattle lawfully on the adjoining close.<sup>92</sup> This construction does not seem to involve any consideration of contributory negligence, but rather to rest on the rule in regard to division fences. Thus, under this construction, the owner of an animal, which escapes from his control, while in the lawful use of a highway, enters an adjoining field, passes thence onto the railroad track through an insufficient fence, and is killed, can not recover; though it is admitted that, under the circumstances, he could not be sued for trespass, and was not guilty of contributory negligence, even by the strict principles of the common law.<sup>93</sup>

§ 2017. **Where the Common Law Rule as to Restraining Animals Prevails.**<sup>94</sup>—In some of the States, where statutes requiring railway companies to fence their right of way exist, and where, also, the English common law rule prevails, requiring the owners of cattle to restrain them from running at large, it has been held that there is no obligation on the part of the company to fence against cattle wrongfully in the highway or an adjoining close, and that the owner of such cattle can recover nothing, under the statute, for their injury or destruction by the engines or trains of the company.<sup>95</sup> And the rule is the same, whether the animal was permitted to stray,<sup>96</sup> or it escaped without the fault of the owner.<sup>97</sup> But in Wisconsin, it has been held that though a statute, making a railway company liable for injuries to stock caused by failure to fence, does not impose an absolute liability upon the company, and admits the defense of contributory negligence, a mere *technical trespass* does not constitute such contributory negligence; it is necessary to show actual negligence.<sup>98</sup> Where, therefore, cattle escape from custody without the owner's fault,<sup>99</sup> or are permitted to stray at a long distance from the track, and they go upon

<sup>92</sup> *Post*, § 2047.

<sup>93</sup> *McDonald v. Pittsfield &c. R. Co.*, 115 Mass. 564. See also *post*, § 2047.

<sup>94</sup> This section is cited in §§ 2059, 2093.

<sup>95</sup> *Chapin v. Sullivan R. R.*, 39 N. H. 564; *Towns v. Cheshire R. Co.*, 21 N. H. 364; *Woolson v. Northern R. Co.*, 19 N. H. 267; *Trow v. Vermont &c. R. Co.*, 24 Vt. 488; *Eames v. Salem &c. R. Co.*, 98 Mass. 560; *Pittsburgh &c. R. Co. v. Methven*, 21 Ohio St. 586; *Eames v. Boston &c. R. Corp.*, 14 Allen (Mass.) 151.

<sup>96</sup> *Jackson v. Rutland &c. R. Co.*, 25 Vt. 150. See also cases cited above.

<sup>97</sup> *Darling v. Boston &c. R. Co.*, 121 Mass. 118; *Hill v. Concord &c. R. Co.*, 67 N. H. 449; s. c. 32 Atl. Rep. 766; *Towns v. Cheshire R. Co.*, 21 N. H. 363.

<sup>98</sup> *Curry v. Chicago &c. R. Co.*, 43 Wis. 665.

<sup>99</sup> *Laude v. Chicago &c. R. Co.*, 33 Wis. 640.



the track through an insufficient fence and are injured, the owner may recover.<sup>100</sup>

§ 2018. **And where Statutes or Regulations, Making it Unlawful to Permit Stock to Run at Large, are in Force.**—Where a “stock law” is in force, prohibiting the owner of animals to permit them to run at large, he may recover, in a statutory action for a failure to fence, though they were running at large at the time of the injury, if he used due care to confine them and they escaped without his fault.<sup>101</sup> Moreover, permitting animals to run at large in violation of the statute will not of itself defeat a recovery.<sup>102</sup> It must appear that the natural and probable consequence of so permitting them to go at large would be that they would go upon the track.<sup>103</sup> Thus, where they are allowed to roam in the immediate vicinity of unfenced railroad tracks, the owner can not recover for injuries to them.<sup>104</sup> And it is a question

<sup>100</sup> *Curry v. Chicago &c. R. Co.*, 43 Wis. 665. In a case in Minnesota, it was held that, where an animal, which had escaped without the fault of the owner, and had been unsuccessfully pursued until dark, was killed during the night on an unfenced track, the owner was entitled to recover: *Nelson v. Great Northern &c. R. Co.*, 52 Minn. 276; s. c. 53 N. W. Rep. 1129. See also *Toledo &c. R. Co. v. Johnson*, 74 Ill. 83; *Cox v. Minneapolis &c. R. Co.*, 41 Minn. 101; s. c. 42 N. W. Rep. 924.

<sup>101</sup> *Stewart v. Chicago &c. R. Co.*, 27 Iowa 282; *Spence v. Chicago &c. R. Co.*, 25 Iowa 139; *Fritz v. Milwaukee &c. R. Co.*, 34 Iowa 338; *Krebs v. Minneapolis &c. R. Co.*, 64 Iowa 670; *Doran v. Chicago &c. R. Co.*, 73 Iowa 115; s. c. 34 N. W. Rep. 619; *Kansas &c. R. Co. v. Wiggins*, 24 Kan. 588; *Atchison &c. R. Co. v. Davis*, 31 Kan. 645; *Missouri &c. R. Co. v. Bradshaw*, 33 Kan. 533; *Missouri &c. R. Co. v. Roads*, 33 Kan. 640; *Atchison &c. R. Co. v. Gabbert*, 34 Kan. 132; *Missouri &c. R. Co. v. Johnson*, 35 Kan. 58; *Pittsburgh &c. R. Co. v. Howard*, 40 Ohio St. 6; *Chicago &c. R. Co. v. Sims*, 17 Neb. 691; *Burlington &c. R. Co. v. Brinkman*, 14 Neb. 70; *Chicago &c. R. Co. v. Harris*, 54 Ill. 528; *Leavenworth &c. R. Co. v. Forbes*, 37 Kan. 445; s. c. 15 Pac. Rep. 595. But it has been held that, where a man turned his mule at night into a field through which ran an unfenced

railroad track, he could not recover for its loss from the railway company. He had failed to put it in an enclosure as required by statute, and the company had failed to fence; and the neglect of each contributed to the injury: *Kansas &c. R. Co. v. Landis*, 24 Kan. 406. See *post*, § 2018, note.

<sup>102</sup> *Cairo &c. R. Co. v. Murray*, 82 Ill. 77; *Indiana &c. R. Co. v. Dooling*, 42 Ill. App. 63; *Atchison &c. R. Co. v. Cupello*, 61 Ill. App. 432. But in Texas it seems that it will, even though the owner has used due diligence to confine them: *Evans v. Sherman &c. R. Co.*, 14 Tex. Civ. App. 437; s. c. 37 S. W. Rep. 93.

<sup>103</sup> *Ewing v. Chicago &c. R. Co.*, 72 Ill. 25; *Ohio &c. R. Co. v. Jones*, 63 Ill. 472; *Chicago &c. R. Co. v. Harris*, 54 Ill. 528; *Rockford &c. R. Co. v. Irish*, 72 Ill. 404; *Cairo &c. R. Co. v. Woolsey*, 85 Ill. 370; *Isbell v. New York &c. R. Co.*, 27 Conn. 393; *Bulkley v. New York &c. R. Co.*, 27 Conn. 479; *Wabash R. Co. v. Perbex*, 57 Ill. App. 62; *Watier v. Chicago &c. R. Co.*, 31 Minn. 91; *Browne v. Providence &c. R. Co.*, 78 Mass. 55 (applying the law of Connecticut).

<sup>104</sup> *Moser v. St. Paul &c. R. Co.*, 42 Minn. 480; s. c. 44 N. W. Rep. 530; *Van Horn v. Burlington &c. R. Co.*, 59 Iowa 33; *Van Horn v. Burlington &c. R. Co.*, 63 Iowa 67; *Peoria &c. R. Co. v. Champ*, 75 Ill. 577.



for the jury whether, under all the circumstances of the case, permitting animals to run at large, in violation of law, is contributory negligence in an action for injuries to them through the failure of a railroad company to fence its track.<sup>105</sup> But where cattle are turned into a field which is traversed by an unfenced railroad track, and they go upon the right of way, they are not "running at large" within the meaning of such a stock law, and the owner is entitled to recover for their destruction in a statutory action.<sup>106</sup> And it has been held that, under such circumstances, the animals would not be trespassers under the common law rule.<sup>107</sup>

§ 2019. **Defense of Contributory Negligence against Liability for Failure to Maintain Statutory Fence in Repair.**<sup>107a</sup>—Whether or not contributory negligence would be a defense to an action for an injury arising from the failure of a railroad company to construct a fence as required by the statute, such negligence will defeat an action for an injury arising from the failure of the company to *maintain in repair such a fence*, once built.<sup>108</sup> What will be considered contributory negligence is a question depending for its solution upon the particular facts of each case. Contributing to a breach or defect in the fence has been repeatedly held to be such negligence on the part of the plaintiff as will bar his recovery from the company.<sup>109</sup> Whatever the rule may

<sup>105</sup> Rockford &c. R. Co. v. Irish, 72 Ill. 405; Cairo &c. R. Co. v. Woolsey, 85 Ill. 370; Lafayette &c. R. Co. v. Ducharme, 4 Ill. App. 178; Peoria &c. R. Co. v. Miller, 11 Ill. App. 375; Wabash R. Co. v. Perbex, 57 Ill. App. 62; Timins v. Chicago &c. R. Co., 72 Iowa 94; s. c. 33 N. W. Rep. 379; Ericson v. Duluth &c. R. Co., 57 Minn. 26; s. c. 58 N. W. Rep. 822.

<sup>106</sup> Horner v. Williams, 100 N. C. 230; s. c. 5 S. E. Rep. 734; Atchison &c. R. Co. v. Riggs, 31 Kan. 622; s. c. 3 Pac. Rep. 305; Gooding v. Atchison &c. R. Co., 32 Kan. 150 (distinguishing Kansas City &c. R. Co. v. Landis, 24 Kan. 406, ante, § 2018, note, on the ground that the statute in that case required the owner of animals to "keep them confined" at night, which obliged him to keep them in a safe enclosure, while the statute here makes it unlawful to permit them to "run at large"). See also Moriarty v. Central &c. R. Co., 64 Iowa 696; Donovan v. Hannibal &c. R. Co., 89 Mo. 147; Stanley v. Missouri R. Co., 84

Mo. 625; Holland v. West End &c. R. Co., 16 Mo. App. 172.

<sup>107</sup> Atchison &c. R. Co. v. Riggs, 31 Kan. 622; Housatonic R. Co. v. Waterbury, 23 Conn. 101; Harmon v. Columbia &c. R. Co., 32 S. C. 127; s. c. 10 S. E. Rep. 877.

<sup>107a</sup> This section is cited in § 2022.

<sup>108</sup> Lawrence v. Milwaukee &c. R. Co., 42 Wis. 322; Jones v. Sheboygan &c. R. Co., 42 Wis. 306. See also Curry v. Chicago &c. R. Co., 43 Wis. 665.

<sup>109</sup> Indianapolis &c. R. Co. v. Shimer, 17 Ind. 295; Toledo &c. R. Co. v. Thomas, 18 Ind. 215; Indianapolis &c. R. Co. v. Petty, 25 Ind. 414; Koutz v. Toledo &c. R. Co., 54 Ind. 515; Illinois &c. R. Co. v. McKee, 43 Ill. 120; Eames v. Boston &c. R. Corp., 14 Allen (Mass.) 151; Duffy v. New York &c. R. Co., 2 Hilt. (N. Y.) 496; Haigh v. London &c. R. Co., 1 Fost. & Fin. 646; s. c. 8 Week. Rep. 6; Illinois &c. R. Co. v. Arnold, 47 Ill. 173; Ellis v. London &c. R. Co., 2 Hurl. & N. 424; s. c. 26 L. J. (Exch.) 349; 3 Jur. (N. S.) 1008; Toledo &c. R. Co.



be with reference to cattle straying upon the land of another, or in the highway, there can be no doubt about a man's right to the use of his own land. There is no negligence in his pasturing his cattle upon his own premises, although he is aware of the defective condition of the fence which it is the duty of the company to maintain between it and the railroad track. He can not be deprived of the ordinary and proper use of his property by the failure of the railroad company to perform its duty.<sup>110</sup> In Wisconsin, however, it has been held that though prior acts of trespass of the plaintiff with his cattle upon the premises of the railroad company could not be shown as a bar to an action for injuries resulting from a defective condition of the fence,<sup>11</sup> yet, if he turns them into a field with knowledge that the railroad fence is defective, it constitutes contributory negligence on his part.<sup>112</sup> In other jurisdictions, it has been held that to permit animals to remain in a field insecurely fenced from the railroad, should go to the jury as evidence of contributory negligence.<sup>113</sup> And if the plaintiff undertakes to repair a defect in the fence, it is a question for the jury whether the measures taken are, under the circumstances, proper and judicious.<sup>114</sup> According to a decision in New York, the plaintiff is required to notify the company of the defect when its existence comes to his knowledge.<sup>115</sup> If, however, the defect was in the *original con-*

v. Fowler, 22 Ind. 316; Davidson v. Central &c. R. Co., 75 Iowa 22; s. c. 39 N. W. Rep. 163; Best v. Ulster &c. R. Co., 35 App. Div. (N. Y.) 623; s. c. 54 N. Y. Supp. 305; McCoy v. Southern &c. R. Co. (Cal.), 26 Pac. Rep. 629.

<sup>110</sup> Shepard v. Buffalo &c. R. Co., 35 N. Y. 644; McCoy v. California &c. R. Co., 40 Cal. 532; Rogers v. Newburyport R. Co., 1 Allen (Mass.) 16; Congdon v. Central &c. R. Co., 56 Vt. 390; s. c. 48 Am. Rep. 793; Terre Haute &c. R. Co. v. McCord, 56 Ill. App. 173; Chicago &c. R. Co. v. Quinn, 74 Ill. App. 610; Lake Erie &c. R. Co. v. Beam, 60 Ill. App. 68; Wilson v. St. Louis &c. R. Co., 87 Mo. 431; s. c. 3 West. Rep. 274; Toledo &c. R. Co. v. Burgan, 9 Ind. App. 604; s. c. 37 N. E. Rep. 31; Cleveland &c. R. Co. v. Scudder, 40 Ohio St. 173; Cressey v. Northern R. Co., 59 N. H. 564; s. c. 47 Am. Rep. 227; St. Louis &c. R. Co. v. Blackwell (Tex. Civ. App.), 40 S. W. Rep. 860; Gulf &c. R. Co. v. Cash, 8 Tex. Civ. App. 569; s. c. 28 S. W. Rep. 387; Chicago &c. R. Co. v. Morton, 55 Ill. App. 144; Dunsford v.

Michigan &c. R. Co., 20 Ont. App. 577. Where the company's duty to fence is a contractual one, a different rule applies. See *post*, § 2022.

<sup>111</sup> Sika v. Chicago &c. R. Co., 21 Wis. 370.

<sup>112</sup> Carey v. Chicago &c. R. Co., 61 Wis. 71; Lawrence v. Milwaukee &c. R. Co., 42 Wis. 322; Peterson v. Northern &c. R. Co., 86 Wis. 206; s. c. 56 N. W. Rep. 639; McCann v. Chicago &c. R. Co., 96 Wis. 664; s. c. 71 N. W. Rep. 1054; Martin v. Stewart, 73 Wis. 553; s. c. 41 N. W. Rep. 538. See also Chicago &c. R. Co. v. Buck, 14 Ill. App. 394.

<sup>113</sup> Poler v. New York &c. R. Co., 16 N. Y. 476; Magilton v. New York &c. R. Co., 11 App. Div. (N. Y.) 373; Johnson v. Chicago &c. R. Co., 29 Minn. 425; Union P. R. Co. v. Schwenck, 13 Neb. 478; Evans v. St. Paul &c. R. Co., 30 Minn. 489.

<sup>114</sup> Chicago &c. R. Co. v. Seirer, 60 Ill. 295; Poler v. New York &c. R. Co., 16 N. Y. 476.

<sup>115</sup> Poler v. New York &c. R. Co., 16 N. Y. 476; Chicago &c. R. Co. v. Seirer, 60 Ill. 295.



*struction* of the fence by the company, there is no such obligation to notify it; *knowledge* of the defect on the part of the company will be *presumed*.<sup>116</sup> A failure on the part of the plaintiff to repair the fence, if it be under the law a division fence, which he is bound to repair, is contributory negligence.<sup>117</sup>

**§ 2020. Failure to Take Advantage of a Statutory Permission to Fence, Not Contributory Negligence.**—Where the statute contains a provision giving the land-owner the right to build or repair the statutory fence and recover the expense from the railroad company, he is not bound to take that course. Such a provision is permissive merely, and a failure to take advantage of it does not constitute contributory negligence on his part.<sup>118</sup>

<sup>116</sup> *Hammond v. Chicago &c. R. Co.*, 43 Iowa 169. See *post*, § 2050.

<sup>117</sup> *Sandusky &c. R. Co. v. Sloan*, 27 Ohio St. 341.

<sup>118</sup> *Buttles v. Chicago &c. R. Co.*, 43 Mo. App. 280; *Cobb v. Kansas City &c. R. Co.*, 43 Mo. App. 313; *Wilson v. St. Louis &c. R. Co.*, 87 Mo. 431; *Donovan v. Hannibal &c. R. Co.*, 89 Mo. 147; s. c. 5 West. Rep. 396; *Texas &c. R. Co. v. Young*, 60 Tex. 201; *Houston &c. R. Co. v.*

*Adams*, 63 Tex. 200; *San Antonio &c. R. Co. v. Knoepfli*, 82 Tex. 270; *St. Louis &c. R. Co. v. Blackwell* (Tex. Civ. App.), 40 S. W. Rep. 860; *Carpenter v. St. Louis &c. R. Co.*, 20 Mo. App. 644; *Louisville &c. R. Co. v. Sumner*, 106 Ind. 55 (applying the rule of contracts in regard to averting damage from defendant's breach); *Toledo &c. R. Co. v. Pence*, 68 Ill. 528.



## CHAPTER LXV.

### DUTIES OF RAILWAY COMPANIES AS TO FENCES AND CROSSINGS.

ART. I. At Common Law, §§ 2021–2026.

ART. II. Under Statutes, §§ 2028–2097.

SUBDIV. 1. *Constitutionality of Statutes Requiring Railway Companies to Fence*, §§ 2028–2033.

SUBDIV. 2. *Construction of Statutes Requiring Railway Companies to Fence*, §§ 2035–2064.

SUBDIV. 3. *Places where these Statutes do not Require Railway Companies to Fence*, §§ 2067–2077.

SUBDIV. 4. *What will be Considered a Compliance with Statutes Requiring Railway Companies to Fence*, §§ 2079–2088.

SUBDIV. 5. *Release of Duty to Build and Maintain Fence by Contract with Land-Owner*, §§ 2089–2097.

### ARTICLE I. AT COMMON LAW.

#### SECTION

2021. Whether negligence in the railway company not to fence in the absence of statute.

2022. Duty of railway company to fence arising out of contract, express or implied.

2023. When obligation of railway company to fence its tracks implied.

#### SECTION

2024. Grant of right of way does not imply obligation on the part of the land-owner to fence.

2025. Liability for injuries to animals through obstructed and defective crossings.

2026. No obligation to make its track or premises safe for animals.

§ 2021. **Whether Negligence in the Railway Company not to Fence in the Absence of Statute.**—At common law there is no obligation resting upon a railway company to fence its right of way; and, in the absence of a statute or a contract imposing such a duty, the mere failure to fence, without more, creates no liability to the owner of animals killed upon the tracks.<sup>1</sup> Nor does the fact that a railway com-

<sup>1</sup> Campbell v. New York &c. R. Co., 50 Conn. 128; Vandegrift v. Delaware R. Co., 2 Houst. (Del.) 287; Henry v. Dubuque &c. R. Co., 2 Iowa 288; Hall v. Cincinnati &c. R. Co., 13 Ky. L. Rep. 436; s. c. 17 S. W. Rep. 207; Knight v. New Orleans &c. R. Co., 15 La. An. 105; Stevenson v. New Orleans &c. R. Co., 35 La. An. 498; Day v. New Orleans &c. R. Co., 35 La. An. 694; Day v. New Orleans &c. R. Co., 36 La. An. 244; Tillotson



pany voluntarily undertakes to inclose its right of way with fences create any duty on its part to erect and maintain them;<sup>2</sup> nor is it liable for damages caused by removing them,<sup>3</sup> or allowing them to get out of repair.<sup>4</sup> It has, however, been urged that the operation of dangerous machinery of the kind in use upon railroads on uninclosed lands is of itself negligence sufficient to render the company liable to the owners of stock for all injuries inflicted by the running of their trains. In two cases in Georgia the question has been suggested, but not decided.<sup>5</sup> In Mississippi, the court say: "As a proprietor, the company is under no greater obligation to fence its road than any other owner of land. But, in the event of an injury, the fact that the road was not fenced must and should exercise an influence in weighing the degree of care to be employed by the company. When an injury is done, the omission to fence will be weighed, along with the other circumstances, in determining the measure of diligence to be used by the company or its agents. The want of the fence will increase the care required in order to prevent wrongs."<sup>6</sup> And this, it seems, is the law in Mississippi;<sup>7</sup> but it has been carried no further. In a case in Ohio, the court said: "It is true there is no law in Ohio requiring railroad companies to fence their roads. But when they leave their roads open and unfenced, they take the risk of intrusions from animals running at large, as do other proprietors who leave their lands uninclosed."<sup>8</sup> In Vermont, independently, it seems, of the statute, or of the duties imposed by it, the court declared it to be the duty of a railroad company, as soon as it has opened the fields of an adjoining land-owner for the

v. Texas &c. R. Co., 44 La. An. 95; Westbourne Cattle Co. v. Manitoba R. Co., 6 Manitoba L. Rep. 553; Nev-ersorry v. Duluth &c. R. Co., 115 Mich 146; s. c. 73 N. W. Rep. 125; 4 Det. L. N. 808; Memphis &c. R. Co. v. Orr, 43 Miss. 279; Vandorn v. New Jersey &c. R. Co., 42 N. J. Eq. 463; s. c. 6 Cent. Rep. 543; Jones v. Western &c. R. Co., 95 N. C. 328; McCook v. Bryan, 4 Okla. 488; s. c. 46 Pac. Rep. 506; Sinard v. Southern R. Co., 101 Tenn. 473; s. c. 48 S. W. Rep. 227; 14 Am. & Eng. Rail. Cas. (N. S.) 17; Cowan v. Union &c. R. Co., 35 Fed. Rep. 43; Gulf &c. R. Co. v. Ellidge, 49 Fed. Rep. 356; s. c. 1 C. C. A. 295; Timm v. Northern &c. R. Co., 3 Wash. Terr. 299; s. c. 13 Pac. Rep. 415; Jolliffe v. Brown, 14 Wash. 155; s. c. 44 Pac. Rep. 149; 3 Am. & Eng. Rail. Cas. (N. S.) 254; Layne v. Ohio River R. Co., 35 W. Va. 438.

<sup>2</sup> Tillotson v. Texas &c. R. Co., 44

La. An. 95; Morss v. Boston &c. R. Co., 2 Cush. (Mass.) 536. But where the presence of the fence created greater danger to cattle straying on the track the company was held liable for negligently leaving gates open: McMaster v. Montana &c. R. Co., 12 Mont. 163; s. c. 29 Pac. Rep. 539.

<sup>3</sup> Fairchild v. New Orleans &c. R. Co., 62 Miss. 177.

<sup>4</sup> Chicago &c. R. Co. v. Woodworth (Ind. Terr.), 35 S. W. Rep. 238.

<sup>5</sup> Atlantic &c. R. Co. v. Burt, 49 Ga. 606; Macon &c. R. Co. v. Vaughn, 48 Ga. 464.

<sup>6</sup> Vicksburg &c. R. Co. v. Patton, 31 Miss. 157.

<sup>7</sup> Memphis &c. R. Co. v. Orr, 43 Miss. 279. See also New Orleans &c. R. Co. v. Field, 46 Miss. 573.

<sup>8</sup> Kerwhaker v. Cleveland &c. R. Co., 3 Ohio St. 185; s. c. 1 Thomp. Neg., 1st ed., 472. But now see 2 Bates Ann. Stat. Ohio, § 3324.



purpose of constructing its road, to use all prudent and reasonable means to prevent the irruption of straying cattle into his lands. Whether or not the building of a fence would be necessary to fulfil this requirement is a question *for the jury*;<sup>9</sup> and the same view was taken in Missouri.<sup>10</sup> In New York it has been suggested that, though a failure to fence may violate no common law duty to the owner of cattle, it might nevertheless be regarded as a neglect of the duty a railway company owes to passengers and employes to provide a safe track, where trespassing animals are apt to derail trains.<sup>11</sup>

§ 2022. **Duty of Railway Company to Fence Arising out of Contract Express or Implied.**<sup>12</sup>—Sometimes there is a duty on the part of the company, *arising out of contract*, to fence its track. A failure to comply with the terms of such contract renders the company liable for all injuries to animals *of the obligee* consequent thereon.<sup>13</sup> But in Pennsylvania, in a case where a railway company, upon the purchase of a right of way through a man's land, contracted with him to fence the road through his land, and neglected so to do, and the land-owner's cattle went upon the railroad track and were killed by the defendant's engines, it was held that he could not recover damages for the injury *in an action of tort*. The company having purchased the right of way for a fixed sum and an agreement to fence, the owner had no right to obstruct the road by allowing his cattle to roam over it. It was further held that, to render the defendants liable, it must appear that the disaster was due *exclusively* to their neglect. The plaintiff's cattle being on the road, where they ought not to be, he could not recover.<sup>14</sup> This is carrying to the extreme limit the English rule of the duty of the owner of cattle to keep them on his own premises. Where the obligation to fence is contractual instead of statutory, it is the duty of the land-owner to use reasonable means to protect himself from the consequences of the violation of the contract. But his failure to do so while the contract is in force and the railway company has equal op-

<sup>9</sup> Holden v. Rutland &c. R. Co., 30 Vt. 298.

<sup>10</sup> Comings v. Hannibal &c. R. Co., 48 Mo. 512.

<sup>11</sup> Donnegan v. Erhardt, 119 N. Y. 468; s. c. 7 L. R. A. 527; 29 N. Y. St. Rep. 589; 23 N. E. Rep. 1051; 42 Am. & Eng. Rail. Cas. 580.

<sup>12</sup> This section is cited in § 2019.

<sup>13</sup> Quimby v. Vermont &c. R. Co., 23 Vt. 388; Trow v. Vermont &c. R. Co., 24 Vt. 488; Gulf &c. R. Co. v. Washington, 49 Fed. Rep. 347; s. c. 4 U. S. App. 121; 1 C. C. A. 286; Louisville &c. R. Co. v. Sumner, 106

Ind. 55; Louisville &c. R. Co. v. Moore, 106 Ind. 600; Eatman v. New Orleans &c. R. Co., 35 La. An. 1018; Toledo &c. R. Co. v. Burgan, 9 Ind. App. 604; s. c. 37 N. E. Rep. 31; Hunter v. Burlington &c. R. Co., 76 Iowa 490; Chicago &c. R. Co. v. Barnes, 116 Ind. 126; Joliet &c. R. Co. v. Jones, 20 Ill. 222; Fernow v. Dubuque &c. R. Co., 22 Iowa 528; Morss v. Boston &c. R. Co., 2 Cush. (Mass.) 536.

<sup>14</sup> Drake v. Philadelphia &c. R. Co., 51 Pa. St. 240.



portunity for performance and equal knowledge of the consequences of non-performance, is not a defense, in a suit for damages.<sup>15</sup>

**§ 2023. When Obligation of Railway Company to Fence its Tracks Implied.**—The other courts in this country have not reached this conclusion. In Vermont, it has been held that an obligation to fence the track will be implied if, in the condemnation of the right of way, the award of damages was made on the understanding that the company was to fence both sides of the track. In the event of a failure to do so, the company can not impute negligence to the owner of cattle straying upon the roadway through the want of such fence.<sup>16</sup> In New York, in a case decided before the enactment of the law requiring railroad companies to fence their tracks, it was held, that where a railroad company took the fee, under the proceedings to condemn a sufficiency of land for the purposes of their roadway, they became thereby adjoining proprietors with the land-owners, and were subjected to the obligation of maintaining division fences imposed by law upon adjoining land-owners; that in estimating the damages to the owner of lands through which a railroad is located, he should be allowed for the expenses of making and maintaining only one-half of the partition fences, since the railroad company are liable to make and maintain the other half.<sup>17</sup>

**§ 2024. Grant of Right of Way does not Imply Obligation on the Part of the Land-Owner to Fence.**—In Kentucky and Indiana, the grant of the right of way by the plaintiff over his farm implies no obligation on his part to fence the railroad track, nor does the acceptance of the grant on the part of the railroad company. The one may continue to use his fields for the pasturage of his stock, and the other its right of way in the ordinary and usual manner; but neither is exempt from the obligation to use due care and diligence to prevent injuries to the other.<sup>18</sup>

**§ 2025. Liability for Injuries to Animals through Obstructed and Defective Crossings.**—Among the various duties which a railroad company owes to the public, is that of constructing safe and suitable crossings at highways and at streets, and keeping them unobstructed

<sup>15</sup> Louisville &c. R. Co. v. Sumner, 106 Ind. 55. Where the obligation is statutory, see *ante*, § 2019.

<sup>16</sup> Quimby v. Vermont &c. R. Co., 23 Vt. 388.

<sup>17</sup> In re Rensselaer &c. R. Co., 4 Paige (N. Y.) 553.

<sup>18</sup> Louisville &c. R. Co. v. Milton, 14 B. Mon. (Ky.) 75; Louisville &c. R. Co. v. Ballard, 2 Metc. (Ky.) 177; Indianapolis &c. R. Co. v. Brownenburg, 32 Ind. 200.



and passable.<sup>19</sup> The owner of a horse which trips and falls in consequence of a defective crossing, and receives injuries from which he dies, may recover therefor.<sup>20</sup> Where a horse, tied in a proper manner, escaped and started to his stable, and was unable to cross the railroad track at the highway crossing because it was obstructed by the cars of the defendant, and wandered up and down until the passage of the next train, by which it was killed, the company was held to be liable for the injury.<sup>21</sup>

§ 2026. **No Obligation to Make its Track or Premises Safe for Animals.**—But a railway company is under no obligation to keep its road passable at places other than public and private crossings,<sup>22</sup> and can not be made liable by reason of excavations along the side of the track, covered with ice, which prevent the escape of cattle upon the approach of a train.<sup>23</sup>

## ARTICLE II. UNDER STATUTES.

### SUBDIVISION 1. *Constitutionality of Statutes Requiring Railway Companies to Fence.*

| SECTION   | SECTION  |
|---|--|
| 2028. Statutes valid which require railway companies to fence.              | 2031. Constitutionality of statutes limiting rate of speed of trains.                                  |
| 2029. Although the charters of such companies are contracts with the State. | 2032. Constitutionality of statutes giving double damages.   |
| 2030. When such statutes valid although retroactive.                        | 2033. Constitutionality of statutes making railway company liable for docket fee, attorney's fee, etc. |

§ 2028. **Statutes Valid which Require Railway Companies to Fence.**—The dangers to domestic animals along the lines of railways, as well as to persons and property being transported over such roads, have seemed to the Legislatures of many States a sufficient reason for the enactment of laws requiring railroad companies to fence their roads against the incursions of live stock, and providing that any company which fails in this duty shall be liable for all stock killed upon its tracks, without reference to the questions of negligence, misconduct, or inevitable accident.<sup>24</sup> The constitutionality of such statutes is

<sup>19</sup> *Ante*, § 1498, *et seq.*

<sup>20</sup> *Delzell v. Indianapolis &c. R. Co.*, 32 Ind. 45. See also *Houston &c. R. Co. v. Autrey*, 4 Tex. Civ. App. 635; *s. c.* 23 S. W. Rep. 817.

<sup>21</sup> *Murray v. South Carolina R. Co.*, 10 Rich. L. (S. C.) 227.

<sup>22</sup> *Ante*, § 1705, *et seq.*

<sup>23</sup> *Peoria &c. R. Co. v. McClenahan*, 74 Ill. 435.

<sup>24</sup> *Gorman v. Pacific R. R.*, 26 Mo. 441; *Burton v. North Missouri R. Co.*, 30 Mo. 372; *Ohio &c. R. Co. v. McClelland*, 25 Ill. 140; *Toledo &c. R. Co. v. Crane*, 68 Ill. 355; *Ewing v. Chicago &c. R. Co.*, 72 Ill. 25;



sustained on the ground that they are a proper exercise of the police power of the State.<sup>25</sup> The Supreme Court of Alabama, in a clear opinion written by Stone, J., have held that a statute of that State providing that "all corporations or persons, owning or controlling any railroad in this State, shall be liable for all damages to live stock, or cattle of any kind, caused by locomotives or railroad cars,"<sup>26</sup> is unconstitutional and void, as involving a deprivation of property without due process of law. The court construed it as fixing an absolute liability on

Peoria &c. R. Co. v. Barton, 80 Ill. 72; Toledo &c. R. Co. v. Larvey, 71 Ill. 522; Williams v. New Albany &c. R. Co., 5 Ind. 111; Toledo &c. R. Co. v. Cory, 39 Ind. 218; Swift v. North Missouri R. Co., 29 Iowa 243; Rogers v. Newburyport R. Co., 1 Allen (Mass.) 16; Lantz v. St. Louis &c. R. Co., 54 Mo. 229; Walther v. Pacific R. Co., 55 Mo. 271; Nall v. St. Louis &c. R. Co., 59 Mo. 112; Cary v. St. Louis &c. R. Co., 60 Mo. 213; Cleveland &c. R. Co. v. Crossley, 36 Ind. 370; St. Joseph &c. R. Co. v. Grover, 11 Kan. 302; Crutchfield v. St. Louis &c. R. Co., 64 Mo. 255; Suydam v. Moore, 8 Barb. (N. Y.) 358; Bulkley v. New York &c. R. Co., 27 Conn. 480; Indianapolis &c. R. Co. v. Marshall, 27 Ind. 300; Hopkins v. Kansas &c. R. Co., 18 Kan. 462; Smith v. Eastern R. R., 35 N. H. 357; Flattes v. Chicago &c. R. Co., 35 Iowa 191; Powell v. Hannibal &c. R. Co., 35 Mo. 458; Tiarks v. St. Louis &c. R. Co., 58 Mo. 45; Missouri &c. R. Co. v. Humes, 115 U. S. 522; Chicago &c. R. Co. v. Dremser, 109 Ill. 402; Quackenbush v. Wisconsin &c. R. Co., 61 Wis. 411.

<sup>25</sup> Ohio &c. R. Co. v. Russell, 115 Ill. 52; s. c. 1 West. Rep. 606; Missouri &c. R. Co. v. Harrelson, 44 Kan. 253; s. c. 24 Pac. Rep. 465; Emmons v. Minneapolis &c. R. Co., 35 Minn. 503; s. c. aff'd Minneapolis &c. R. Co. v. Emmons, 149 U. S. 364; Davis v. Hannibal &c. R. Co., 19 Mo. App. 425; s. c. 1 West. Rep. 724; Hines v. Missouri R. Co., 86 Mo. 629; Texas &c. R. Co. v. Childress, 64 Tex. 346; Oregon R. &c. Co. v. Dacres, 1 Wash. 195; s. c. 23 Pac. Rep. 415; Quackenbush v. Wisconsin &c. R. Co., 62 Wis. 411; s. c. reaff'd 71 Wis. 472; Missouri &c. R. Co. v. Humes, 115 U. S. 512; Blair v. Milwaukee &c. R. Co., 20 Wis. 254; Smith v. Eastern R. R., 35 N. H. 356; Horn v. Atlantic &c. R. Co., 35 N.

H. 169; Bulkley v. New York &c. R. Co., 27 Conn. 479; Jones v. Galena &c. R. Co., 16 Iowa 6; Sawyer v. Vermont &c. R. Co., 105 Mass. 196; Pennsylvania &c. R. Co. v. Riblet, 66 Pa. St. 164; s. c. 5 Am. Rep. 360; Toledo &c. R. Co. v. Jacksonville, 67 Ill. 37; s. c. 16 Am. Rep. 611; Madison &c. R. Co. v. Whiteneck, 8 Ind. 217; Nelson v. Vermont &c. R. Co., 26 Vt. 717; s. c. 62 Am. Dec. 614; Norris v. Androscoggin R. Co., 39 Me. 273; s. c. 63 Am. Dec. 621; Chicago &c. R. Co. v. Haggerty, 67 Ill. 113; Chicago &c. R. Co. v. Reidy, 66 Ill. 43; Galena &c. R. Co. v. Crawford, 25 Ill. 529; Ohio &c. R. Co. v. Shanafelt, 25 Ill. 140; New Albany &c. R. Co. v. Tilton, 12 Ind. 3; s. c. 74 Am. Dec. 195; Wilder v. Maine Central R. Co., 65 Me. 332; s. c. 20 Am. Rep. 698; Indianapolis &c. R. Co. v. Townsend, 10 Ind. 38; Kansas Pacific R. Co. v. Mower, 16 Kan. 573; Gorman v. Pacific Railroad, 26 Mo. 441; s. c. 72 Am. Dec. 220; Thorpe v. Rutland &c. R. Co., 27 Vt. 140; s. c. 62 Am. Dec. 625. Such a statute is valid, although it excludes the defense of contributory negligence: Quackenbush v. Wisconsin &c. R. Co., 62 Wis. 411; s. c. 71 Wis. 472. And, although it subjects the railroad company to double damages: Humes v. Missouri &c. R. Co., 82 Mo. 221; s. c. 52 Am. Rep. 369; Meyers v. Union Trust Co., 82 Mo. 237. And to attorney's fees, in addition to damages: Peoria &c. R. Co. v. Duggan, 109 Ill. 537; s. c. 50 Am. Rep. 619. For other constitutional objections to such law, held untenable, see Barnett v. Atlantic &c. R. Co., 68 Mo. 56; s. c. 30 Am. Rep. 773. Exercise of power to compel railway companies to fence, where there is a reserved power to alter or amend charter: Suydam v. Moore, 8 Barb. (N. Y.) 358.

<sup>26</sup> Ala. Laws 1877, p. 54.



railroad companies to make compensation for injuries done to property in the prosecution of their lawful business, without any wrong, fault or neglect on their part, when, under the general law of the land, none else is liable under such circumstances;<sup>27</sup> and other State courts have taken the same view.<sup>28</sup> But the Supreme Court of the United States find no constitutional objection to a State statute making railroad companies liable in double damages for killing or injuring domestic animals, in consequence of their getting upon the railroad track by reason of the fact that the company has not fenced its track as therein prescribed, where the statute provides that, after the fences prescribed are made, the corporation shall be liable only on the principle of negligence or willfulness.<sup>29</sup>

§ 2029. **Although the Charters of Such Companies are Contracts with the State.**—Railway companies have frequently sought to avoid the additional burden thus imposed upon them, on the ground that their charters were contracts, the obligation of which the State Legislatures had no power to impair, unless the right to alter and amend was reserved. The determination of the courts has universally been against this theory. As such statutes are in the nature of police regulations, designed for the protection of the lives and property of the travelling public, there is no reason why an artificial person should not be subject to such an exercise of the police power of the sovereignty, as well as natural persons.<sup>30</sup> It was held in New York, that the statute

<sup>27</sup> Zeigler v. South &c. R. Co., 58 Ala. 594.

<sup>28</sup> Jensen v. Union &c. R. Co., 6 Utah 253; s. c. 21 Pac. Rep. 994; Bielenberg v. Montana &c. R. Co., 8 Mont. 271; s. c. 20 Pac. Rep. 314; Cateril v. Union &c. R. Co., 2 Idaho 540; s. c. 21 Pac. Rep. 416. A statute of New Hampshire relating to *damage done by dogs* was held unconstitutional, in so far as it undertook to charge the owner with the amount of damage done by his dog as fixed by the selectmen of the town, without an opportunity to be heard, because it was contrary to natural justice, and not within the scope of the legislative authority conferred by the constitution on the general court: East Kingston v. Towle, 48 N. H. 57; s. c. 2 Am. Rep. 174. The court cited Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35.

<sup>29</sup> Missouri &c. R. Co. v. Humes, 115 U. S. 512.

<sup>30</sup> Gorman v. Pacific &c. R. Co., 26 Mo. 441; Ohio &c. R. Co. v. McClelland, 25 Ill. 140; Galena &c. R. Co. v. Crawford, 25 Ill. 529; Wilder v. Maine &c. R. Co., 65 Me. 333; Waldron v. Rensselaer &c. R. Co., 8 Barb. (N. Y.) 890; Clark v. Hannibal &c. R. Co., 36 Mo. 203; Suydam v. Moore, 8 Barb. (N. Y.) 358; Thorpe v. Rutland &c. R. Co., 27 Vt. 141; New Albany &c. R. Co. v. Tilton, 12 Ind. 3; New Albany &c. R. Co. v. Maiden, 12 Ind. 10; Indianapolis &c. R. Co. v. Parker, 29 Ind. 471; Kansas &c. R. Co. v. Mower, 16 Kan. 573; Nelson v. Vermont &c. R. Co., 26 Vt. 717; Blair v. Milwaukee &c. R. Co., 20 Wis. 254; Indianapolis &c. R. Co. v. Townsend, 10 Ind. 38; Jeffersonville &c. R. Co. v. Applegate, 10 Ind. 49; Indianapolis &c. R. Co. v. McKinney, 24 Ind. 283; Gilmore v. European R. Co., 60 Me. 237; Rhodes v. Utica &c. R. Co., 5 Hun (N. Y.) 344; McCall v. Chamberlain, 13 Wis. 640; Staats v. Hudson River R. Co., 4 Abb. App.



requiring railroad companies to construct and maintain fences, with necessary and suitable gates at farm crossings, was not inconsistent with the prior enactments of the charter of a company requiring it to fence its road and *permitting* the adjoining land-owner to erect gates at proper and convenient places, etc., and providing that they should "be kept in repair by the persons using the same;" and that, notwithstanding such charter, the company was liable for injuries consequent upon a defective maintenance of the gates.<sup>31</sup>

**§ 2030. When Such Statutes Valid although Retroactive.**—The general tendency of the courts has been to sustain these statutes, and the kindred ones concerning the running of trains, signals, etc., and to give them such a construction as to effect the object of the Legislature. A statute of Maine imposing a penalty of \$100 per month upon railway companies which are required by their charters to make and maintain fences, and which fail to do so, has been construed to apply to corporations existing prior to its passage, and has been held not invalid as retrospective legislation affecting vested rights.<sup>32</sup> A statute of Massachusetts,<sup>33</sup> in its terms prospective, has been held to apply only to roads thereafter to be constructed, and not to a road which had been *located* and partially graded before the passage of the act.<sup>34</sup>

**§ 2031. Constitutionality of Statutes Limiting Rate of Speed of Trains.**—A law making railway companies liable for injuries to stock by trains running within the corporate limits of any city or town at a prohibited rate of speed, is a constitutional and proper exercise of the police power.<sup>35</sup>

**§ 2032. Constitutionality of Statutes Giving Double Damages.**—Some of the statutes, by way of a further inducement to railway companies to fence their track, provide that the plaintiff may recover *double* the amount of damages actually sustained.<sup>36</sup> In an Iowa case,

Dec. (N. Y.) 287; Gillam v. Sioux City &c. R. Co., 26 Minn. 268; Minneapolis &c. R. Co. v. Emmons, 149 U. S. 364; s. c. 37 L. ed. 769; 13 Sup. Ct. Rep. 870; Whittier v. Chicago &c. R. Co., 24 Minn. 394; Cairo &c. R. Co. v. Peoples, 92 Ill. 97; Cairo &c. R. Co. v. Warrington, 92 Ill. 157.

<sup>31</sup> Staats v. Hudson River R. Co., 4 Abb. App. Dec. (N. Y.) 287.

<sup>32</sup> Norris v. Androscoggin R. Co., 39 Me. 273.

<sup>33</sup> Stat. 1846, ch. 271, § 3.

<sup>34</sup> Stearns v. Old Colony &c. R. Co., 1 Allen (Mass.) 493; Baxter v. Boston &c. R. Co., 102 Mass. 383.

<sup>35</sup> *Ante*, § 1895; Chicago &c. R. Co. v. Reidy, 66 Ill. 43; Chicago &c. R. Co. v. Haggerty, 67 Ill. 113; Toledo &c. R. Co. v. Deacon, 63 Ill. 91; Mobile &c. R. Co. v. State, 51 Miss. 137.

<sup>36</sup> Wag. Mo. Stat. 520, § 5; Wood v. St. Louis &c. R. Co., 58 Mo. 109; Bay City &c. R. Co. v. Austin, 21 Minn. 390.



it was held that such a provision was not unconstitutional, as in conflict with the Fourteenth Amendment to the Constitution of the United States, which forbids a State to "deny to any person within its jurisdiction the equal protection of its laws."<sup>37</sup> But in Nebraska such a law was declared unconstitutional, because, in effect, it appropriates private property to private use.<sup>38</sup>

§ 2033. **Constitutionality of Statutes Making Railway Company Liable for Docket Fee, Attorney's Fee, etc.**—In Indiana, a section of a statute providing that "if the defendant shall appeal from such judgment of [the justice], and shall not reduce the damages assessed twenty per cent., the Appellate Court shall give judgment for double the amount of damages assessed in such Appellate Court, and a docket fee of five dollars,"<sup>39</sup> has been held unconstitutional and void.<sup>40</sup> Clearly, such a statute is penal in its nature, and subject to a strict construction.<sup>41</sup> A statute of Kansas, to the effect that the plaintiff may recover "a reasonable attorney's fee" for the prosecution of his suit against the company, in addition to the damages sustained, has been held valid.<sup>42</sup> Where the defendant recovered judgment before a justice, and, on appeal, the plaintiff recovered judgment, it was held proper for the judgment of the District Court to include the fees of the plaintiff's attorney in the trial before the justice.<sup>43</sup>

## SUBDIVISION 2. *Construction of Statutes Requiring Railway Companies to Fence.*

### SECTION

2035. Doctrine that such statutes are to be construed remedially.  
2036. Doctrine that such statutes are to be construed strictly.  
2037. Statutes giving double damages construed strictly.  
2038. Statutes not applicable to the care of cattle detained in a wreck.

### SECTION

2039. Construction of the words "willful act of the owner or agent."  
2040. Construction of the words "running at large."  
2041. Construction of the words, "where the same pass through, along, or adjoining inclosed or cultivated fields, or uninclosed prairie lands."

<sup>37</sup> *Tredway v. Sioux City &c. R. Co.*, 43 Iowa 527. The same is held of the Missouri double damage act: *Spealman v. Missouri &c. R. Co.*, 71 Mo. 434; *Phillips v. Missouri &c. R. Co.*, 86 Mo. 540; *Hines v. Missouri &c. R. Co.*, 86 Mo. 629.

<sup>38</sup> *Atchison &c. R. Co. v. Baty*, 6 Neb. 37.

<sup>39</sup> 1 *Gavin & Hord Ind. Stat.* 523, § 3.

<sup>40</sup> *Madison &c. R. Co. v. Whiteneck*, 8 Ind. 217; *Madison &c. R. Co. v.*

*Herod*, 10 Ind. 2; *Evansville &c. R. Co. v. Kargus*, 10 Ind. 182; *Indiana &c. R. Co. v. Gapen*, 10 Ind. 292; *Jeffersonville &c. R. Co. v. Dougherty*, 10 Ind. 549.

<sup>41</sup> *Bay City &c. R. Co. v. Austin*, 21 Mich. 190; *Davis v. Chicago &c. R. Co.*, 40 Iowa 292.

<sup>42</sup> *Kansas Pacific R. Co. v. Mewer*, 16 Kan. 573; *Atchison &c. R. Co. v. Harper*, 19 Kan. 529.

<sup>43</sup> *Missouri River &c. R. Co. v. Shirley*, 20 Kan. 660.



## SECTION

- 2042. Construction of statute making railway company "and its agents" liable.
- 2043. Failure to fence gives right to action for damages, although not given in express terms.
- 2044. Whether the statutory duty to fence extends to the protection of crops.
- 2045. Whether it extends to the protection of employes of the company.
- 2046. Doctrine that it extends to passengers.
- 2047. Whether extends to the benefit of those who are not adjoining owners.
- 2048. Extends to lessees and others rightfully on adjoining lands.
- 2049. Liability extends both to lessor and lessee of the railroad, and to receivers.
- 2050. Failure to erect the fence required by such statutes creates a liability independent of negligence.
- 2051. Failure to fence must have been at the point of entry.
- 2052. And must have been the proximate cause of the injury complained of.
- 2053. Places where the company is bound to fence under these statutes.

## SECTION

- 2054. Duty to erect cattle-guards and end fences at highway crossings.
- 2055. Duty to fence where the railroad runs along the side of the highway or another railroad.
- 2056. Duty to fence in abandoned tow-path, highway, etc.
- 2057. Duty to fence where the highway and track cross each other at acute angles.
- 2058. Duty to erect gates and bars at farm crossings.
- 2059. Duty to keep them closed, whether upon the company or the land-owner.
- 2060. Whether such statutes require cattle-guards at farm crossings.
- 2061. Duty to fence where the railway company owns the adjoining lands.
- 2062. Immaterial whether the company owns the fee or merely an easement in the right of way.
- 2063. Construction of the statute as to the time within which the company must fence.
- 2064. Failure to keep the statutory fence in repair creates a liability only in case of negligence.

§ 2035. **Doctrine that Such Statutes are to be Construed Remedially.**—*In general*, statutes requiring railway companies to fence their tracks have been held to be *remedial*, and hence to be liberally construed.<sup>44</sup> For instance, in Illinois, it was held that a statute using the terms "cattle, horses, sheep, and hogs" included "mules and asses" in the terms "cattle and horses."<sup>45</sup>

<sup>44</sup> Ohio &c. R. Co. v. Brubaker, 47 Ill. 462; Rockford &c. R. Co. v. Heflin, 65 Ill. 367; Tracy v. Troy &c. R. Co., 38 N. Y. 433.

<sup>45</sup> Ohio &c. R. Co. v. Brubaker, 47 Ill. 462; Toledo &c. R. Co. v. Cole, 50 Ill. 185. Hogs are included in the

terms "horses, cattle, mules, or *other animals*," of the Missouri statute: Henderson v. Wabash &c. R. Co., 81 Mo. 605. They are also included in the term "live stock" of an Iowa statute: Lee v. Minneapolis &c. R. Co., 66 Iowa 131.



§ 2036. **Doctrine that Such Statutes are to be Construed Strictly.**—But in Indiana, such a statute is considered to be in derogation of common right, and hence to be strictly construed.<sup>46</sup>

§ 2037. **Statutes Giving Double Damages Construed Strictly.**—In other States, the double-damage clause is regarded as penal, and subjected to a strict construction.<sup>47</sup>

§ 2038. **Statute not Applicable to the Care of Cattle Detrained in a Wreck.**—In a case where a train was wrecked near the plaintiff's land, and live stock thereon was turned into his field for safe keeping as soon as extricated from the wreck, it was held that the statute was inapplicable; that the plaintiff could not recover double damages under it; but that he might recover, independently of the statute, single damages for the injury to his crops.<sup>48</sup>

§ 2039. **Construction of the Words "Willful Act of the Owner or Agent."**—In Iowa, where the statute provides for the usual absolute liability of a railroad company which fails to fence its track, for injuries to live stock, "unless the injury complained of is occasioned by the *willful act* of the owner or his agent," it has been held that merely permitting the stock to run at large is not such willful act as is contemplated by the statute.<sup>49</sup>

§ 2040. **Construction of the Words "Running at Large."**—A statute required railroad companies to fence their roads against stock "running at large." These terms were held to include cattle pastured on the close of the owner, which was surrounded by a defective fence, and which thence had escaped to the railroad track, and were injured.<sup>50</sup> A horse that had escaped from control with a halter and bridle on;<sup>51</sup> a sucking colt that strayed from its dam while she was being led across defendant's depot grounds;<sup>52</sup> and a team of horses hitched to a wagon and running away without a driver,<sup>53</sup> were held to be "run-

<sup>46</sup> *Indianapolis &c. R. Co. v. Kinney*, 8 Ind. 402.

<sup>47</sup> *Bay City &c. R. Co. v. Austin*, 21 Mich. 390; *Davis v. Chicago &c. R. Co.*, 40 Iowa 292; *Moriarty v. Central Iowa R. Co.*, 64 Iowa 696; *Miller v. Chicago &c. R. Co.*, 59 Ind. 707.

<sup>48</sup> *Grau v. St. Louis &c. R. Co.*, 54 Mo. 240.

<sup>49</sup> *Stewart v. Burlington &c. R. Co.*, 32 Iowa 561.

<sup>50</sup> *Hinman v. Chicago &c. R. Co.*, 28 Iowa 491; *Fritz v. Milwaukee &c.*

*R. Co.*, 34 Iowa 337; *Hammond v. Chicago &c. R. Co.*, 43 Iowa 168; *McCool v. Galena &c. R. Co.*, 17 Iowa 461; *Pearson v. Milwaukee &c. R. Co.*, 45 Iowa 497. Compare Vol. I, § 912.

<sup>51</sup> *Welsh v. Chicago &c. R. Co.*, 53 Iowa 632.

<sup>52</sup> *Smith v. Kansas City &c. R. Co.*, 58 Iowa 622.

<sup>53</sup> *Inman v. Chicago &c. R. Co.*, 60 Iowa 459.



ning at large" within the meaning of the statute. But a team of horses hitched to a sleigh, wandering on the prairie at night, with the driver in an unconscious drunken stupor, were not so "at large."<sup>54</sup> Under another statute, denying a recovery for cattle killed at a highway crossing while permitted to be at large, it was held that where a herdsman, in following one of the herd which had strayed, got so far from the main body that he was unable to prevent their stopping or loitering at a crossing when he saw a train approaching,—they were "at large" within the meaning of the statute.<sup>55</sup>

§ 2041. **Construction of the Words "Where the Same Pass Through, Along, or Adjoining Inclosed or Cultivated Fields, or Uninclosed Prairie Lands."**—Under a Missouri statute providing that railroad companies shall fence their roads "where the same pass through, along, or adjoining inclosed or cultivated fields or uninclosed prairie lands," it has been held that the failure of the company to fence its road where it passed through uninclosed lands will not make it amenable for killing stock at that point, unless it appear that it was prairie land.<sup>56</sup>

§ 2042. **Construction of Statute Making Railway Company "and its Agents" Liable.**—The terms of a New York statute making the "railroad corporation and *its agents*" liable, etc., have been held to include the engineer, who had charge of the engine, and the fireman, who was hired by the engineer.<sup>57</sup>

§ 2043. **Failure to Fence Gives Right to Action for Damages, although not Given in Express Terms.**—In construing a Wisconsin statute containing no provision to the effect that a railroad company, failing in its duty to fence its track, shall be liable for injuries to stock resulting from such failure, the court considered that the effect of the statute was the same as if it had contained such a provision, on the "general principle that where the law imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty, he is liable to those for whose benefit it was imposed, for any damages sustained by reason of such neglect."<sup>58</sup>

<sup>54</sup> *Grove v. Burlington &c. R. Co.*, 75 Iowa 163.

<sup>55</sup> *Thompson v. Grand Trunk R. Co.*, 22 Ont. App. 453.

<sup>56</sup> *Cary v. St. Louis &c. R. Co.*, 60 Mo. 209; *Tiarks v. St. Louis &c. R. Co.*, 58 Mo. 45; *Shelton v. St. Louis &c. R. Co.*, 60 Mo. 412.

<sup>57</sup> *Suydam v. Moore*, 8 Barb. (N. Y.) 358. See also *St. Johnsbury &c. R. Co. v. Hunt*, 59 Vt. 294.

<sup>58</sup> *McCall v. Chamberlain*, 13 Wis. 639. See also *Brown v. Milwaukee &c. R. Co.*, 21 Wis. 39; *Sika v. Chicago &c. R. Co.*, 21 Wis. 370.



§ 2044. **Whether the Statutory Duty to Fence Extends to the Protection of Crops.**—It has been held in Missouri, that no action lies under such a statute, in the absence of specific provisions, for injuries to crops by cattle which come upon land through defects in the statutory fence.<sup>59</sup> The statute under which this was ruled<sup>60</sup> was subsequently amended so as to make the railroad company liable, in addition, for all damages “by reason of any horses, cattle, mules, or other animals escaping from or coming upon said lands, fields, or inclosures,” in consequence of a failure to maintain proper fences.<sup>61</sup> It was urged that this law was unconstitutional, because “the Legislature has no right to subject one person to expense for the sole benefit of another.” The court held otherwise, on the ground that the statute is a police regulation, designed for the protection of the public, and that the advantage to the adjoining land-owner is merely incidental to that object.<sup>62</sup> In Iowa, a statute provides that railroad companies shall make and maintain proper cattle-guards where their roads enter and leave improved or fenced lands.<sup>63</sup> A failure to comply with this duty was held to render them liable for an injury to crops consequent therefrom.<sup>64</sup> In New Hampshire, a railroad company was held liable for injuries to crops, consequent upon a failure to maintain statutory fences.<sup>64a</sup> But under an Illinois statute, holding delinquent companies liable for damages done to “cattle, horses, sheep, hogs, or *other stock*,” it was held that no recovery could be had for an injury to *crops*.<sup>65</sup> A Minnesota statute, providing that any railway company, failing to fence, should be liable for all consequent damages, was held to impose a liability in favor of one whose farm was rendered *less fit for pasturing* cattle by a failure to fence.<sup>66</sup> Under the Kansas statute the land-owner is entitled to recover not only the value of crops de-

<sup>59</sup> Clark v. Hannibal &c. R. Co., 36 Mo. 203.

<sup>60</sup> 1 Rev. Stat. Mo. 1885, p. 437, § 52.

<sup>61</sup> 1 Wag. Mo. Stat. 311, § 43.

<sup>62</sup> Trice v. Hannibal &c. R. Co., 49 Mo. 440; Ackley v. St. Louis &c. R. Co., 30 Mo. App. 657; Langkop v. Missouri &c. R. Co., 55 Mo. App. 611; Shotwell v. St. Joseph &c. R. Co., 37 Mo. App. 653; Gordon v. St. Joseph &c. R. Co., 37 Mo. App. 662.

<sup>63</sup> Laws Iowa 1862, ch. 169, § 3; Iowa Code 1873, § 1288.

<sup>64</sup> Smith v. Chicago &c. R. Co., 38 Iowa 518; Donald v. St. Louis &c. R. Co., 44 Iowa 157; Raridon v. Central &c. R. Co., 65 Iowa 640. See also St. Louis &c. R. Co. v. Blackwell (Tex. Civ. App.), 40 S. W. Rep. 860.

There is no such duty, however, in the absence of statute: Rossignoll v. Northeastern R. Co., 75 Ga. 354. In West Virginia such a statute has been construed as being for the benefit of the owner of the inclosed land only: Maynard v. Norfolk &c. R. Co., 40 W. Va. 331.

<sup>64a</sup> Dean v. Sullivan R. Co., 22 N. H. 316. See also Leggett v. Rome &c. R. Co., 41 Hun (N. Y.) 80; Pound v. Port Huron &c. R. Co., 54 Mich. 13.

<sup>65</sup> Peoria &c. R. Co. v. Schiller, 12 Ill. App. 443; Cannon v. Louisville &c. R. Co., 34 Ill. App. 640.

<sup>66</sup> Emmons v. Minneapolis &c. R. Co., 35 Minn. 503; Nelson v. Minneapolis &c. R. Co., 41 Minn. 131; s. c. 42 N. W. Rep. 788.



stroyed by reason of the company's failure to erect proper cattle-guards, but also reasonable compensation for the time and labor necessarily expended in *trying to prevent further damage*.<sup>67</sup>

§ 2045. **Whether it Extends to the Protection of Employes of the Company.**—An employé of the company, receiving a personal injury in an accident consequent upon a failure to maintain proper fences, may recover damages of the company for such injury, without showing negligence other than the failure to fence.<sup>68</sup>

§ 2046. **Doctrine that it Extends to Passengers.**—It has also been held that a *passenger* upon a train, who received personal injuries in a wreck consequent upon a collision with a cow which got upon the track through a defect in the statutory fence, was entitled to recover damages for such injuries. The court say that the statute "was not enacted for the paltry purpose of determining who should bear the pecuniary burden of building and maintaining division fences as between railroad companies and the adjoining proprietors of land; nor to fix the liability of such companies for injuries occasioned to domestic animals before such fences should be built; but the great object of its enactment was the increased safety of the lives and limbs of passengers which would be secured by a strict observance of its provisions."<sup>69</sup>

§ 2047. **Whether Extends to the Benefit of those who are not Adjoining Owners.**<sup>70</sup>—In some instances the statutory fence has been regarded as a *division fence* and the statute has been held to apply only to such cattle as stray directly from the land of the owners to the railroad track. If they are trespassing on the abutting premises, and thence escape, through a defect of the statutory fence, to the railway track, and are there injured, the owner can not recover.<sup>71</sup> The doc-

<sup>67</sup> *St. Louis &c. R. Co. v. Ritz*, 33 Kan. 404.

<sup>68</sup> *Donnegan v. Erhardt*, 119 N. Y. 468; s. c. 7 L. R. A. 527; overruling *Langlois v. Buffalo &c. R. Co.*, 19 Barb. (N. Y.) 364. But it has been held that the benefit of the statute does not extend to a *sub-contractor*, whose horse entered upon the track through a breach in the fence made by the *principal contractor*: *Clark v. Chicago &c. R. Co.*, 62 Mich. 358; s. c. 28 N. W. Rep. 914.

<sup>69</sup> *Blair v. Milwaukee &c. R. Co.*, 20 Wis. 254.

<sup>70</sup> This section is cited in §§ 2016, 2059, 2093.

<sup>71</sup> *Walsh v. Virginia &c. R. Co.*, 8 Nev. 111; *McDonnell v. Pittsfield &c. R. Corp.*, 115 Mass. 564; *Maynard v. Boston &c. R. R.*, 115 Mass. 458; *Eames v. Salem &c. R. Co.*, 98 Mass. 560; *Pittsburg &c. R. Co. v. Methven*, 21 Ohio St. 586; *Jackson v. Rutland &c. R. Co.*, 25 Vt. 150; *Bemis v. Connecticut &c. R. Co.*, 42 Vt. 375; *Morse v. Rutland &c. R. Co.*, 27 Vt. 49; *Towns v. Cheshire R. Co.*, 21 N. H. 364; *Cornwall v. Sullivan R. Co.*, 28 N. H. 161; *Woolson v. Northern R. Co.*, 19 N. H. 267; *Morse v. Boston &c. R. Co.*, 66 N. H. 148; *Allen v. Boston &c. R. Co.*, 87 Me. 326; s. c. 32 Atl. Rep. 963; *Mayberry v. Con-*



trine has been carried so far, in some instances, as to be held to apply to animals which were lawfully in the highway, in the charge of a keeper, but which broke from his control, escaped into an adjoining lot, and thence, through an insufficient fence, on to the railroad track, where the injury occurred. The fact that the animals were unlawfully upon the lot was considered sufficient to defeat the claims of their owner for damages.<sup>72</sup> Such is the interpretation given to the English statute.<sup>73</sup> This doctrine was announced (*obiter dictum*) by Shankland, J., in *Brooks v. New York &c. Railroad Company*,<sup>74</sup> but the authority of this case was overruled in *Corwin v. New York &c. Railroad Company*.<sup>75</sup> There, it is held that a railroad company failing to maintain the statutory fence, is liable to the owner of cattle injured in consequence thereof, notwithstanding the fact that he is not an adjoining proprietor. The courts holding this view, which is undoubtedly the better one, proceed upon the idea that the statutory obligation to fence is a police regulation for the benefit of the general public, and should be so construed as to give effect to that object.<sup>76</sup> But under a statute of Missouri, requiring railway companies to erect fences on the sides of the road where the same passes through, along or adjoining inclosed or cultivated fields, or uninclosed prairie lands, it has been held that, while the duty to fence through uninclosed lands is for the benefit of all,<sup>77</sup> yet the duty to fence through inclosed lands is for the benefit of the adjoining land-owner only.<sup>78</sup> Thus, the owner of cattle, unlawfully on land adjoining a railway, can not recover in a

cord &c. R. Co., 47 N. H. 391; *Giles v. Boston &c. R. Co.*, 55 N. H. 552. See also *Westbourne Cattle Co. v. Manitoba &c. R. Co.*, 6 Manitoba L. Rep. 553; *Ferris v. Canadian &c. R. Co.*, 9 Manitoba L. Rep. 501; *Knight v. New York &c. R. Co.*, 99 N. Y. 25.

<sup>72</sup> *McDonnell v. Pittsfield &c. R. Co.*, 115 Mass. 564; *Giles v. Boston &c. R. Co.*, 55 N. H. 552; *Mayberry v. Concord R. R.*, 47 N. H. 391.

<sup>73</sup> 8 & 9 Vict., c. 20, § 68; *Rickets v. East and West India Docks &c. R. Co.*, 12 C. B. 160; s. c. 7 Eng. Rail. Cas. 295; 6 Jur. 1072; 21 L. J. (C. P.) 201; *Dawson v. Midland R. Co.*, L. R. 8 Exch. 8; 42 L. J. (Exch.) 49; *Manchester &c. R. Co. v. Wallis*, 14 C. B. 213.

<sup>74</sup> 13 Barb. (N. Y.) 594.

<sup>75</sup> 13 N. Y. 42.

<sup>76</sup> See *ante*, § 2013. And the company is not excused by the fact that the land is securely fenced on the other three sides: *Louisville &c. R. Co. v. Patton*, 104 Tenn. 40; s. c. 54 S. W. Rep. 984.

<sup>77</sup> *Hamilton v. Missouri &c. R. Co.*, 87 Mo. 85; s. c. 1 West. Rep. 754; *Duncan v. St. Louis &c. R. Co.*, 91 Mo. 67; s. c. 8 West. Rep. 282; *Kaes v. Missouri &c. R. Co.*, 6 Mo. App. 397; *Young v. Kansas City &c. R. Co.*, 39 Mo. App. 52; *Kinion v. Kansas City &c. R. Co.*, 39 Mo. App. 382; *Duke v. Kansas City &c. R. Co.*, 39 Mo. App. 105; *Jackson v. St. Louis &c. R. Co.*, 43 Mo. App. 324; *Brandenburg v. St. Louis &c. R. Co.*, 44 Mo. App. 224; *Schable v. Hannibal &c. R. Co.*, 69 Mo. 91; *Walton v. St. Louis &c. R. Co.*, 67 Mo. 56.

<sup>78</sup> *Berry v. St. Louis &c. R. Co.*, 65 Mo. 172; *Peddycord v. Missouri &c. R. Co.*, 85 Mo. 160; *Carpenter v. St. Louis &c. R. Co.*, 25 Mo. App. 110; *Smith v. St. Louis &c. R. Co.*, 25 Mo. App. 113; *Summers v. Hannibal &c. R. Co.*, 29 Mo. App. 41; *Ferris v. St. Louis &c. R. Co.*, 30 Mo. App. 122; *Hendrix v. St. Joseph &c. R. Co.*, 38 Mo. App. 520.



statutory action for failure to fence, where the land is otherwise inclosed with a lawful fence;<sup>79</sup> but, if it is not so inclosed, he may recover, notwithstanding they were trespassing at the time they were injured.<sup>80</sup>

**§ 2048. Extends to Lessees and Others Rightfully on Adjoining Lands.**—The statutory duty of a railway company to fence its right of way exists in favor of rightful occupants, whether lessees of or licensees on adjoining land, as well as in favor of the owner himself.<sup>81</sup>

**§ 2049. Liability Extends both to Lessor and Lessee of the Railroad, and to Receivers.**<sup>82</sup>—The duty to erect and maintain the statutory fence rests upon the lessee of a railroad, and it is liable for animals killed on the track which entered at a place where the road should have been, but was not, properly fenced.<sup>83</sup> In Kansas, it was held that a company operating a railroad for the benefit of bondholders and stockholders of the railroad company was not an "assignee or lessee," but was a "railway company" within the terms of the statute, and was therefore liable.<sup>84</sup> Moreover, the liability for violation of the statutory duty to fence remains with the lessor of the road,<sup>85</sup> although

<sup>79</sup> *Harrington v. Chicago &c. R. Co.*, 71 Mo. 384; *Peddicord v. Missouri &c. R. Co.*, 85 Mo. 160; *Carpenter v. St. Louis &c. R. Co.*, 25 Mo. App. 110; *Smith v. St. Louis &c. R. Co.*, 25 Mo. App. 113; *Geiser v. St. Louis &c. R. Co.*, 61 Mo. App. 459; s. c. 1 Mo. App. Rep. 672.

<sup>80</sup> *Dean v. Omaha &c. R. Co.*, 54 Mo. App. 647.

<sup>81</sup> *McCoy v. Southern &c. R. Co.* (Cal.), 26 Pac. Rep. 629; *St. Louis &c. R. Co. v. Dudgeon*, 28 Kan. 283; *Summers v. Hannibal &c. R. Co.*, 29 Mo. App. 41; *Veerhusen v. Chicago &c. R. Co.*, 53 Wis. 689; *Smith v. Barre R. Co.*, 64 Vt. 21; s. c. 23 Atl. Rep. 632; *Payne v. Current River R. Co.*, 75 Mo. App. 14; s. c. 1 Mo. App. Rep. 292. On the other hand, the borrower or tenant of an animal may recover from the company as "owner:" *New York &c. R. Co. v. Auer*, 106 Ind. 219; s. c. 3 West. Rep. 660.

<sup>82</sup> This section is cited in § 2164.

<sup>83</sup> *Pittsburgh &c. R. Co. v. Thompson*, 21 Ind. App. 355; s. c. 50 N. E. Rep. 828; *Missouri &c. R. Co. v. Morrow*, 32 Kan. 217; *Missouri &c. R. Co. v. Ricketts*, 45 Kan. 617; s. c. 26 Pac. Rep. 50; 45 Am. & Eng. Rail.

*Cas.* 485; *Farley v. St. Louis &c. R. Co.*, 72 Mo. 338; *Sinclair v. Missouri &c. R. Co.*, 70 Mo. App. 588; *McCall v. Chamberlin*, 13 Wis. 641; *Clement v. Canfield*, 28 Vt. 302; *Stewart v. Chicago &c. R. Co.*, 27 Iowa 283; *Burchfield v. Northern &c. R. Co.*, 57 Barb. (N. Y.) 589; *Labussiere v. New York &c. R. Co.*, 10 Abb. Pr. (N. Y.) 398, note. Such was held not the rule, however, under an Iowa statute, where the lessee was an individual, because the statute used the terms "railroad company:" *Liddle v. Keokuk &c. R. Co.*, 23 Iowa 378.

<sup>84</sup> *Union Trust Co. v. Kendall*, 20 Kan. 515. For the construction of an Indiana statute enacting "that lessees, assignees, receivers, and other persons running or controlling any railroad, in the corporate name of such company, shall be liable, jointly or severally with such company, for stock killed or injured by the locomotives," see the case of *Ohio &c. R. Co. v. Fitch*, 20 Ind. 500, where the whole statute is set out at length.

<sup>85</sup> *Fontaine v. Southern &c. R. Co.*, 54 Cal. 645; *Haas v. New York &c. R. Co.*, 11 App. Div. (N. Y.) 625;



the lessee has contracted to discharge all the statutory obligations and duties imposed on the lessor.<sup>86</sup> And the plaintiff has the option of suing either the lessor or lessee.<sup>87</sup> It is not necessary, in order to hold one of them liable, to plead the relation which they bear to each other.<sup>88</sup> A consolidated railway company is liable to be sued for a violation of the statute on the part of one of the constituent companies;<sup>89</sup> but a mortgagor company can not be sued on such a claim arising after the road has been sold under foreclosure.<sup>90</sup> The fact that the road has passed into the hands of a *receiver* is not, however, a defense to the action,<sup>91</sup> though the property of the company in the hands of the receiver, being *in custodia legis*, can not be taken in execution.<sup>92</sup> The railway company is liable for injuries due to a failure to fence, though inflicted by the cars of another corporation operated by *contractors* in constructing the road.<sup>93</sup>

§ 2050. Failure to Erect the Fence Required by Such Statutes Creates a Liability Independent of Negligence.<sup>94</sup>—Under statutes requiring railway companies to build and maintain fences along their right of way, an omission to erect a proper fence in the first instance creates a liability for stock killed in consequence thereof, without regard to any consideration of negligence.<sup>95</sup> It is immaterial that the

s. c. 42 N. Y. Supp. 302; *South & C. R. Co. v. Pilgreen*, 62 Ala. 305; *Kansas City & C. R. Co. v. Ewing*, 23 Kan. 273; *Harmon v. Columbia & C. R. Co.*, 28 S. C. 401; *Wabash & C. R. Co. v. Payton*, 106 Ill. 534; *Singleton v. Southwestern R. Co.*, 70 Ga. 464. See also *Fort Wayne & C. R. Co. v. Hinebaugh*, 43 Ind. 354; *Illinois & C. R. Co. v. Finnigan*, 21 Ill. 646.

<sup>86</sup> *St. Louis & C. R. Co. v. Curl*, 28 Kan. 622. Compare *ante*, § 1955.

<sup>87</sup> *Eaton v. Oregon R. & C. Co.*, 19 Or. 391; s. c. 24 Pac. Rep. 415; 43 Am. & Eng. Rail. Cas. 57. See also *Tracy v. Troy & C. R. Co.*, 55 Barb. 530; s. c. 38 N. Y. 433; *Indianapolis & C. R. Co. v. Solomon*, 23 Ind. 534; *Indianapolis & C. R. Co. v. Warner*, 35 Ind. 516; *Toledo & C. R. Co. v. Rumbold*, 40 Ill. 143; *East St. Louis & C. R. Co. v. Gerber*, 82 Ill. 632; *Wyman v. Penobscot & C. R. Co.*, 46 Me. 162.

<sup>88</sup> *Indianapolis & C. R. Co. v. Warner*, 35 Ind. 516.

<sup>89</sup> *St. Louis & C. R. Co. v. Marker*, 41 Ark. 542.

<sup>90</sup> *Western R. Co. v. Davis*, 66 Ala. 578.

<sup>91</sup> *Ohio & C. R. Co. v. Russell*, 115

Ill. 52; s. c. 1 West. Rep. 606. See also *Kansas & C. R. Co. v. Wood*, 24 Kan. 619; *Kansas & C. R. Co. v. Weichselbaum*, 24 Kan. 619; *McKinney v. Ohio & C. R. Co.*, 22 Ind. 99; *Louisville & C. R. Co. v. Cauble*, 46 Ind. 277; *Indianapolis & C. R. Co. v. Ray*, 51 Ind. 269; *Ohio & C. R. Co. v. Fitch*, 20 Ind. 500.

<sup>92</sup> 5 *Thomp. Corp.*, § 6931, and many cases there cited.

<sup>93</sup> *Silver v. Kansas City & C. R. Co.*, 21 Mo. App. 5; s. c. 3 West. Rep. 284; *Glandon v. Chicago & C. R. Co.*, 68 Iowa 457. See also *Kansas City & C. R. Co. v. Ewing*, 23 Kan. 273; *Wichita & C. R. Co. v. Gibbs*, 47 Kan. 274; s. c. 27 Pac. Rep. 991; *Rockford & C. R. Co. v. Heflin*, 65 Ill. 367; *Huey v. Indianapolis & C. R. Co.*, 45 Ind. 320.

<sup>94</sup> This section is cited in §§ 2019, 2064, 2079.

<sup>95</sup> *Atchison & C. R. Co. v. Betts*, 10 Colo. 431; s. c. 15 Pac. Rep. 821; *Denver & C. R. Co. v. Henderson*, 10 Colo. 1; s. c. 13 Pac. Rep. 910; *Grand Rapids & C. R. Co. v. Jones*, 81 Ind. 523; *Talbot v. Minneapolis & C. R. Co.*, 82 Mich. 66; s. c. 45 N. W. Rep. 1113; *Smith v. St. Louis & C. R. Co.*,



railroad company has used due diligence under the circumstances; the liability is not defeated or diminished by the fact that the injury could not have been avoided by the use of the greatest diligence.<sup>96</sup> So, in regard to defective fences, the doctrine that the company is entitled to a reasonable time in which to discover and repair the defect<sup>97</sup> has no application where the fence never was sufficient.<sup>98</sup> If the defect was in the original construction of the fence or gate, that fact alone will charge the defendant with notice.<sup>99</sup> Such a liability, however, is purely statutory, and applies only to the subjects described in the statute. Thus, under a statute making railway companies liable for stock killed by reason of a failure to fence, it was held that a railway company was liable for a team of *horses* injured by a train, at a place where the right of way should have been, but was not fenced, without regard to its negligence; but that its liability for injury to a *wagon* to which they were hitched must be determined *solely* upon the question of negligence.<sup>100</sup> Such a statute has been construed as not imposing an absolute duty to fence, and consequently as not giving a right of action for *injury to a child* that got upon the track through an insufficient fence.<sup>101</sup>

§ 2051. Failure to Fence must have been at the Point of Entry.<sup>102</sup>—To render the railway company liable under such statutes

91 Mo. 58; s. c. 8 West. Rep. 288; Vail v. Kansas City &c. R. Co., 28 Mo. App. 372; Becker v. New York &c. R. Co., 31 N. Y. St. Rep. 750; s. c. 10 N. Y. Supp. 413; Hindman v. Oregon R. &c. Co., 17 Ore. 614; s. c. 22 Pac. Rep. 116; Gulf &c. R. Co. v. Keith, 74 Tex. 287; s. c. 11 S. W. Rep. 1117; Gulf &c. R. Co. v. Hudson, 77 Tex. 494; Norfolk &c. R. Co. v. Johnson, 91 Va. 661; s. c. 22 S. E. Rep. 505; 1 Va. L. Reg. 367; Dacres v. Oregon R. &c. Co. (Wash. Terr.), 20 Pac. Rep. 601; Pennsylvania Co. v. Dunlap, 112 Ind. 93; 13 N. E. Rep. 403; Norman v. Chicago &c. R. Co. (Iowa), 81 N. W. Rep. 597; Pothast v. Chicago &c. R. Co. (Iowa), 81 N. W. Rep. 693; Whittier v. Chicago &c. R. Co., 24 Minn. 394; Vanderworker v. Missouri &c. R. Co., 51 Mo. App. 166; Union &c. R. Co. v. High, 14 Neb. 14; International &c. R. Co. v. Cocke, 64 Tex. 151. Compare Vol. I, § 904, *et seq.*

<sup>96</sup> Cincinnati &c. R. Co. v. Stonecipher, 95 Tenn. 311; s. c. 32 S. W. Rep. 208.

<sup>97</sup> Post, § 2085.

<sup>98</sup> Duncan v. St. Louis &c. R. Co., 91 Mo. 68; Dooley v. Missouri &c. R. Co., 36 Mo. App. 381; Gulf &c. R. Co. v. Rowland (Tex. Civ. App.), 23 S. W. Rep. 421; Morrison v. Burlington &c. R. Co., 84 Iowa 663.

<sup>99</sup> Hammond v. Chicago &c. R. Co., 43 Iowa 168.

<sup>100</sup> Gulf &c. R. Co. v. Keith, 74 Tex. 287; s. c. 11 S. W. Rep. 1117.

<sup>101</sup> Walkenhauer v. Chicago &c. R. Co., 3 McCrary (U. S.) 553; s. c. 17 Fed. Rep. 136. See also Fitzgerald v. St. Paul &c. R. Co., 29 Minn. 336; s. c. 13 N. W. Rep. 168; Marcott v. Marquette &c. R. Co., 49 Mich. 99; s. c. 13 N. W. Rep. 374; Keyser v. Chicago &c. R. Co., 56 Mich. 559; s. c. 23 N. W. Rep. 311. In Wisconsin, however, the *opposite conclusion* has been reached. There a railway company has been held liable for the death of a child which got upon the track through a defective gate: Stuetgen v. Wisconsin &c. R. Co., 80 Wis. 498; s. c. 50 N. W. Rep. 407. Compare *ante*, § 1807.

<sup>102</sup> This section is cited in § 2168.



for stock killed on its tracks, it is necessary to show that they entered at a point which should have been, but was not, fenced. It is the absence or defect of a fence *at the point of entry* that fixes the liability of the company under the statute.<sup>103</sup> The condition of the fence where the animal was actually killed is immaterial, if it did not enter at that point.<sup>104</sup> While the burden is on the plaintiff in all cases to show that the company has violated the statute by failing to erect and maintain a proper fence at the point where his stock entered the right of way,<sup>105</sup> it is sufficient for him to establish the point at which the entry was made and the fact that that point was not properly fenced. If the place was one which the company was not bound to fence, the burden is upon it to show that fact.<sup>106</sup>

§ 2052. **And must have been the Proximate Cause of the Injury Complained of.**—Of course, in order to recover under the statute, it is necessary to establish that the failure to fence was the proximate cause of the injury for which a recovery is sought.<sup>107</sup> Thus, where, if the statutory fence had been properly built, it would not have kept the animals in question off the track, there can be no recovery in a statutory action.<sup>108</sup> And it has been held that, where, just before the accident, a fire had swept everything combustible on both sides of the track, so that, if the fence had been properly built, it would have been

<sup>103</sup> Chicago &c. R. Co. v. Blair, 75 Ill. App. 659; Louisville &c. R. Co. v. Goodbar, 102 Ind. 596; s. c. 1 West. Rep. 133, 317; Indiana &c. R. Co. v. Quick, 109 Ind. 295; Missouri &c. R. Co. v. Leggett, 27 Kan. 323; Atchison &c. R. Co. v. Cash, 27 Kan. 587; Cox v. Minneapolis &c. R. Co., 41 Minn. 101; s. c. 42 N. W. Rep. 924; Ehret v. Kansas City &c. R. Co., 20 Mo. App. 251; s. c. 2 West. Rep. 555; Miller v. Wabash R. Co., 47 Mo. App. 630; Roberts v. Quincy &c. R. Co., 49 Mo. App. 164; Sullivan v. Oregon R. &c. Co., 19 Or. 319; s. c. 24 Pac. Rep. 408; 42 Am. & Eng. Rail. Cas. 625; 8 Rail. & Corp. L. J. 208; Dunkirk &c. R. Co. v. Mead, 90 Pa. St. 454; Nashville &c. R. Co. v. Hughes, 94 Tenn. 450; s. c. 29 S. W. Rep. 723; Louisville &c. R. Co. v. Etzler, 3 Ind. App. 562; s. c. 30 N. E. Rep. 32; Wabash R. Co. v. Tretts, 96 Ind. 450.

<sup>104</sup> Alsop v. Ohio &c. R. Co., 19 Ill. App. 292; Duggan v. Peoria &c. R. Co., 42 Ill. App. 536; Jeffersonville &c. R. Co. v. Lyon, 72 Ind. 107; Wabash R. Co. v. Forshee, 77 Ind. 158;

Louisville &c. R. Co. v. Etzler, 3 Ind. App. 562; s. c. 30 N. E. Rep. 32; Snider v. St. Louis &c. R. Co., 73 Mo. 465; Foster v. St. Louis &c. R. Co., 90 Mo. 116; Warden v. Missouri &c. R. Co., 78 Mo. App. 664; s. c. 2 Mo. App. Rep. 345; Jebb v. Chicago &c. R. Co., 67 Mich. 160; s. c. 34 N. W. Rep. 538; 10 West. Rep. 905.

<sup>105</sup> Ft. Wayne &c. R. Co. v. Herbold, 99 Ind. 91; Louisville &c. R. Co. v. Quade, 91 Ind. 295; Lake Erie &c. R. Co. v. Kneadle, 94 Ind. 454.

<sup>106</sup> Jeffersonville &c. R. Co. v. Peters, 1 Ind. App. 69; Cincinnati &c. R. Co. v. Parker, 109 Ind. 235; Ft. Wayne &c. R. Co. v. Herbold, 99 Ind. 91. As to when *exceptions* embodied in the statute must be *negatived*, see *post*, § 2169.

<sup>107</sup> Ridenore v. Wabash &c. R. Co., 81 Mo. 227; Montgomery v. Wabash &c. R. Co., 90 Mo. 446; Gordon v. Chicago &c. R. Co., 44 Mo. App. 201. See also Hovorka v. Minneapolis &c. R. Co., 31 Minn. 221; Vol. I, § 43, *et seq.*

<sup>108</sup> See *post*, § 2081.



burned,—there can be no recovery under the statute for a failure to fence.<sup>109</sup>

§ 2053. **Places where the Company is Bound to Fence under these Statutes.**—Under these statutes, the railway company is obliged to fence wherever the right to fence exists and it is practicable to do so without interfering with its duty to the public or endangering the safety of its passengers or employés.<sup>110</sup>

§ 2054. **Duty to Erect Cattle-Guards and End Fences at Highway Crossings.**—While a railway company may not interfere with the rights of the public by building a fence across a public road, it may and must erect suitable cattle-guards and end fences at the side of the highway where it intersects the right of way, to prevent stock from straying upon the tracks. Even though not expressly provided for, they will be regarded as a part of the statutory fence, and the duty to erect them will be implied from a general provision requiring the right of way to be securely fenced.<sup>111</sup> In the absence of a statute to that effect, however, the law does not impose a duty of building and maintaining cattle-guards at points where the tracks enter and leave fields through which they run.<sup>112</sup> In the State of Iowa there is a double liability statute compelling railway companies to fence their tracks, and also a statute requiring the erection of cattle-guards at highway crossings and awarding single damages for its violation. The courts

<sup>109</sup> Cook v. Minneapolis &c. R. Co., 98 Wis. 624; s. c. 40 L. R. A. 457; 74 N. W. Rep. 561. But in a case in Texas it was held that, where a herd of cattle stampeded across the track, evidence that the statutory fence, if it had been built, would have been carried away without a possibility of its turning them,—was inadmissible: Gulf &c. R. Co. v. Hudson, 77 Tex. 494; s. c. 14 S. W. Rep. 158. It seems difficult to see a reason for such a decision. Evidence as to whether the accident was the natural and probable consequence of the omission of duty, might well be inadmissible. But where the result would have been exactly the same if the duty had been fully performed, there would seem to be no ground of liability.

<sup>110</sup> Kingsbury v. Chicago &c. R. Co., 104 Iowa 63; s. c. 73 N. W. Rep. 477; Louisville &c. R. Co. v. Zink, 85 Ind. 219; Pennsylvania Co. v. Dunlap, 112 Ind. 93; s. c. 11 West. Rep. 87; 13

N. E. Rep. 403; McIntosh v. Hannibal &c. R. Co., 26 Mo. App. 377; Baker v. Chicago &c. R. Co., 41 Mo. App. 260. As to places where these statutes do not require fences, see *post*, § 2067, *et seq.*

<sup>111</sup> Indianapolis &c. R. Co. v. Irish, 26 Ind. 268; Pittsburgh &c. R. Co. v. Eby, 55 Ind. 567; Indianapolis &c. R. Co. v. Kibby, 28 Ind. 480; Evansville &c. R. Co. v. Barbee, 74 Ind. 169; Wabash R. Co. v. Tretts, 96 Ind. 450; New York &c. R. Co. v. Zumbaugh, 17 Ind. App. 171; s. c. 46 N. E. Rep. 548; Union &c. R. Co. v. Harris, 28 Kan. 206; McGhee v. Guyn, 98 Ky. 209; s. c. 32 S. W. Rep. 615; 17 Ky. L. Rep. 794; Edwards v. Kansas City &c. R. Co., 74 Mo. 117; Lake Shore &c. R. Co. v. Sharpe, 38 Ohio St. 150. As to the sufficiency of the cattle-guard, see *post*, § 2082.

<sup>112</sup> Rossignoll v. Northeastern R. Co., 75 Ga. 354.



of that State hold that, though cattle-guards are, strictly speaking, a part of the fence required by the double liability statute,—yet, as that act is penal and to be strictly construed, and the subject of cattle-guards is provided for by a separate statute, single damages only can be recovered for a failure to erect them.<sup>113</sup>

§ 2055. **Duty to Fence where the Railroad Runs along the Side of the Highway or Another Railroad.**—The fact that a public highway runs along the side of a railroad track does not, of itself, show a valid reason why a fence should not be maintained between the road and the track, but rather a stronger reason why the track should be fenced.<sup>114</sup> Moreover, a railway company is not relieved from the statutory liability for failure to fence, by the fact that it is the *middle one* of several railroads parallel and contiguous to each other.<sup>115</sup> But in Connecticut it has been held that one of two parallel railroad companies is not obliged to build a fence between them, even though the other has failed to fence either side of its tracks.<sup>116</sup>

§ 2056. **Duty to Fence In Abandoned Tow-Path, Highway, etc.**<sup>117</sup>—Where a railroad was built upon the *tow-path of an abandoned canal*, it was held that it might be fenced without infringing any of the rights of the public, and that unless it was so fenced the company would be liable.<sup>118</sup> Where a *highway* has not been in a condition for use by the public, and has not been used for thirty-six years, the *presumption of its abandonment* is justified; the right to its full use by the owner is restored, and the duty to fence is imposed on a railroad company using a portion of it for its track.<sup>119</sup> But a mere non-user of the highway by the travelling public during a period of two years is not sufficient to raise a presumption of abandonment, and does not impose the duty of fencing upon the defendant.<sup>120</sup>

<sup>113</sup> Moriarty v. Central Iowa R. Co., 64 Iowa 696. As to the duty to provide cattle-guards at the limits of depot grounds, see *post*, § 2075, note.

<sup>114</sup> Indianapolis &c. R. Co. v. McKinney, 24 Ind. 283; Indianapolis &c. R. Co. v. Guard, 24 Ind. 222; Jeffersonville &c. R. Co. v. Sweeney, 32 Ind. 430; Illinois &c. R. Co. v. Trowbridge, 31 Ill. App. 190; Louisville &c. R. Co. v. Shanklin, 94 Ind. 297; Missouri &c. R. Co. v. Eckel, 49 Kan. 794; s. c. 31 Pac. Rep. 693; Rozzelle v. Hannibal &c. R. Co., 79 Mo. 349; Maher v. Winona &c. R. Co., 31 Minn. 401; Emmerson v. St. Louis &c. R. Co., 35 Mo. App. 621.

<sup>115</sup> Kelter v. New York &c. R. Co., 126 N. Y. 365; s. c. 27 N. E. Rep. 553; 37 N. Y. St. Rep. 485; 10 Rail. & Corp. L. J. 15.

<sup>116</sup> Gallagher v. New York &c. R. Co., 57 Conn. 442; s. c. 18 Atl. Rep. 786; 5 L. R. A. 737; 40 Am. & Eng. Rail. Cas. 197.

<sup>117</sup> This section is cited in § 2073.

<sup>118</sup> Whitewater Valley R. Co. v. Quick, 30 Ind. 384.

<sup>119</sup> Jeffersonville &c. R. Co. v. O'Connor, 37 Ind. 96; Louisville &c. R. Co. v. Shanklin, 94 Ind. 297.

<sup>120</sup> Indiana &c. R. Co. v. Gapen, 10 Ind. 292; McNamara v. Minneapolis &c. R. Co., 95 Mich. 545; s. c. 55 N. W. Rep. 440.



§ 2057. **Duty to Fence where the Highway and Track Cross Each Other at Acute Angles.**—Where a public highway and a railroad track cross each other at a very acute angle, the latter must be fenced up to the intersection of the highway and track, and not merely to the point where the highway intersects the line of the company's right of way.<sup>121</sup>

§ 2058. **Duty to Erect Gates and Bars at Farm Crossings.**—In many cases the statute itself provides for gates and bars at farm crossings. In the absence of express provision, a general direction to fence includes the erection of such gates or bars. They are regarded as part of the statutory fence, and the railway company is under the same duty to erect them in the first instance and keep them in repair when once erected, as it is in regard to any other part of the fence.<sup>122</sup>

§ 2059. **Duty to Keep them Closed, Whether upon the Company or the Land-Owner.**<sup>123</sup>—As these gates and bars are part of the statutory fence, the duty of the railroad company to keep its fence in *repair* requires it to use due diligence to *keep them closed*.<sup>124</sup> *Reasonable care*, however, is all that is required. It is not bound to keep a *special patrol* sufficient to discover immediately when gates are open. It can not be charged with negligence until it has had *reasonable time* to

<sup>121</sup> Andre v. Chicago & C. R. Co., 30 Iowa 107.

<sup>122</sup> Russell v. Hanley, 20 Iowa 219; Hammond v. Chicago & C. R. Co., 43 Iowa 169; McCoy v. Southern & C. R. Co., 94 Cal. 568; s. c. 29 Pac. Rep. 1110; Miller v. Chicago & C. R. Co., 66 Iowa 546; Stewart v. Cincinnati & C. R. Co., 89 Mich. 315; s. c. 50 N. W. Rep. 852; 49 Am. & Eng. Rail. Cas. 456; McMillan v. Chicago & C. R. Co., 70 Mo. App. 568; Vanduzer v. Lehigh & C. R. Co., 58 N. J. L. 8; s. c. 32 Atl. Rep. 376; Hungerford v. Syracuse & C. R. Co., 46 Hun (N. Y.) 339; s. c. 12 N. Y. St. Rep. 204; Pittsburgh & C. R. Co. v. Cunningham, 39 Ohio St. 327; Caldon v. Chicago & C. R. Co., 85 Wis. 527; Louisville & C. R. Co. v. Goodbar, 102 Ind. 596; s. c. 1 West. Rep. 133; Wabash R. Co. v. Williamson, 104 Ind. 154; s. c. 2 West. Rep. 222; Jenkins v. Chicago & C. R. Co., 27 Mo. App. 578; Terre Haute & C. R. Co. v. Elam, 20 Ill. App. 603; Fremont & C. R. Co. v. Pounder, 36 Neb. 247; s. c. 54 N. W. Rep. 509; Omaha & C. R. Co. v. Sev-

erin, 30 Neb. 318; s. c. 46 N. W. Rep. 842; 1 Neb. L. J. 316; 45 Am. & Eng. Rail. Cas. 122; International & C. R. Co. v. Searight, 8 Tex. Civ. App. 593; s. c. 28 S. W. Rep. 39; Missouri & C. R. Co. v. Bellows (Tex. Civ. App.), 39 S. W. Rep. 1000; 2 Am. Neg. Rep. 467; Wabash R. Co. v. Kime, 42 Ill. App. 272. In Tennessee there is a statute making it a misdemeanor to obstruct a private way, and it is there held that a railway company has no right to fence a private crossing: Mobile & C. R. Co. v. Thompson, 101 Tenn. 197.

<sup>123</sup> This section is cited in § 2014.

<sup>124</sup> Peoria & C. R. Co. v. Babb, 23 Ill. App. 454; West v. Missouri & C. R. Co., 26 Mo. App. 344; Woods v. Missouri & C. R. Co., 51 Mo. App. 500; Lake Erie & C. R. Co. v. Beam, 60 Ill. App. 68; Jacksonville & C. R. Co. v. Harris, 33 Fla. 217; s. c. 14 South. Rep. 726; Nicholson v. Atchison & C. R. Co., 55 Mo. App. 593. As to what constitutes the duty to repair, see *post*, § 2064.



make the discovery, or has failed to take proper action after notification.<sup>125</sup> But it is also the duty of the adjoining owner, for whose benefit and convenience gates are maintained at farm crossings, to keep them closed; and he has no redress for stock killed which escape upon the track through a gate that has been left open.<sup>126</sup> This does not alter the railway company's liability to others than adjoining owners; as to them, it must use due diligence to keep such gates closed;<sup>127</sup> though in one State it is held that the owner of trespassing animals can have no higher right than the owner of the land through which they got upon the track.<sup>128</sup> An express statutory provision, however, imposing upon the adjoining owner the duty of keeping gates closed at crossings connecting parts of his farm,<sup>129</sup> has been construed to relieve the railway company from liability to third persons for stock entering upon the tracks at such crossings and killed without negligence on its part.<sup>130</sup> This exemption is confined to the farm crossings referred to in the statute. Thus, where an adjoining owner owns land on one side of the track only, and uses a gate to reach a private side track owned by him and connected with the railroad, the company is liable to a third party for

<sup>125</sup> *Chicago &c. R. Co. v. Sierer*, 13 Ill. App. 261; *Chicago &c. R. Co. v. Patterson*, 72 Ill. App. 428; *Wait v. Burlington &c. R. Co.*, 74 Iowa 207; s. c. 37 N. W. Rep. 159.

<sup>126</sup> *Ranney v. Chicago &c. R. Co.*, 59 Ill. App. 130; *Evansville &c. R. Co. v. Mosier*, 114 Ind. 447; s. c. 17 N. E. Rep. 109; 14 West. Rep. 299; *Savage v. Chicago &c. R. Co.*, 31 Minn. 419; *Hook v. Worcester &c. R. Co.*, 58 N. H. 251; *Diamond Brick Co. v. New York &c. R. Co.*, 58 Hun (N. Y.) 396; s. c. 34 N. Y. St. Rep. 637; 12 N. Y. Supp. 22; *Bond v. Evansville &c. R. Co.*, 100 Ind. 301; *Louisville &c. R. Co. v. Goodbar*, 102 Ind. 596; *Manwell v. Burlington &c. R. Co.*, 80 Iowa 662; *Lemon v. Chicago &c. R. Co.*, 59 Mich. 618; *Texas &c. R. Co. v. Glenn*, 8 Tex. Civ. App. 301; *San Antonio &c. R. Co. v. Robinson*, 17 Tex. Civ. App. 400; *Richardson v. Chicago &c. R. Co.*, 56 Wis. 347; *Simmons v. Poughkeepsie &c. R. Co.*, 2 App. Div. (N. Y.) 117; s. c. 73 N. Y. St. Rep. 148; 37 N. Y. Supp. 522.

<sup>127</sup> *Wabash R. Co. v. Williamson*, 104 Ind. 154; *Baltimore &c. R. Co. v. Kreiger*, 90 Ind. 380; *Connolly v. Central Vermont R. Co.*, 4 App. Div. (N. Y.) 221; s. c. 38 N. Y. Supp. 587;

*Dayton v. New York &c. R. Co.*, 81 Hun (N. Y.) 284; s. c. 62 N. Y. St. Rep. 747; 30 N. Y. Supp. 783; *Louisville &c. R. Co. v. Goodbar*, 102 Ind. 596; *Galveston &c. R. Co. v. Wesendorf* (Tex. Civ. App.), 39 S. W. Rep. 132.

<sup>128</sup> *Adams v. Atchison &c. R. Co.*, 46 Kan. 161; s. c. 26 Pac. Rep. 439; *Rouse v. Osborne*, 3 Kan. App. 139; s. c. 42 Pac. Rep. 843. See also *Estes v. Atlantic &c. R. Co.*, 63 Me. 309. This view would probably prevail wherever the statutory fence is regarded as a division fence: See *ante*, § 2047. And the same result would be reached where allowing cattle to run at large is a defense to the statutory action: See *ante*, § 2017.

<sup>129</sup> *Burns' Ind. Stat.*, §§ 5320-5327.

<sup>130</sup> *Louisville &c. R. Co. v. Etzler*, 119 Ind. 39; s. c. 19 N. E. Rep. 615; *Louisville &c. R. Co. v. Thomas*, 1 Ind. App. 131; s. c. 27 N. E. Rep. 302; *Louisville &c. R. Co. v. Hughes*, 2 Ind. App. 68; s. c. 28 N. E. Rep. 158; *Pennsylvania Co. v. Spaulding*, 112 Ind. 47; s. c. 13 N. E. Rep. 268; 11 West. Rep. 98; *Hunt v. Lake Shore &c. R. Co.*, 112 Ind. 69; s. c. 11 West. Rep. 107; 13 N. E. Rep. 263.



stock killed by its negligent failure to close the gate, though it was put in under a contract with the adjoining owner, whereby he agreed to keep it closed.<sup>131</sup>

§ 2060. **Whether Such Statutes Require Cattle-Guards at Farm Crossings.**—It has been held, in New York, Illinois, Indiana, Mississippi and Missouri, that the statute does not require cattle-guards to be put in at farm crossings.<sup>132</sup>

§ 2061. **Duty to Fence where the Railway Company Owns the Adjoining Lands.**—Under the interpretation given to the English statute, there arises still another class of exceptions. The statute provides for fences "separating the land taken for the use of the railway from the adjoining lands not taken." The court has held that this does not require the company to fence against their own lands.<sup>133</sup> The American cases do not, in general, justify such a doctrine. It is only when such adjoining land of the company is used by the public that the company is relieved of the obligation to fence its road.<sup>134</sup> But a statute of Indiana has received an interpretation similar to the one given to the English law.<sup>135</sup> There, the court holds that a railroad company is not bound to fence its track, where the result of such fencing would be to cut it off from the use of its own property,—buildings, machine-shops, wood-sheds, etc.,—although such buildings or sheds may not be in present use.<sup>136</sup>

<sup>131</sup> Wabash R. Co. v. Williamson, 3 Ind. App. 190; s. c. 29 N. E. Rep. 455. See also Louisville & C. R. Co. v. Hart, 2 Ind. App. 130; s. c. 23 N. E. Rep. 218; Louisville & C. R. Co. v. Hughes, 2 Ind. App. 68; s. c. 28 N. E. Rep. 158; Louisville & C. R. Co. v. Consolidated Tank-Line Co., 4 Ind. App. 40; s. c. 30 N. E. Rep. 159.

<sup>132</sup> Bartlett v. Dubuque & C. R. Co., 20 Iowa 188; Brooks v. New York & C. R. Co., 13 Barb. (N. Y.) 594; Peoria & C. R. Co. v. Barton, 80 Ill. 72; Pennsylvania Co. v. Spaulding, 112 Ind. 47; s. c. 13 N. E. Rep. 268; 11 West. Rep. 98; Dent v. St. Louis & C. R. Co., 33 Mo. 496; Vicksburg & C. R. Co. v. Dixon, 61 Miss. 119 (holding that the fact that guards have been put in at a farm crossing at the request of the owner without asserting a legal right to the contrary, does not make the company liable for a failure to repair after being notified of a defect); Sather v. Chicago & C. R. Co., 40 Minn. 91; s. c. 41 N. W. Rep. 458; Missouri &

R. Co. v. Hanacek (Tex.), 55 S. W. Rep. 1117; Omaha & C. R. Co. v. Severin, 30 Neb. 318; s. c. 46 N. W. Rep. 842; 45 Am. & Eng. Rail. Cas. 122; 1 Neb. L. J. 316.

<sup>133</sup> Marfell v. South Wales R. Co., 8 C. B. (N. S.) 525; s. c. 7 Jur. (N. S.) 240; 29 L. J. (C. P.) 315; 2 L. T. (N. S.) 629; 8 Week. Rep. 765; Roberts v. Great Western R. Co., 4 C. B. (N. S.) 506; 4 Jur. (N. S.) 1240; 27 L. J. (C. P.) 266; 1 Fost. & Fin. 29; Matson v. Baird, 3 App. Cas. 1082.

<sup>134</sup> Klock v. New York & C. R. Co., 62 Hun (N. Y.) 291; s. c. 42 N. Y. St. Rep. 200; 17 N. Y. Supp. 120. But the company is not liable to *its tenant* for a failure so to fence: Potter v. New York & C. R. Co., 38 N. Y. St. Rep. 798; 15 N. Y. Supp. 12.

<sup>135</sup> Post, § 2067.

<sup>136</sup> Indianapolis & C. R. Co. v. Oestel, 20 Ind. 231; Jeffersonville & C. R. Co. v. Beatty, 36 Ind. 15.



§ 2062. **Immaterial whether the Company Owns the Fee or Merely an Easement in the Right of Way.**—This statutory duty to fence their roads is not affected one way or the other by the fact that the company owns the land upon which its track is situated, or has only an easement in the right of way.<sup>137</sup>

§ 2063. **Construction of the Statute as to the Time within which the Company must Fence.**—Another class of exceptions to the general rule arises where the company is not required by the statute to fence its track until the expiration of a certain period of time after the road is open for travel. In Illinois, this time is six months.<sup>138</sup> In Wisconsin, a statute required the La Crosse and Milwaukee Railroad Company to fence its track in parcels, each to be fenced within one year after it was put in operation.<sup>139</sup> Recoveries for injuries occurring within the time limited are governed by common law principles.<sup>140</sup> Negligence must be alleged and shown. In the absence of a specific provision, it seems that it is the duty of the company to keep its track fenced from the time it is opened for use.<sup>141</sup> The obligation begins as soon as the necessity for protection to the owner of land and stock arises,<sup>142</sup> and is not postponed till the road is sufficiently constructed to bring material from a distance.<sup>143</sup> Where the statute makes the company liable for stock killed while "operating" roads uninclosed with a legal fence, it is not essential to such liability that the road be completed and open to traffic. If *construction trains* are in service, the road must be guarded by a fence, and the company can not claim exemption on the ground that it should have a reasonable time after construction of the road in which to build fences.<sup>144</sup>

§ 2064. **Failure to Keep the Statutory Fence in Repair Creates a Liability only in Case of Negligence.**<sup>145</sup>—Though a railway company

<sup>137</sup> Toledo &c. R. Co. v. Pence, 68 Ill. 255.

<sup>138</sup> As to pleading this exception, see *post*, § 2169. Although the fence may have been built for several years, there is no duty to keep it in repair, unless the road has been in operation six months: Duggan v. Peoria &c. R. Co., 42 Ill. App. 536. See also Baltimore &c. R. Co. v. McElroy, 35 Ohio St. 147.

<sup>139</sup> Gen. Laws Wis. 1856, ch. 122, § 15.

<sup>140</sup> Gilman &c. R. Co. v. Spencer, 76 Ill. 192; Rockford &c. R. Co. v. Connell, 67 Ill. 216; McCall v. Chamberlain, 13 Wis. 637.

<sup>141</sup> Comings v. Hannibal &c. R. Co., 48 Mo. 512; Clark v. Vermont &c. R.

Co., 28 Vt. 103; Continental Improvement Co. v. Ives, 30 Mich. 448.

<sup>142</sup> Blewett v. Wyandotte &c. R. Co., 72 Mo. 583; Silver v. Kansas City &c. R. Co., 78 Mo. 528; s. c. 47 Am. Rep. 118; Cobb v. Kansas City &c. R. Co., 43 Mo. App. 313; Silver v. Kansas City &c. R. Co., 21 Mo. App. 5; s. c. 3 West. Rep. 284 (obligation arises as soon as fences on land, over which track is laid, are removed).

<sup>143</sup> Gordon v. Chicago &c. R. Co., 44 Mo. App. 201.

<sup>144</sup> Glandon v. Chicago &c. R. Co., 68 Iowa 457; Chicago &c. R. Co. v. Totten, 1 Kan. App. 558; s. c. 42 Pac. Rep. 269.

<sup>145</sup> This section is cited in §§ 2059, 2079.



which has, in the first instance, failed to erect a sufficient fence in compliance with the terms of the statute, is liable for resulting damage regardless of negligence,<sup>146</sup> yet when such a fence is once built, its duty to keep it in repair is discharged by the exercise of *ordinary care and diligence*.<sup>147</sup>

### SUBDIVISION 3. *Places where these Statutes do not Require Railway Companies to Fence.*

| SECTION  | SECTION  |
|--|--|
| 2067. General statement of doctrine.   | 2072. Whether these statutes require cattle-guards in the streets of cities, towns, or villages. |
| 2068. Such statutes not construed as requiring fencing in public places.   | 2073. Such statutes do not require fences at highway crossings.                                  |
| 2069. Liability for injuries at such places governed by common law principles.                                   | 2074. Statutes requiring gates at highway crossings.   |
| 2070. Construction of statutes excepting from their operation railway tracks within cities, towns, and villages. | 2075. Such statutes do not require fences within depot grounds and switch limits.                |
| 2071. What statutes not construed as requiring track to be fenced in cities and towns.                           | 2076. What depot grounds include, within this rule.  |
|  | 2077. What deemed "switch limits" within this rule.  |

§ 2067. **General Statement of Doctrine.**<sup>148</sup>—It is obvious that there are places along the line of every railroad where it is impossible and improper for the road to be fenced,—where, for instance, it is crossed by highways, or runs along a street, or at the depots, stations, etc., of the company, necessarily open for access by the public. In some instances these places are specifically excepted from the operation of the statute by its terms.<sup>149</sup> In others, the courts have held that such exceptions are necessarily implied from the inconvenience which would

<sup>146</sup> *Ante*, § 2050.

<sup>147</sup> *Pierce v. Rabberman*, 77 Ill. App. 619; *Mackie v. Central & C. R. Co.*, 54 Iowa 540; *Bennett v. Wabash & C. R. Co.*, 61 Iowa 355; *Grand Rapids & C. R. Co. v. Monroe*, 47 Mich. 152; *Varco v. Chicago & C. R. Co.*, 30 Minn. 18; *Case v. St. Louis & C. R. Co.*, 75 Mo. 668; *Rutledge v. Hannibal & C. R. Co.*, 78 Mo. 286; *Vinyard v. St. Louis & C. R. Co.*, 80 Mo. 92; *King v. Chicago & C. R. Co.*, 90 Mo. 520; *Hoskins v. Chicago & C. R. Co.*, 19 Mo. App. 96; s. c. 1 West. Rep. 398; *Davis v. Hannibal & C. R. Co.*, 19 Mo. App. 425; *Baltimore & C. R.*

*Co. v. Schultz*, 43 Ohio St. 270; s. c. 1 West. Rep. 72; *Gulf & C. R. Co. v. Cash*, 8 Tex. Civ. App. 569; s. c. 28 S. W. Rep. 387; *Lake Erie & C. R. Co. v. Fishback*, 5 Ind. App. 403; s. c. 32 N. E. Rep. 346; *Townsley v. Missouri & C. R. Co.*, 89 Mo. 31. As to what constitutes a compliance with the duty to repair, see *post*, § 2085.

<sup>148</sup> This section is cited in §§ 2053, 2061.

<sup>149</sup> *Wag. Stat. Mo.* 310, § 43; *Rev. Stat. Ill.* 1877, p. 769, § 48. See *Walton v. St. Louis & C. R. Co.*, 67 Mo. 56.



follow any other interpretation.<sup>150</sup> Mere inconvenience, difficulty, or expense of construction will not relieve a company of its duty to fence;<sup>151</sup> but, where the erection of a fence would interfere with the rights of the public, or the performance of its duty to the public, or endanger the safety of its passengers or employes, none is required.<sup>152</sup>

§ 2068. **Such Statutes not Construed as Requiring Fencing in Public Places.**—The proper test, as deduced from the American cases, of whether or not a particular place ought to be fenced by a railroad company, seems to be the fact of its being in law a *public place*, joined with the fact of its practical user by the public.<sup>153</sup> Although it be in law a public place, still, if for any reason it be not used and is not likely to be used as such by the public, the road must be fenced.<sup>154</sup> In Missouri, however, it seems that by the fact that a particular place is in law a public place, the company is relieved from its duty to fence its road at that point, although it may not be in public use. Thus, where an animal was injured at a place where the road was crossed by a *street*, which was *platted* and *dedicated*, but which was unimproved, and, owing to the unevenness of the ground, could not be

<sup>150</sup> Indianapolis &c. R. Co. v. Oestel, 20 Ind. 231; Louisville &c. R. Co. v. Francis, 58 Ind. 389; Rogers v. Chicago &c. R. Co., 26 Iowa 558; Davis v. Burlington &c. R. Co., 26 Iowa 549; Durand v. Chicago &c. R. Co., 26 Iowa 559; Indianapolis &c. R. Co. v. Caudle, 60 Ind. 112.

<sup>151</sup> Tracy v. Troy &c. R. Co., 38 N. Y. 433; Wichita &c. R. Co. v. Hart, 7 Kan. App. 554; s. c. 51 Pac. Rep. 932; Cleveland &c. R. Co. v. Capoot, 69 Ill. App. 163; Greeley v. St. Paul &c. R. Co., 33 Minn. 136; s. c. 53 Am. Rep. 16.

<sup>152</sup> Cincinnati &c. R. Co. v. Wood, 82 Ind. 593; Louisville &c. R. Co. v. Clark, 94 Ind. 111; Pennsylvania Co. v. Lindley, 2 Ind. App. 111; s. c. 23 N. E. Rep. 106; Jeffersonville &c. R. Co. v. Peters, 1 Ind. App. 69; s. c. 27 N. E. Rep. 299; Chicago &c. R. Co. v. Green, 4 Kan. App. 133; s. c. 46 Pac. Rep. 200; Spooner v. St. Louis &c. R. Co., 66 Mo. App. 32; Pearson v. Chicago &c. R. Co., 33 Mo. App. 543; International &c. R. Co. v. Dunham, 68 Tex. 231; s. c. 4 S. W. Rep. 472; Jennings v. St. Joseph &c. R. Co., 37 Mo. App. 651; Indiana &c. R. Co. v. Leak, 89 Ind. 596.

<sup>153</sup> Toledo &c. R. Co. v. Chapin, 66 Ill. 505; Ewing v. Chicago &c. R. Co., 72 Ill. 25; Cleveland &c. R. Co. v.

Crossley, 36 Ind. 371; Tracy v. Troy &c. R. Co., 38 N. Y. 433; Brady v. Rensselaer, 1 Hun (N. Y.) 378; Cleveland &c. R. Co. v. McConnell, 26 Ohio St. 57; Indianapolis &c. R. Co. v. Warner, 35 Ind. 516; Jeffersonville &c. R. Co. v. Parkhurst, 34 Ind. 501; Flint &c. R. Co. v. Lull, 28 Mich. 510; Indianapolis &c. R. Co. v. Parker, 29 Ind. 471; Pittsburgh &c. R. Co. v. Ehrhart, 36 Ind. 119; Halloran v. New York &c. R. Co., 2 E. D. Smith (N. Y.) 257; Pittsburgh &c. R. Co. v. Bowyer, 45 Ind. 496; Indianapolis &c. R. Co. v. Snelling, 16 Ind. 435; Ohio &c. R. Co. v. Rowland, 50 Ind. 349; Lloyd v. Pacific R. Co., 49 Mo. 199; Morris v. St. Louis &c. R. Co., 58 Mo. 78; Swearingen v. Missouri &c. R. Co., 64 Mo. 73; Robertson v. Atlantic &c. R. Co., 64 Mo. 412; Vanderkar v. Rensselaer &c. R. Co., 13 Barb. (N. Y.) 390; Bellefontaine R. Co. v. Reed, 33 Ind. 477; Madison &c. R. Co. v. Kane, 11 Ind. 375; Brace v. New York &c. R. Co., 27 N. Y. 269; Indiana &c. R. Co. v. Leamon, 18 Ind. 173; Indianapolis R. Co. v. Lowe, 29 Ind. 545; McKinley v. Chicago &c. R. Co., 47 Iowa 76.

<sup>154</sup> Toledo &c. R. Co. v. Cary, 37 Ind. 172; Toledo &c. R. Co. v. Howell, 38 Ind. 447.



used until it was improved, the court held that the company was under no obligation to fence its track, and was not liable for an injury to animals unless negligence was alleged and proved;<sup>155</sup> and it made no difference whether the town was incorporated or not.<sup>156</sup> On the other hand, where the territorial limits of a town are contracted, the company must fence, in portions of the town thus thrown outside the new limits.<sup>157</sup>

§ 2069. **Liability for Injuries at Such Places Governed by Common Law Principles.**<sup>158</sup>—Where injuries occur at places where the railroad companies may not legally fence their tracks, the rights and liabilities of the parties are to be determined upon the general principles of the law of negligence, without regard to the statute concerning fences.<sup>159</sup>

§ 2070. **Construction of Statutes Excepting from their Operation Railway Tracks within Cities, Towns, and Villages.**—In considering

<sup>155</sup> *Meyer v. North Missouri R. Co.*, 35 Mo. 352; *Elliott v. Hannibal & C. R. Co.*, 66 Mo. 683. See also *Long v. Central Iowa R. Co.*, 64 Iowa 657.

<sup>156</sup> *Gerren v. Hannibal & C. R. Co.*, 60 Mo. 405. See also *Cleveland & C. R. Co. v. Dunn*, 63 Ill. App. 531.

<sup>157</sup> *McCormick v. St. Louis & C. R. Co.*, 20 Mo. App. 640; s. c. 3 West. Rep. 191.

<sup>158</sup> This section is cited in §§ 2105, 2125.

<sup>159</sup> *Indianapolis & C. R. Co. v. Caldwell*, 9 Ind. 398; *Lafayette & C. R. Co. v. Shriner*, 6 Ind. 141; *Great Western R. Co. v. Morthland*, 30 Ill. 451; *Galena & C. R. Co. v. Griffin*, 31 Ill. 304; *Schneir v. Chicago & C. R. Co.*, 40 Iowa 337; *Indianapolis & C. R. Co. v. McKinney*, 24 Ind. 283; *Jeffersonville & C. R. Co. v. Underhill*, 48 Ind. 389; *Smith v. Chicago & C. R. Co.*, 34 Iowa 506; *McPheeters v. Hannibal & C. R. Co.*, 45 Mo. 23; *Chicago & C. R. Co. v. McMorro*, 67 Ill. 218; *Peoria & C. R. Co. v. Barton*, 80 Ill. 72; *Jeffersonville & C. R. Co. v. Brevoort*, 30 Ind. 325; *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471; *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 370; *Jeffersonville & C. R. Co. v. Parkhurst*, 34 Ind. 501; *Indianapolis & C. R. Co. v. Christy*, 43 Ind. 144; *Whitbeck v. Dubuque & C. R. Co.*, 21 Iowa 103; *Balcom v. Dubuque & C. R. Co.*, 21 Iowa 102; *Wier v. St. Louis & C. R.*

*Co.*, 48 Mo. 558; *Toledo & C. R. Co. v. Barlow*, 71 Ill. 640; *Illinois & C. R. Co. v. Bull*, 72 Ill. 537; *Roberts v. Great Western R. Co.*, 4 C. B. (N. S.) 506; s. c. 4 Jur. (N. S.) 1240; 27 L. J. (C. P.) 266; 1 *Fost. & Fin.* 29; *Logansport & C. R. Co. v. Caldwell*, 38 Ill. 280; *Rockford & C. R. Co. v. Lewis*, 58 Ill. 49; *Wabash R. Co. v. Howard*, 57 Ill. App. 66; *Louisville & C. R. Co. v. Goodbar*, 102 Ind. 596; *Becholdt v. Grand Rapids & C. R. Co.*, 113 Ind. 343; s. c. 15 N. E. Rep. 686; 13 *West. Rep.* 53; *Cincinnati & C. R. Co. v. Jones*, 111 Ind. 259; s. c. 12 N. E. Rep. 113; 9 *West. Rep.* 602; *Chicago & C. R. Co. v. Campbell*, 47 Mich. 265; *Fitzgerald v. Chicago & C. R. Co.*, 18 Mo. App. 391; *Ehret v. Kansas City & C. R. Co.*, 20 Mo. App. 251; s. c. 2 *West. Rep.* 553; *Evans v. St. Louis & C. R. Co.*, 21 Mo. App. 648; s. c. 4 *West. Rep.* 820; *Henderson v. St. Louis & C. R. Co.*, 36 Mo. App. 109; *Eaton v. McNeill*, 31 Or. 128; s. c. 49 *Pac. Rep.* 875; 8 *Am. & Eng. Rail. Cas.* (N. S.) 680; *Missouri & C. R. Co. v. Willis*, 17 Tex. Civ. App. 228; s. c. 42 S. W. Rep. 371; *Bremmer v. Green Bay & C. R. Co.*, 61 Wis. 114; *Peters v. Stewart*, 72 Wis. 133; *Riley v. Chicago & C. R. Co.*, 104 Iowa 235; s. c. 73 N. W. Rep. 488; *Ohio & C. R. Co. v. Gross*, 41 Ill. App. 561; *Sullivan v. Hannibal & C. R. Co.*, 72 Mo. 195.



the question as to what is a village, within the terms of an Illinois statute, in terms excepting from its operation those portions of the railroad tracks within the limits of cities, incorporated towns and villages,<sup>160</sup> the court say: "Any small assemblage of houses, for dwelling or business, or both, in the country, constitutes a village, whether they are situated upon regularly laid out streets and alleys, or not."<sup>161</sup> The presumption is that the houses compose a village; if an animal is killed beyond the houses, the presumption is that it is killed beyond the village; if the town extends beyond the houses, the defendant should show the fact.<sup>162</sup> But it has been held that a railway company is not, as a matter of law, relieved from the duty to fence at a station not within the limits of an incorporated town, as the statute makes no exception of such a place.<sup>163</sup> The Missouri fence law<sup>164</sup> does not require railway companies to fence their tracks within the limits of incorporated cities and towns.<sup>165</sup> But the "Damage Act"<sup>166</sup> of that State, for the purpose of furnishing "an inducement for the roads to fence their track, where it was not deemed absolutely necessary to compel them to do so," raises an inference of negligence when the stock is injured at a place where the law does not require the road to be fenced, which must be rebutted by the defendant.<sup>167</sup> But this rule does not apply to places where it is unlawful for the company to maintain fences.<sup>168</sup>

**§ 2071. What Statutes not Construed as Requiring Track to be Fenced in Cities and Towns.**—And, where there is no express provision relating to the subject, it is usually held that there is an implied exception in the operation of the statute as to that portion of a railroad track which lies within the limits of cities and villages.<sup>169</sup> Though this implied exception applies in cities and towns where the tracks are intersected by streets and alleys,<sup>170</sup> even though they are not in a condition to be used by the public,<sup>171</sup> it does not necessarily

<sup>160</sup> Rev. Stat. Ill. 1877, p. 769, § 48.

<sup>161</sup> *Illinois &c. R. Co. v. Williams*, 27 Ill. 49. To the same effect: *Toledo &c. R. Co. v. Spangler*, 71 Ill. 568; *Chicago &c. R. Co. v. Rice*, 71 Ill. 567.

<sup>162</sup> *Ohio &c. R. Co. v. Irvin*, 27 Ill. 178.

<sup>163</sup> *Chicago &c. R. Co. v. Dumser*, 109 Ill. 402.

<sup>164</sup> Wag. Mo. Stat. 310, § 43.

<sup>165</sup> *Edwards v. Hannibal &c. R. Co.*, 66 Mo. 571; *Cousins v. Hannibal &c. R. Co.*, 66 Mo. 572; *Elliott v. Hannibal &c. R. Co.*, 66 Mo. 683; *Meyer v. North Missouri R. Co.*, 35 Mo. 352.

<sup>166</sup> Wag. Mo. Stat. 520, § 5.

<sup>167</sup> *Edwards v. Hannibal &c. R. Co.*, 66 Mo. 571; *Elliott v. Hannibal &c. R. Co.*, 66 Mo. 683; *Iba v. Hannibal &c. R. Co.*, 45 Mo. 470; *Ells v. Pacific R. Co.*, 48 Mo. 231.

<sup>168</sup> *Elliott v. Hannibal &c. R. Co.*, 66 Mo. 683.

<sup>169</sup> *Davis v. Burlington &c. R. Co.*, 26 Iowa 549; *Rogers v. Chicago &c. R. Co.*, 26 Iowa 558.

<sup>170</sup> *Blanford v. Minneapolis &c. R. Co.*, 71 Iowa 310; s. c. 32 N. W. Rep. 357; *Ohio &c. R. Co. v. Heady* (Ind. App.), 28 N. E. Rep. 212.

<sup>171</sup> *Lathrop v. Central &c. R. Co.*, 69 Iowa 105.



apply to the spaces between such streets and other places within cities and towns, and the railway is not relieved of its obligation to fence them, if it can be done without interfering with the rights of the public or the proper running of the road.<sup>172</sup> But where a railroad occupies a street, it can not obstruct it and interfere with its use by building fences.<sup>173</sup> If, however, the railroad is laid out along the *edge of a town*, and no streets or alleys extend across the track, the exception does not apply, and the company is bound to fence.<sup>174</sup>

§ 2072. **Whether these Statutes Require Cattle-Guards in the Streets of Cities, Towns, or Villages.**—A railroad company is not bound by the statute to erect and maintain cattle-guards in the streets of cities or villages. There they would be nuisances.<sup>175</sup> This is true, however, only in those instances where the erections would impede the free use of such highways by the public. Where they can be maintained without interfering with travel and traffic upon the streets, it is the duty of the company to build and keep them up.<sup>176</sup>

§ 2073. **Such Statutes do not Require Fences at Highway Crossings.**—A railway company, under these statutes, is not obliged to fence a place where its track is crossed by or is built upon a *public highway*.<sup>177</sup> This exception applies both to highways used by the public, though not regularly laid out and legally established,<sup>178</sup> and

<sup>172</sup> Toledo &c. R. Co. v. Howell, 38 Ind. 447; Toledo &c. R. Co. v. Owen, 43 Ind. 405; Jeffersonville &c. R. Co. v. Parkhurst, 34 Ind. 501; Indianapolis &c. R. Co. v. Lindley, 75 Ind. 426; Pittsburgh &c. R. Co. v. Laufman, 78 Ind. 319; Toledo &c. R. Co. v. Cupp, 9 Ind. App. 244; s. c. 36 N. E. Rep. 445; Coyle v. Chicago &c. R. Co., 62 Iowa 518; Flint &c. R. Co. v. Lull, 28 Mich. 510; La Paul v. Truesdale, 44 Minn. 275; s. c. 46 N. W. Rep. 363; 45 Am. & Eng. Rail. Cas. 468; Cleveland &c. R. Co. v. McConnell, 26 Ohio St. 57; Gulf &c. R. Co. v. Adams (Tex. Civ. App.), 24 S. W. Rep. 834; Wymore v. Hannibal &c. R. Co., 79 Mo. 247; Young v. Hannibal &c. R. Co., 79 Mo. 336; Crawford v. New York &c. R. Co., 18 Hun (N. Y.) 108.

<sup>173</sup> Rippe v. Chicago &c. R. Co., 42 Minn. 34; s. c. 5 L. R. A. 864; 43 N. W. Rep. 652; 40 Am. & Eng. Rail. Cas. 231. See also Snook v. Clark, 20 Mont. 230; s. c. 50 Pac. Rep. 718.

<sup>174</sup> Kirkland v. Missouri &c. R. Co., 82 Mo. 466; Brandenburg v. St. Louis &c. R. Co., 44 Mo. App. 224.

<sup>175</sup> Vanderkar v. Rensselaer &c. R. Co., 13 Barb. (N. Y.) 390; Halloran v. New York &c. R. Co., 2 E. D. Smith (N. Y.) 257; Parker v. Rensselaer &c. R. Co., 16 Barb. (N. Y.) 315.

<sup>176</sup> Brace v. New York &c. R. Co., 27 N. Y. 269; Jeffersonville &c. R. Co. v. Parkhurst, 34 Ind. 501; Toledo &c. R. Co. v. Howell, 38 Ind. 447; Toledo &c. R. Co. v. Owen, 43 Ind. 405; Madison &c. R. Co. v. Kane, 11 Ind. 375.

<sup>177</sup> Soward v. Chicago &c. R. Co., 30 Iowa 551; Louisville &c. R. Co. v. Francis, 58 Ind. 389; Lepp v. St. Louis &c. R. Co., 87 Mo. 139; s. c. 2 West. Rep. 110; Ehret v. Kansas City &c. R. Co., 20 Mo. App. 251; s. c. 2 West. Rep. 555.

<sup>178</sup> Missouri &c. R. Co. v. Kocher, 46 Kan. 272; s. c. 26 Pac. Rep. 731; Atchison &c. R. Co. v. Griffiths, 28 Kan. 539; Luckie v. Chicago &c. R. Co., 76 Mo. 639; Brown v. Kansas City &c. R. Co., 20 Mo. App. 427; s. c. 2 West. Rep. 571; Jenkins v. Chicago &c. R. Co., 27 Mo. App. 578; Roberts v. Quincy &c. R. Co., 43 Mo. App. 287.



to highways legally opened and established, though not in public use.<sup>170</sup>

§ 2074. **Statutes Requiring Gates at Highway Crossings.**—The English statute makes special provision for highway crossings, requiring the company to keep good and sufficient gates on each side of the highway, and to keep them closed, except when horses and vehicles are passing.<sup>180</sup>

§ 2075. **Such Statutes do not Require Fences within Depot Grounds and Switch Limits.**<sup>181</sup>—Public necessity and convenience, and a due regard for the safety of its employes, require a railway company to leave its tracks within *depot grounds* and *switch limits* unfenced; and these places therefore constitute a well recognized exception to the company's statutory duty to fence.<sup>182</sup> Some difficulty, however, is encountered in applying the rule under varying circumstances. Founded in the necessity of the public for convenient access to depots,

<sup>170</sup> *Giltz v. St. Louis & C. R. Co.*, 65 Mo. App. 445. As to the duty to fence an abandoned highway, see *ante*, § 2056.

<sup>180</sup> 8 & 9 Vict., c. 20, § 47; *Marfell v. South Wales R. Co.*, 8 C. B. (N. S.) 525; s. c. 7 Jur. (N. S.) 240; 29 L. J. (C. P.) 315; 8 Week. Rep. 765; 2 L. T. (N. S.) 629; *Fawcett v. York & C. R. Co.*, 16 Q. B. 610; 15 Jur. 173; 20 L. J. (Q. B.) 222.

<sup>181</sup> This section is cited in §§ 2054, 2079.

<sup>182</sup> *Louisville & C. R. Co. v. Scott*, 34 Ill. App. 635; *Indiana & C. R. Co. v. Quick*, 109 Ind. 295; *Indiana & C. R. Co. v. Sawyer*, 109 Ind. 342; *Peyton v. Chicago & C. R. Co.*, 70 Iowa 522; *Chicago & C. R. Co. v. Clonch*, 2 Kan. App. 728; s. c. 43 Pac. Rep. 1140; 3 Am. & Eng. Rail. Cas. (N. S.) 240; *Stern v. Michigan & C. R. Co.*, 76 Mich. 591; s. c. 43 N. W. Rep. 587; *Rabidon v. Chicago & C. R. Co.*, 115 Mich. 390; s. c. 39 L. R. A. 405; 73 N. W. Rep. 386; 4 Det. L. N. 868; *Smith v. Minneapolis & C. R. Co.*, 37 Minn. 103; s. c. 33 N. W. Rep. 316; *Lepp v. St. Louis & C. R. Co.*, 87 Mo. 139; s. c. 2 West. Rep. 110; *Crenshaw v. St. Louis & C. R. Co.*, 54 Mo. App. 233; *Pierce v. Andrews*, 13 Ohio C. C. 513; s. c. 7 Ohio Dec. 105; *Moses v. Southern & C. R. Co.*, 18 Ore. 385; s. c. 8 L. R. A. 135; 23 Pac. Rep. 498; 42 Am. & Eng. Rail. Cas.

555; *Fiske v. Northern & C. R. Co.*, 19 Or. 163; s. c. 23 Pac. Rep. 898; *Chicago & C. R. Co. v. Hogan*, 30 Neb. 686; s. c. 46 N. W. Rep. 1015; 1 Neb. L. J. 346; *Bean v. St. Louis & C. R. Co.*, 20 Mo. App. 641; *Webster v. Atchison & C. R. Co.*, 57 Mo. App. 451; *Schafer v. St. Louis & C. R. Co.*, 65 Mo. App. 201; *Gulf & C. R. Co. v. Wallace*, 2 Tex. Civ. App. 270; s. c. 21 S. W. Rep. 973; *Swanson v. Melton* (Tex. App.), 17 S. W. Rep. 1088; *Gulf & C. R. Co. v. Simonton* (Tex. Civ. App.), 22 S. W. Rep. 285; *Flagg v. Chicago & C. R. Co.*, 96 Mich. 30. It is nevertheless the duty of the company to provide suitable cattle-guards to prevent stock from passing onto the track beyond the limits of such grounds: *Kobe v. Northern & C. R. Co.*, 36 Minn. 518; s. c. 32 N. W. Rep. 783. And, where a railway company voluntarily fenced its depot grounds, it was held liable for a negligent failure to repair the fence. The court held that, as the company had treated it as a right-of-way fence, it was *estopped* to set up the defense that it was within depot grounds; and that the adjoining owner had a right to rely upon that interpretation until he received formal notice from the railway company to the contrary: *Chicago & C. R. Co. v. Guertin*, 115 Ill. 466.



freight-houses and side-tracks, and in the safety of employes in handling trains,—this modification of the general obligation to fence should be carried no further than the necessity upon which it rests requires.<sup>183</sup>

§ 2076. **What Depot Grounds Include, within this Rule.**—In the opening of depot grounds the railway company will be held to the exercise of a reasonable discretion, in regard to their character and extent, in view of its present or prospective needs.<sup>184</sup> Generally speaking, the depot grounds include places where passengers get on and off trains, where goods are loaded and unloaded, and all land necessary and convenient, and actually used, for such purpose, by the public and the company.<sup>185</sup> A point on the main line of a road, on which are situated a water tank, a building containing a telegraph and ticket office and sleeping quarters for the agent, and a platform for receiving and shipping freight,—has been held to be a *depot*, which the railway company was not liable for leaving unfenced.<sup>186</sup> It was so held, also, with regard to a station used for passengers and freight, for a period of three weeks only, during *camp-meeting time*, and occasionally by *picnic parties*.<sup>187</sup> But a *mere siding*, used by the company for loading wood and for passing trains, where there is no agent, and passengers have to flag their own trains, is not a depot within the exception and must be fenced.<sup>188</sup> So, where all that had been done towards making depot grounds was to remove the fences at a siding and erect a platform, but without leaving an agent in charge, so that those who wished to board a train were obliged to flag it themselves, it was held that the company was liable for damages to stock, due to the lack of a fence.<sup>189</sup> Not only must the buildings be of such a character as to answer the purposes of a depot, in order to bring the place within the exception, but the grounds must be limited to the needs

<sup>183</sup> *Kobe v. Northern &c. R. Co.*, 36 Minn. 518; s. c. 32 N. W. Rep. 783; *Payton v. Chicago &c. R. Co.*, 70 Iowa 522.

<sup>184</sup> *Rinear v. Grand Rapids &c. R. Co.*, 70 Mich. 620; s. c. 38 N. W. Rep. 599; 14 West. Rep. 908; *Johnson v. Chicago &c. R. Co.*, 27 Mo. App. 379; *Pearson v. Chicago &c. R. Co.*, 33 Mo. App. 543; *Mills &c. Lumber Co. v. Chicago &c. R. Co.*, 94 Wis. 336; s. c. 68 N. W. Rep. 996; *Cole v. Duluth &c. R. Co.*, 104 Wis. 460; s. c. 80 N. W. Rep. 736.

<sup>185</sup> *Plunkett v. Minneapolis &c. R. Co.*, 79 Wis. 222; s. c. 48 N. W. Rep. 519; *Dolan v. Newburg &c. R. Co.*, 120 N. Y. 571; s. c. 31 N. Y. St. Rep.

852; 24 N. E. Rep. 824; *Robinson v. St. Louis &c. R. Co.*, 21 Mo. App. 141.

<sup>186</sup> *Peters v. Stewart*, 72 Wis. 133; s. c. 39 N. W. Rep. 380.

<sup>187</sup> *Stewart v. Pennsylvania Co.*, 2 Ind. App. 142; s. c. 28 N. E. Rep. 211.

<sup>188</sup> *Hurt v. St. Paul &c. R. Co.*, 39 Minn. 485; s. c. 40 N. W. Rep. 613. See also *Jaeger v. Chicago &c. R. Co.*, 75 Wis. 130; s. c. 43 N. W. Rep. 732; 40 Am. & Eng. Rail. Cas. 194; *Moser v. St. Paul &c. R. Co.*, 42 Minn. 480; s. c. 44 N. W. Rep. 530.

<sup>189</sup> *Anderson v. Stewart*, 76 Wis. 43; s. c. 44 N. W. Rep. 1091.



of the buildings and the locality. Thus, it was held in one case that a point forty rods from a small station in an unincorporated town,<sup>190</sup> and, in another case, a point seven hundred and twenty-one feet from a station, unused and out of repair and with no grounds outside the usual right of way,—were not within depot grounds, so as to relieve the company from liability for a failure to fence.<sup>191</sup> And a company is liable where it fails to fence a strip of land, not necessary for its station grounds, even though in fact so used.<sup>192</sup>

§ 2077. What Deemed "Switch Limits" within this Rule.—Again, while it is not necessary to fence at a place used for switching cars and loading and unloading freight, when it would seriously interfere with the company's business and the safety of its employes,<sup>193</sup> yet if such interference would not result, fences and cattle-guards must be erected within switching grounds, even though they are used in connection with a depot.<sup>194</sup> The fact that a switch and side-tracks, which do not constitute part of a depot, and which are in the country and seldom used, can be more conveniently and safely used if unfenced, will not exempt the company from the duty of fencing them, if the increase in danger and inconvenience would be slight.<sup>195</sup>

#### SUBDIVISION 4. *What will be Considered a Compliance with Statutes Requiring Railway Companies to Fence.*

##### SECTION

2079. What deemed a sufficient fence within the meaning of these statutes.

2080. Such fence may be a river.

##### SECTION

2081. When need not be sufficient to turn swine, sheep, etc.

2082. Sufficiency of cattle-guards, cattle-pits, etc.

<sup>190</sup> Iowa &c. R. Co. v. Gushee, 49 Ill. App. 609.

<sup>191</sup> McDonough v. Milwaukee &c. R. Co., 73 Wis. 223; s. c. 40 N. W. Rep. 806.

<sup>192</sup> Atchison &c. R. Co. v. Shaft, 33 Kan. 521; Prickett v. Atchison &c. R. Co., 33 Kan. 748; McGrath v. Detroit &c. R. Co., 57 Mich. 555.

<sup>193</sup> Cleveland &c. R. Co. v. Abney, 43 Ill. App. 92; Cleveland &c. R. Co. v. Myers, 43 Ill. App. 251; Cleveland &c. R. Co. v. Roper, 47 Ill. App. 320; Evansville &c. R. Co. v. Willis, 93 Ind. 507; Lake Erie &c. R. Co. v. Kneadle, 94 Ind. 454; Grondin v. Duluth &c. R. Co., 100 Mich. 598; s. c. 59 N. W. Rep. 229; Rabidon v. Chicago &c. R. Co., 115 Mich. 390; s. c. 39 L. R. A. 405; 73 N. W. Rep.

386; 4 Det. L. N. 868; Missouri &c. R. Co. v. Willis, 17 Tex. Civ. App. 228; s. c. 47 S. W. Rep. 371; Mills &c. L. Co. v. Chicago &c. R. Co., 94 Wis. 336; s. c. 69 N. W. Rep. 996.

<sup>194</sup> Toledo &c. R. Co. v. Fly, 8 Ind. App. 602; s. c. 36 N. E. Rep. 215; Chouteau v. Hannibal &c. R. Co., 28 Mo. App. 556; Vanderworker v. Missouri &c. R. Co., 51 Mo. App. 166; Bean v. St. Louis &c. R. Co., 20 Mo. App. 641; s. c. 3 West. Rep. 192; Railroad Co. v. Newbrander, 40 Ohio St. 15.

<sup>195</sup> Toledo &c. R. Co. v. Franklin, 159 Ill. 99; s. c. 42 N. E. Rep. 319; Toledo &c. R. Co. v. Cupp, 9 Ind. App. 244; s. c. 36 N. E. Rep. 445; Russell v. Hannibal &c. R. Co., 26 Mo. App. 368.



## SECTION

2083. Company chargeable with negligence of the contractor in constructing fence.

2084. Unless the plaintiff himself was the contractor.

2085. Company bound only to ordinary care in the maintenance of its fences.

## SECTION

2088. Care required in preventing company with notice of a defect.

2087. Company bound to use ordinary care to keep cattle-guards, gates, bars, etc., in repair.

2088. Care required in preventing cattle-guards from becoming filled up with ice and snow.

§ 2079. What Deemed a Sufficient Fence within the Meaning of these Statutes.—In general language, the requirement of these statutes is that the company shall build and maintain, on both sides of its road, wherever it may lawfully do so, a fence sufficient to “turn stock.”<sup>196</sup> It need not be a literal fence, if it is a sufficient barrier to serve the purpose. “We see no reason,” said Cole, J., “why a *bluff*, a *hedge*, a *trench*, a *wall*, a *trestle*, or the like, may not be of equal security with the statutory defined lawful fence; and if so found in fact, it would, under the statute, be a lawful fence.”<sup>197</sup> In Wisconsin there is a statutory provision to the like effect.<sup>198</sup> The fence must be

<sup>196</sup> Chicago &c. R. Co. v. Umphenour, 69 Ill. 198; Toledo &c. R. Co. v. Thomas, 18 Ind. 215; Jeffersonville &c. R. Co. v. Avery, 31 Ind. 277; Kelihier v. Connecticut &c. R. Co., 107 Mass. 411; McDowell v. New York &c. R. Co., 37 Barb. (N. Y.) 196; Brady v. Rensselaer &c. R. Co., 1 Hun (N. Y.) 378; Brown v. Milwaukee &c. R. Co., 21 Wis. 39; Tredway v. Sioux City &c. R. Co., 43 Iowa 527; Tallman v. Syracuse &c. R. Co., 4 Abb. App. Dec. (N. Y.) 351; Eames v. Salem &c. R. Co., 98 Mass. 560; Bessant v. Great Western R. Co., 8 C. B. (N. S.) 368; Walther v. Pacific R. Co., 55 Mo. 271; Chicago &c. R. Co. v. Lyon, 50 Neb. 640; s. c. 70 N. W. Rep. 261.

<sup>197</sup> Hilliard v. Chicago &c. R. Co., 37 Iowa 442. See also Collier v. Georgia R. Co., 76 Ga. 611.

<sup>198</sup> Rev. Stat. Wis. 1878, § 1810. Under this statute, which provides that no fence need be constructed “where the proximity of ponds, --- hills, embankments, or other sufficient protection, renders a fence unnecessary to protect cattle from straying” upon the track, it has been held that, if cattle have, in a given instance, surmounted an embankment,

that fact is conclusive evidence that such embankment was not a “sufficient protection”: Veerhusen v. Chicago &c. R. Co., 53 Wis. 689. This provision was amended by Wis. L. 1881, ch. 193, by inserting the words “or other domestic animals” between the words “cattle” and “from.” In the construction of statutes requiring railway companies to erect and maintain fences, the courts have apparently drawn a distinction between the two duties. In the original erection of the fence, they require a compliance with the terms of the statute, regardless of any consideration of negligence (*ante*, § 2050); while, in the maintenance of a fence properly constructed, they enforce a liability for non-compliance only where negligence can be shown (*ante*, § 2064). This distinction, however, is a little difficult of pursuit. It is often necessary to submit to the jury the question, whether the railway company has used a reasonable discretion in omitting to fence, as in the case of depot grounds (*ante*, § 2075), or whether the fence, as built, is reasonably sufficient for the purpose prescribed, such as to “turn livestock;” and thus



sufficient to turn not only ordinary stock,<sup>199</sup> but also stock to some extent breachy,<sup>200</sup> though not such as are *unusually* so.<sup>201</sup> But it must not be of a kind that will be a source of danger and probable injury to cattle in an adjoining field.<sup>202</sup> In Minnesota, however, where a statute made a *wire fence* a lawful fence, it was held that such a fence was a proper one for a railway company to build.<sup>203</sup> But a law of North Carolina, making it unlawful to erect a *barbed wire fence* along a public road or highway, unless a railing is placed on top of it, has been held inapplicable to fences erected by railway companies along their right of way, on the ground that the statute was for the protection of cattle on a highway only.<sup>204</sup> The fact that a fence is not exactly on the line of the right of way, does not prevent it from being a sufficient right-of-way fence, nor relieve the company from maintaining it as such.<sup>205</sup>

§ 2080. **Such Fence may be a River.**—By the charter of the Hudson River Railroad Company, it is relieved from obligation to maintain fences where its road is constructed in the river. In an action for injuries to cattle which swam or forded an intervening channel or creek which separated an island from the main land, and which varied in depth from two to ten feet, according to the state of the tide, and went upon the railroad track and were there injured,—it was held that the road need not be fenced at such a place, and that the exemption granted in the charter was not changed or removed by the provisions of the General Railroad Act of 1848.<sup>206</sup> But where a fence had been built across the bed of a creek, which, at the time, was

the question of due care is indirectly involved. But, granted a defective fence, the cases seem to hold that, if the defect occurred in the original construction, no further proof of negligence is required, but if the defect is due to lack of repair, it is necessary, in order to establish a liability, to show that the railway company was negligent in failing to discover and remedy it.

<sup>199</sup> Leggett v. Illinois & C. R. Co., 72 Ill. App. 577; Shellabarger v. Chicago & C. R. Co., 66 Iowa 18; Davidson v. Michigan & C. R. Co., 49 Mich. 428; Baltimore & C. R. Co. v. Schultz, 43 Ohio St. 270; International & C. R. Co. v. Barton (Tex. Civ. App.), 54 S. W. Rep. 797.

<sup>200</sup> Chicago & C. R. Co. v. Bryant, 29 Ill. App. 17.

<sup>201</sup> Chicago & C. R. Co. v. Evans, 45 Ill. App. 79.

<sup>202</sup> Rehler v. Western New York & C. R. Co., 28 N. Y. St. Rep. 311; s. c. 8 N. Y. Supp. 286; Louisville & C. R. Co. v. Shelton, 43 Ill. App. 220. In Georgia it has been held that, if a railway company chooses to erect a *barbed wire fence*, it must use diligence corresponding to the danger of frightened stock being wounded by it: Atlantic & C. R. Co. v. Husson, 62 Ga. 679.

<sup>203</sup> Halverson v. Minneapolis & C. R. Co., 32 Minn. 88.

<sup>204</sup> Winkler v. Carolina & C. R. Co., 126 N. C. 370; s. c. 35 S. E. Rep. 621.

<sup>205</sup> Chicago & C. R. Co. v. Guertin, 115 Ill. 466; s. c. 3 West. Rep. 52; Wabash R. Co. v. Forshee, 77 Ind. 158.

<sup>206</sup> Schermerhorn v. Hudson & C. R. Co., 38 N. Y. 103.



full of water, but which subsequently dried up and left a space below the lower wire, the railway company was held liable for failure to erect a sufficient fence.<sup>207</sup>

§ 2081. **When Need not be Sufficient to Turn Swine, Sheep, etc.**<sup>208</sup>—In Kansas, the fence required by the statute is "a lawful fence." Such a fence, in that State, need not be sufficient to "turn" swine. Against these, therefore, it is held that a railroad company is not bound to fence, and a recovery for injury to swine can not be had without a showing of negligence.<sup>209</sup> The company is not liable, where the violation of the statute is not the proximate cause of the injury. But, in order to escape liability, it must appear that the statutory fence, if built, would not have kept out the animals in question.<sup>210</sup>

§ 2082. **Sufficiency of Cattle-Guards, Cattle-Pits, etc.**<sup>211</sup>—As to the sufficiency of such structures, the requirements are to the same effect and extent as are exacted of the company in regard to the fence itself, namely, that they should be sufficient to serve the purpose,—to keep cattle out.<sup>212</sup> The fact that the cattle-pit is built on a solid rock is not an excuse for having it of insufficient depth to exclude cattle. As the court sententiously remarked, "Rocks may be removed by drills, gunpowder and fire."<sup>213</sup> It is not a defense, that the guard in question is the same in construction as those *in general use*, in the absence of proof that it satisfies the statutory requirements.<sup>214</sup> But it may be shown that the pattern used has been found by experience to be effective for the purpose required.<sup>215</sup> To be sufficient, a cattle-guard must be something extending clear across the right of way and connecting with the fences at the sides, so as to prevent animals from passing.<sup>216</sup> And, where the side fences are not built up to connect with the cattle-

<sup>207</sup> *Selders v. Kansas City & C. R. Co.*, 19 Mo. App. 334; s. c. 1 West. Rep. 435.

<sup>208</sup> This section is cited in § 2052.

<sup>209</sup> *Atchison & C. R. Co. v. Yates*, 21 Kan. 613; s. c. 8 Cent. L. J. 459.

<sup>210</sup> *Missouri & C. R. Co. v. Baxter*, 45 Kan. 520; s. c. 26 Pac. Rep. 49; 45 Am. & Eng. Rail. Cas. 471; *Leavenworth & C. R. Co. v. Forbes*, 37 Kan. 445; s. c. 15 Pac. Rep. 595; *Leebrick v. Republican & C. R. Co.*, 41 Kan. 756; s. c. 21 Pac. Rep. 796; *Missouri & C. R. Co. v. Bradshaw*, 33 Kan. 533; *Missouri & C. R. Co. v. Roads*, 33 Kan. 640 (burden of showing that fact, on company).

<sup>211</sup> This section is cited in § 2054.

<sup>212</sup> *Pittsburgh & C. R. Co. v. Eby*, 55

Ind. 567; *Missouri & C. R. Co. v. Manson*, 31 Kan. 337.

<sup>213</sup> *New Albany & C. R. Co. v. Pace*, 13 Ind. 411.

<sup>214</sup> *Chicago & C. R. Co. v. Bryant*, 29 Ill. App. 17; *Allen v. Burlington & C. R. Co.*, 64 Iowa 94; *Horan v. Taylor & C. R. Co.*, 3 Wills. (Tex. Civ. App.) 515; *Schuyler v. Fitchburg R. Co.*, 47 N. Y. St. Rep. 741; s. c. 20 N. Y. Supp. 287.

<sup>215</sup> *Smead v. Lake Shore & C. R. Co.*, 58 Mich. 200.

<sup>216</sup> *Heskett v. Wabash & C. R. Co.*, 61 Iowa 467; *Louisville & C. R. Co. v. Thomas*, 106 Ind. 10; s. c. 2 West. Rep. 742; *Louisville & C. R. Co. v. Beauchamp* (Ky.), 55 S. W. Rep. 716 (no off. rep.).



guards,<sup>217</sup> or where the latter, without excuse, are set back a considerable distance from the highway, the railway company is liable for injuries to stock entering upon the tracks through the space thus left unfenced.<sup>218</sup> Where, however, it is excused from erecting cattle-guards at a crossing from the necessity of using the track unincumbered, the company must erect them at the nearest point at which such necessity ceases.<sup>219</sup> A railroad bridge over a stream at the side of a highway the top of which consists of ties six inches apart, has been held insufficient as a cattle-guard.<sup>220</sup>

**§ 2083. Company Chargeable with Negligence of the Contractor in Constructing Fence.**—The company does not perform its statutory duty by merely contracting with another person to erect the fence, if the performance itself is insufficient.<sup>221</sup>

**§ 2084. Unless the Plaintiff Himself was the Contractor.**—If such a contract is made with the plaintiff, and he fails in his performance of it, he can not recover, of course, for an injury to his stock resulting from a defect consequent upon such failure. In such a case, he is guilty of contributory negligence. But if he originally erected the fence under such a contract, and it was accepted by the company and paid for, the company can not afterwards plead a defective construction as contributory negligence. By the acceptance they assume responsibility for the defect.<sup>222</sup>

**§ 2085. Company Bound Only to Ordinary Care in the Maintenance of its Fences.**<sup>223</sup>—Railroad companies are bound to exercise only

<sup>217</sup> *Coleman v. Flint & Co. R. Co.*, 64 Mich. 160; s. c. 7 West. Rep. 348; *McCracken v. Chicago & Co. R. Co.*, 91 Iowa 711; s. c. 58 N. W. Rep. 1085.

<sup>218</sup> *Parker v. Lake Shore & Co. R. Co.*, 93 Mich. 607; s. c. 53 N. W. Rep. 834; *Peoria & Co. R. Co. v. Shelley*, 25 Ill. App. 141; *Louisville & Co. R. Co. v. Porter*, 97 Ind. 267; *Fort Wayne & Co. R. Co. v. Herbold*, 99 Ind. 91; *Sarver v. Chicago & Co. R. Co.*, 104 Iowa 59; s. c. 73 N. W. Rep. 498; *Wabash R. Co. v. Crews*, 65 Ill. App. 442. Where, however, the cattle-guards are properly constructed, the mere fact that the bridge over the ditch does not completely cross the highway, does not show negligence on the part of the company: *Whitskey v. Chicago & Co. R. Co.*, 62 Mich. 245.

<sup>219</sup> *Railroad Co. v. Newbrander*, 40 Ohio St. 15.

<sup>220</sup> *Ham v. Newburgh & Co. R. Co.*, 69 Hun (N. Y.) 137; s. c. 52 N. Y. St. Rep. 536; 23 N. Y. Supp. 197. See also *Cincinnati & Co. R. Co. v. Jones*, 111 Ind. 259; s. c. 9 West. Rep. 605.

<sup>221</sup> *Gill v. Atlantic & Co. R. Co.*, 27 Ohio St. 240; *Shepard v. Buffalo & Co. R. Co.*, 35 N. Y. 641; *New Albany & Co. R. Co. v. Maiden*, 12 Ind. 10; *Chicago & Co. R. Co. v. Hutchinson*, 45 Kan. 186. The non-liability of proprietors for the negligence of independent contractors has already been discussed: Vol. I, § 620, *et seq.*

<sup>222</sup> *Norris v. Androscoggin R. Co.*, 39 Me. 274. Compare Vol. I, §§ 687, 688, 1095.

<sup>223</sup> This section is cited in §§ 2050, 2064.



ordinary care and diligence in the reparation of the statutory fences, cattle-guards, etc., the jury being, of course, the judges of whether or not their efforts in that direction were judicious and reasonable, under the circumstances of the case.<sup>224</sup> Says Woodruff, J.: "The statute does not make the company insurers in respect of the fences, but their liability is a question of the neglect of duty; and in case of a casual defect, either notice to the company, lapse of time, or other circumstances from which negligence can be inferred, must be shown."<sup>225</sup> Generally speaking, to render a railway company liable for failure to repair a fence, which was properly constructed in the first instance, it must have, or, under the circumstances, ought to have had knowledge of, and an opportunity to remedy, the defect.<sup>226</sup> Thus, where the fence is suddenly destroyed by fire,<sup>227</sup> prostrated by a storm,<sup>228</sup> or thrown down by malicious persons, the company is liable only when it has notice of the fact and has failed within a reasonable time to make repairs, or where the fence has remained so long in that condition that the want of knowledge amounts to negligence.<sup>229</sup> The com-

<sup>224</sup> *Lemmon v. Chicago &c. R. Co.*, 32 Iowa 151; *Stephenson v. Grand Trunk R. Co.*, 35 Mich. 323; *Henderson v. Chicago &c. R. Co.*, 43 Iowa 620; *Estes v. Atlantic &c. R. Co.*, 63 Me. 309; *Leyden v. New York &c. R. Co.*, 55 Hun (N. Y.) 114; *Accola v. Chicago &c. R. Co.*, 70 Iowa 185.

<sup>225</sup> *Murray v. New York &c. R. Co.*, 3 Abb. App. Dec. (N. Y.) 343. See, to the same effect, *Chicago &c. R. Co. v. Umphenour*, 69 Ill. 198; *Chicago &c. R. Co. v. Barrie*, 55 Ill. 227; *Aylesworth v. Chicago &c. R. Co.*, 30 Iowa 459; *Lemmon v. Chicago &c. R. Co.*, 32 Iowa 151; *Hilliard v. Chicago &c. R. Co.*, 37 Iowa 442; *Davis v. Chicago &c. R. Co.*, 40 Iowa 292; *Norris v. Androscooggin R. Co.*, 39 Me. 274; *McCormick v. Chicago &c. R. Co.*, 41 Iowa 194; *Robinson v. Grand Trunk R. Co.*, 32 Mich. 323; *Stephenson v. Grand Trunk R. Co.*, 35 Mich. 323; *Henderson v. Chicago &c. R. Co.*, 43 Iowa 620; *Wheeler v. Erie R. Co.*, 2 N. Y. S. C. (T. & C.) 635; *Murray v. New York &c. R. Co.*, 4 Keyes (N. Y.) 274; *Brown v. Milwaukee &c. R. Co.*, 21 Wis. 39; *Chicago &c. R. Co. v. Harris*, 54 Ill. 529; *Toledo &c. R. Co. v. Fowler*, 22 Ind. 316; *Munch v. New York &c. R. Co.*, 29 Barb. (N. Y.) 647; *Illinois &c. R. Co. v. Swearingen*, 47 Ill. 206; *Illinois &c. R. Co. v. Arnold*, 47 Ill. 173; *Chicago &c. R. Co. v. Saunders*,

85 Ill. 288; *Illinois &c. R. Co. v. Dickerson*, 27 Ill. 55; *Brady v. Rensselaer &c. R. Co.*, 1 Hun (N. Y.) 378.

<sup>226</sup> *Cleveland &c. R. Co. v. Dugan*, 18 Ind. App. 435; s. c. 48 N. E. Rep. 238; *Brentner v. Chicago &c. R. Co.*, 58 Iowa 625; *Fitterling v. Missouri &c. R. Co.*, 79 Mo. 504; *Heaston v. Wabash &c. R. Co.*, 18 Mo. App. 403; *Foster v. St. Louis &c. R. Co.*, 44 Mo. App. 11; *Hodge v. New York &c. R. Co.*, 27 Hun (N. Y.) 394; *Jebb v. Chicago &c. R. Co.*, 67 Mich. 160; s. c. 34 N. W. Rep. 538; 10 West. Rep. 905. See also *Jacksonville &c. R. Co. v. Prior*, 34 Fla. 271; s. c. 15 South. Rep. 760.

<sup>227</sup> *Toledo &c. R. Co. v. Eder*, 45 Mich. 329.

<sup>228</sup> *Townley v. Missouri &c. R. Co.*, 89 Mo. 31; s. c. 5 West. Rep. 400; *Goddard v. Chicago &c. R. Co.*, 54 Wis. 548; *Graves v. Chicago &c. R. Co.*, 47 Minn. 429.

<sup>229</sup> *Walthers v. Missouri &c. R. Co.*, 78 Mo. 617. As to *negligent ignorance*, see Vol. I, § 8; *Chicago &c. R. Co. v. Barrie*, 55 Ill. 227; *Henderson v. Chicago &c. R. Co.*, 43 Iowa 620; *Toledo &c. R. Co. v. Fowler*, 22 Ind. 316; *Russell v. Hanley*, 20 Iowa 219; *Perry v. Dubuque &c. R. Co.*, 36 Iowa 102; *Toledo &c. R. Co. v. Milligan*, 52 Ind. 505; *Morrison v. Kansas City &c. R. Co.*, 27 Mo. App. 418; *Parks v. Hannibal &c. R. Co.*, 20 Mo.



pany is entitled to a reasonable time after notice of a defect in which to repair;<sup>230</sup> and whether forty-eight,<sup>231</sup> or even twelve hours is reasonable, under the circumstances, is for the determination of the jury.<sup>232</sup> But it must use due diligence to discover the defect. Permitting a fence to become rotten is evidence of negligence.<sup>233</sup> And the fact that a board had fallen from a fence without the company's knowledge does not excuse it from liability, where the defect was attributable to a generally defective condition.<sup>234</sup> That stock have been kept in the adjoining field for some time without escaping through the defective fence, is no excuse for neglect to discover and repair the defect.<sup>235</sup> But where the evidence showed that the plaintiff himself did not discover the defect till a week after the accident, and that his son, when he went through the gate on the morning of the accident, did not notice it, a demurrer to the evidence was sustained.<sup>236</sup>

§ 2086. **What Lapse of Time Charges a Company with Notice of a Defect.**—As to what lapse of time is sufficient to charge the defendant with notice of the defect, it is impossible to state any general rule. It depends upon the nature of the defect and the circumstances of the case.<sup>237</sup> The company is not required to keep a guard along its track, to see a defect in the fence the moment it occurs; still, they must do so within a reasonable time.<sup>238</sup> But a general allegation on the part of the defendant that the fence had been defective only a short time is bad, as too indefinite.<sup>239</sup> The lapse of over two months was considered sufficient in one case,<sup>240</sup> and twenty-four hours insufficient

App. 440; *Davis v. Hannibal & C. R. Co.*, 19 Mo. App. 425; *Harrington v. Chicago & C. R. Co.*, 71 Mo. 384; *Binicker v. Hannibal & C. R. Co.*, 83 Mo. 660.

<sup>230</sup> *Clardy v. St. Louis & C. R. Co.*, 75 Mo. 576; *Busby v. St. Louis & C. R. Co.*, 81 Mo. 43; *Young v. Hannibal & C. R. Co.*, 82 Mo. 427.

<sup>231</sup> *Bell v. Chicago & C. R. Co.*, 64 Iowa 321.

<sup>232</sup> *Crosby v. Detroit & C. R. Co.*, 58 Mich. 458. See also *Wait v. Burlington & C. R. Co.*, 74 Iowa 207.

<sup>233</sup> *Hovorka v. Minneapolis & C. R. Co.*, 34 Minn. 281; *Chicago & C. R. Co. v. Morton*, 55 Ill. App. 144.

<sup>234</sup> *Baltimore & C. R. Co. v. Schultz*, 43 Ohio St. 270; s. c. 1 West. Rep. 70. See also *Gould v. Bangor & C. R. Co.*, 82 Me. 122; s. c. 19 Atl. Rep. 84.

<sup>235</sup> *Baltimore & C. R. Co. v. Schultz*, 43 Ohio St. 270; s. c. 1 West. Rep. 70.

<sup>236</sup> *Laney v. Kansas City & C. R. Co.*, 83 Mo. 466.

<sup>237</sup> *Toledo & C. R. Co. v. Cohen*, 44 Ind. 444; *Cleveland & C. R. Co. v. Brown*, 45 Ind. 91; *Perry v. Dubuque & C. R. Co.*, 36 Iowa 102; *McDowell v. New York & C. R. Co.*, 37 Barb. (N. Y.) 196.

<sup>238</sup> *Chicago & C. R. Co. v. Harris*, 54 Ill. 528; *Harding v. Chicago & C. R. Co.*, 100 Iowa 677; s. c. 69 N. W. Rep. 1019; 6 Am. & Eng. Rail. Cas. (N. S.) 615. Whether an inspection every two days is due diligence, under the circumstances, is for the jury to determine: *Evans v. St. Paul & C. R. Co.*, 30 Minn. 489. See also *Anderson v. Chicago & C. R. Co.*, 93 Iowa 561; s. c. 61 N. W. Rep. 1058; *McGuire v. Ogdensburg & C. R. Co.*, 44 N. Y. St. Rep. 348; s. c. 18 N. Y. Supp. 313.

<sup>239</sup> *Jeffersonville & C. R. Co. v. Nichols*, 30 Ind. 321.

<sup>240</sup> *Galveston & C. R. Co. v. Walter* (Tex. Civ. App.), 25 S. W. Rep. 163; See also *Fritz v. Kansas City & C. R. Co.*, 61 Iowa 323.



in another, to charge the company with notice of a defect.<sup>241</sup> Where a railway company had built a lawful fence across a hollow or branch, but the tension of the wires had drawn the posts up, leaving a space below, and the defect was shown to have existed for more than two weeks, it was held that the jury might infer negligence on the part of the company.<sup>242</sup>

§ 2087. **Company Bound to Use Ordinary Care to Keep Cattle-Guards, Gates, Bars, etc., in Repair.**—Liability for failure to repair at these points is governed by the same principle as at any other part of the statutory fence. The railway company is not liable for damages resulting from defective gates and bars,<sup>243</sup> or cattle-guards,<sup>244</sup> unless it had *notice of the defect*, actual or constructive, and a reasonable opportunity to repair. A railway company is bound to provide sufficient *gates and fastenings at farm crossings* and use ordinary care to detect and remedy defects in them,<sup>245</sup> and not leave them in such a condition that they can be easily opened by a gust of wind or by stock.<sup>246</sup> Where gate fastenings were negligently left in such a condition that a stranger could not fasten the gate, it was held that the railway company was not relieved from liability by the fact that a stranger who found it open the night before the accident, did not shut it.<sup>247</sup> But where the defect did not cause the accident, and the result would have been the same if the gate had been in proper condition, the company will not be liable for the injury.<sup>248</sup> Nor is the company

<sup>241</sup> Cleveland &c. R. Co. v. Dugan, 18 Ind. App. 435; 48 N. E. Rep. 238.

<sup>242</sup> Davis v. Hannibal &c. R. Co., 19 Mo. App. 425; s. c. 1 West. Rep. 722.

<sup>243</sup> Jacksonville &c. R. Co. v. Harris, 33 Fla. 217; s. c. 14 South. Rep. 726; Missouri &c. R. Co. v. Pfrang, 7 Kan. App. 1; s. c. 51 Pac. Rep. 911; Estes v. Atlantic &c. R. Co., 63 Me. 308; Sather v. Chicago &c. R. Co., 40 Minn. 91; s. c. 41 N. W. Rep. 458; Parks v. Hannibal &c. R. Co., 20 Mo. App. 440; s. c. 3 West. Rep. 198; Hungerford v. Syracuse &c. R. Co., 46 Hun (N. Y.) 339; s. c. 12 N. Y. St. Rep. 204; Peoria &c. R. Co. v. Aten, 43 Ill. App. 68; Patten v. Chicago &c. R. Co., 75 Iowa 459; s. c. 39 N. W. Rep. 708 (no duty to remove *drift snow* from fences sufficiently to keep off stock).

<sup>244</sup> Kansas City &c. R. Co. v. Grimes, 50 Kan. 655; s. c. 32 Pac. Rep. 376.

<sup>245</sup> Payne v. Kansas City &c. R. Co., 72 Iowa 214; s. c. 33 N. W. Rep. 633; Morrison v. Kansas City &c. R. Co., 27 Mo. App. 418; Mobile &c. R. Co. v. Tiernan, 102 Tenn. 704; s. c. 52 S. W. Rep. 179. Where a person is permitted, as a mere licensee, to use a private passageway of the company for the passage of his stock, he does so at his own risk: Truax v. Chicago &c. R. Co., 83 Wis. 547. Compare Vol. I, § 945, *et seq.*, ante, §§ 1705, 1719.

<sup>246</sup> Hill v. Missouri &c. R. Co., 66 Mo. App. 184; St. Louis &c. R. Co. v. Kinman, 9 Kan. App. 633; s. c. 53 Pac. Rep. 1037; Chicago &c. R. Co. v. Finch, 42 Ill. App. 90.

<sup>247</sup> Chisholm v. Northern &c. R. Co., 53 Minn. 122; s. c. 54 N. W. Rep. 1061.

<sup>248</sup> Davenport v. Chicago &c. R. Co., 76 Wis. 399; s. c. 45 N. W. Rep. 215.



liable, where the plaintiff has arranged the fastenings to suit his own convenience, and left them in such a condition that the gate might be opened by stock rubbing against it.<sup>249</sup>

§ 2088. **Care Required in Preventing Cattle-Guards from Becoming Filled Up with Ice and Snow.**—Where cattle-guards become filled with ice and snow, the company is bound to use due diligence to keep them open, but is liable for failing to do so only after it has notice, or could have acquired notice, in the exercise of ordinary care, that they were obstructed, and has had a reasonable time within which to clear them.<sup>250</sup> But in Minnesota it is held that, except under extraordinary circumstances, reasonable care does not require a railway company to remove natural accumulations of snow and ice from its cattle-guards,<sup>251</sup>—the reason being that the benefits to be derived would be out of all proportion to the difficulty of performing such a duty. The frequent fall of snow and the necessity of housing cattle in winter, reason the court, reduce the probability of their getting upon the track and dispense with much of the precaution which, at other seasons of the year, would be required to prevent it.

SUBDIVISION 5. *Release of Duty to Build and Maintain Fence by Contract with Land-Owners.*

SECTION

2089. Whether competent for the land-owner to release the obligation of the railway company by contract.

2090. Effect of such releases upon the rights of strangers to them.

2091. Whether such contracts are covenants running with the land.

SECTION

2092. Whether such a release may be implied.

2093. Whether contract by adjoining owner to build and maintain the statutory fence relieves the company from further liability.

<sup>249</sup> Chicago &c. R. Co. v. Dannel, 48 Ill. App. 251.

<sup>250</sup> Indiana &c. R. Co. v. Drum, 21 Ill. App. 331; Chicago &c. R. Co. v. Kennedy, 22 Ill. App. 308; Grahlman v. Chicago &c. R. Co., 78 Iowa 564; s. c. 42 Am. & Eng. Rail. Cas. 488; 43 N. W. Rep. 529; Robinson v. Chicago &c. R. Co., 79 Iowa 496; s. c. 44 N. W. Rep. 718; Giger v. Chicago &c. R. Co., 80 Iowa 492; s. c. 45 N. W. Rep. 906; Wait v. Bennington &c. R. Co., 61 Vt. 268; s. c. 17 Atl. Rep. 284; Dunnigan v. Chicago &c. R. Co., 18 Wis. 28;

Pothast v. Chicago &c. R. Co. (Iowa), 81 N. W. Rep. 693 (where the cattle-guard was clogged with sand); Louisville &c. R. Co. v. Beauchamp (Ky.), 55 S. W. Rep. 716 (where the cattle-guard was overgrown with vegetation); Schuyler v. Fitchburgh &c. R. Co., 47 N. Y. St. Rep. 741; s. c. 20 N. Y. Supp. 287.

<sup>251</sup> Blais v. Minneapolis &c. R. Co., 34 Minn. 570; s. c. 57 Am. Rep. 36; Stacey v. Winona &c. R. Co., 42 Minn. 158; s. c. 43 N. W. Rep. 906; 40 Am. & Eng. Rail. Cas. 217.



## SECTION

2094. Doctrine that expense of fencing is included in assessment of damages for right of way and assumed by land-owner.

2095. Whether grant of right of way makes railway fence a partition fence.

## SECTION

2096. Effect of refusal of land-owner to permit company to erect bars at farm crossings.

2097. Effect of voluntary act of land-owner in building or repairing fences.

§ 2089. **Whether Competent for the Land-Owner to Release the Obligation of the Railway Company by Contract.**—As has been repeatedly decided, the duty imposed upon the company by the statute is a *duty to the public*, and to the adjoining land-owner; hence it seems that it is competent for the latter to release the obligation by contract with the company only so far as his own rights are concerned.<sup>252</sup>

§ 2090. **Effect of Such Releases upon the Rights of Strangers to them.**—In some jurisdictions the effect of such a release is extended to the stock of a stranger trespassing upon the premises of such adjoining land-owner.<sup>253</sup> This, however, is not the rule in New York, where it is held that such a trespasser is a stranger to the covenant, and not bound by it.<sup>254</sup> And the same rule, resting upon virtually the same grounds, obtains in Maine,<sup>255</sup> Missouri,<sup>256</sup> and Iowa.<sup>257</sup>

§ 2091. **Whether Such Contracts are Covenants Running with the Land.**—It has been held that such a contract, *made verbally*, is not a *covenant running with the land*, and will not bind the owner's lessee.<sup>258</sup> We should think not. Such a ruling would subvert the theories of conveyancing, equally with the principles of equity. But if such a contract be a covenant in a deed granting the right of way, it will bind the grantee, lessee, tenant, etc., of the covenantor,<sup>259</sup>

<sup>252</sup> Pittsburgh &c. R. Co. v. Smith, 26 Ohio St. 124; Indianapolis &c. R. Co. v. Petty, 25 Ind. 413; Duffy v. New York &c. R. Co., 2 Hilt. (N. Y.) 496; Easter v. Little Miami &c. R. Co., 14 Ohio St. 48; Cincinnati &c. R. Co. v. Waterson, 4 Ohio St. 424; Tower v. Providence &c. R. Co., 2 R. I. 404; Shepard v. Buffalo &c. R. Co., 35 N. Y. 641; Ellis v. Pacific R. Co., 48 Mo. 231; St. Louis &c. R. Co. v. Washburn, 7 Reporter 142. See also Stoutimore v. Chicago &c. R. Co., 39 Mo. App. 257; Cincinnati &c. R. Co. v. Hildreth, 77 Ind. 504.

<sup>253</sup> Indianapolis &c. R. Co. v. Petty, 25 Ind. 413.

<sup>254</sup> Corwin v. New York &c. R. Co., 13 N. Y. 49; Talmadge v. Rensselaer &c. R. Co., 13 Barb. (N. Y.) 493.

<sup>255</sup> Gilman v. European &c. R. Co., 60 Me. 237.

<sup>256</sup> Berry v. St. Louis &c. R. Co., 65 Mo. 172.

<sup>257</sup> Warren v. Keokuk &c. R. Co., 41 Iowa 485.

<sup>258</sup> St. Louis &c. R. Co. v. Todd, 36 Ill. 409; Boston &c. R. Co. v. Briggs, 132 Mass. 24. See also Wilder v. Maine &c. R. Co., 65 Me. 332.

<sup>259</sup> Duffy v. New York &c. R. Co., 2 Hilt. (N. Y.) 496; Easter v. Little Miami &c. R. Co., 14 Ohio St. 48; Cincinnati &c. R. Co. v. Waterson,



but only in the same way and to the same extent that the covenantor is bound. Thus, a release, by the grantor of abutting premises, of the obligation on the part of the company, as adjoining land-owner, to make a partition or division fence, will not operate against the grantee as a release of the statutory duty, imposed by subsequent law, to fence both sides of its road completely.<sup>260</sup>

**§ 2092. Whether Such a Release may be Implied.**—It seems that a release of the company's obligation to maintain a fence may in some instances be implied. Thus, where a lane, leading from the highway to the plaintiff's residence, crossed the railroad track, and at each end of the lane were gates, which, with the enclosing fences, were maintained by the plaintiff, it was held, in an action by him for killing his cow at the crossing, that the company were justified in assuming that he preferred the open crossing, and that he could not recover.<sup>261</sup> But where a contract provided that the company should make and maintain good and sufficient fences on both sides of the road, but omitted to say anything about gates, farm-crossings, etc., the court held that no release of the statutory duty to make and maintain such fences would be implied from the omission.<sup>262</sup>

**§ 2093. Whether Contract by Adjoining Owner to Build and Maintain the Statutory Fence Relieves the Company from Further Liability.**—It has been held that, because the duty imposed by the statute is a public duty, established by a general police regulation looking to the safety of human life and of property, it is not competent for the company to "divest itself of responsibility by making private contracts with the numerous landholders along its route, by which they separately agree and bind themselves to make and keep up fences."<sup>263</sup> But it has been held that where the land-owner has received in the assessment of damages an agreed compensation for erecting and maintaining,<sup>264</sup> or has, by express agreement, undertaken to erect and maintain the statutory fence,<sup>265</sup> he himself can not recover damages for an injury to his stock, resulting from a failure to fulfill his contract.<sup>266</sup>

4 Ohio St. 424; *Tower v. Providence &c. R. Co.*, 2 R. I. 404; *Indianapolis &c. R. Co. v. Petty*, 25 Ind. 413.

<sup>260</sup> *Shepard v. Buffalo &c. R. Co.*, 35 N. Y. 641.

<sup>261</sup> *Tyson v. Keokuk &c. R. Co.*, 43 Iowa 207. See also *Tombs v. Rochester &c. R. Co.*, 18 Barb. (N. Y.) 583.

<sup>262</sup> *Poler v. New York &c. R. Co.*, 16 N. Y. 476.

<sup>263</sup> *New Albany &c. R. Co. v. Mai-*

*den*, 12 Ind. 10. See also *Baltimore &c. R. Co. v. Johnson*, 59 Ind. 188.

<sup>264</sup> *Terre Haute &c. R. Co. v. Smith*, 16 Ind. 102.

<sup>265</sup> *Ells v. Pacific R. Co.*, 48 Mo. 231; *Neversorry v. Duluth &c. R. Co.*, 115 Mich. 146.

<sup>266</sup> *Ohio Valley R. Co. v. O'Daniel* (Ky.), 15 Ky. L. Rep. 295; *Pittsburgh &c. R. Co. v. Heiskell*, 38 Ohio St. 666; *Rabberman v. Pierce*, 77 Ill. App. 405; *Lake Erie &c. R. Co. v.*



While this contractual obligation relieves the railway company of any liability for damage due to its breach, to the land-owner or to his tenant, who, with knowledge of the contract, keeps up the fence,<sup>267</sup> it does not alter its duty to others. As to them, the land-owner is simply the agent of the company, and the contract can not be set up in an action under the statute brought by any one not a party to it.<sup>268</sup> Recovery has been granted, even where the plaintiff's cattle were trespassing upon the land of an adjoining owner, who had covenanted to erect and maintain the statutory fence, through the defective condition of which the cattle got upon the track and were killed.<sup>269</sup>

**§ 2094. Doctrine that Expense of Fencing is Included in Assessment of Damages for Right of Way and Assumed by Land-Owner.**—In Wisconsin, it has been held that, where damages were assessed and paid to the land-owner through whose premises the railroad passed, it would be presumed that the expense of building and maintaining a fence along the line of road was included in the damages; and if the land-owner's cattle were injured in consequence of defects in the fence, either before or after the passage of the statute requiring the company to fence, there can be no recovery.<sup>270</sup>

**§ 2095. Whether Grant of Right of Way Makes Railway Fence a Partition Fence.**—A grant by the land-owner of a right of way through his premises does not operate to make the fences required by the statute partition fences, and the land-owner is under no obligation to assist in maintaining them.<sup>271</sup>

**§ 2096. Effect of Refusal of Land-Owner to Permit Company to Erect Bars at Farm Crossings.**—In another case it was held that the

Weisel, 55 Ohio St. 155; s. c. 44 N. E. Rep. 923; Terry v. New York & R. Co., 22 Barb. (N. Y.) 575.

<sup>267</sup> St. Louis & C. R. Co. v. Washburn, 97 Ill. 253.

<sup>268</sup> Indianapolis & C. R. Co. v. Thomas, 84 Ind. 194; Brown v. Southern & C. R. Co., 36 Or. 128; s. c. 58 Pac. Rep. 1104; Pittsburgh & C. R. Co. v. Allen, 40 Ohio St. 206.

<sup>269</sup> Neversorry v. Duluth & C. R. Co., 115 Mich. 146; s. c. 73 N. W. Rep. 125; 4 Det. L. N. 808; Pittsburgh & C. R. Co. v. Allen, 40 Ohio St. 206. A different rule has been announced in a case in Kansas, where it was held that the owner of trespassing animals could have no greater rights than the adjoining owner trespassed

upon: Rouse v. Osborne, 3 Kan. App. 139; s. c. 42 Pac. Rep. 843. The same result would probably be reached wherever the statutory fence is regarded as a division fence (see *ante*, § 2047), or wherever the fact that cattle are at large is admitted as a defense in the statutory action: See *ante*, § 2017.

<sup>270</sup> Johnson v. Milwaukee & C. R. Co., 19 Wis. 137. See also Baltimore & C. R. Co. v. Wood, 47 Ohio St. 431; s. c. 24 N. E. Rep. 1077; 24 Ohio L. J. 78; Welles v. Northern & C. R. Co., 150 Pa. St. 620; s. c. 25 Atl. Rep. 51; 31 W. N. C. (Pa.) 93.

<sup>271</sup> Cleveland & C. R. Co. v. Crossley, 36 Ind. 370.



refusal of the land-owner to permit the company to erect bars at his farm crossing, as required by the statute, would operate as a legal excuse for their omission to build the fence, notwithstanding an express agreement for the erection of gates.<sup>272</sup>

§ 2097. **Effect of Voluntary Act of Land-Owner in Building or Repairing Fences.**—The railway company is not excused from the duty of building the statutory fence because the adjoining owner has voluntarily built fences of his own along the right of way.<sup>273</sup> Nor does the mere fact that the adjoining landholder has kept the fence in repair, relieve the company from liability, if they permit it to become defective, and thereby stock are injured.<sup>274</sup> But, where the adjoining owner has voluntarily erected and maintained a fence, which, in all respects, satisfies the statute, the company can not be held liable under the statute.<sup>275</sup>

<sup>272</sup> *Hurd v. Rutland &c. R. Co.*, 25 Vt. 117.

<sup>273</sup> *Louisville &c. R. Co. v. White*, 94 Ind. 257; *Norfolk &c. R. Co. v. McGavock*, 90 Va. 507; s. c. 18 S. E. Rep. 909; *Wabash R. Co. v. Randol*, 69 Ill. App. 432. The fact that the land-owner joins his fence to the

right of way fence imposes no duty on him to keep up the latter: *Busby v. St. Louis &c. R. Co.*, 81 Mo. 43.

<sup>274</sup> *Jeffersonville &c. R. Co. v. Sullivan*, 38 Ind. 262; *Peoria &c. R. Co. v. Babbs*, 23 Ill. App. 454.

<sup>275</sup> *Hovorka v. Minneapolis &c. R. Co.*, 31 Minn. 221.



## CHAPTER LXVI.

DUTY OF RAILWAY COMPANY AS TO RUNNING ITS TRAINS SO AS TO AVOID  
INJURIES TO ANIMALS.

## SECTION

2100. Duty to exercise ordinary care to avoid injuring cattle: extraordinary care to avoid injuring passengers.
2101. Duty as to speed of train—high speed not of itself negligence.
2102. But may become evidence of negligence for the jury.
2103. Prohibited rate of speed is negligence *per se*.
2104. Validity of statutes and ordinances limiting rate of speed.
2105. Duty to ring bell and sound steam whistle at railway crossings.
2106. Duty to keep a lookout for animals on the track.
2107. Duty to give alarm and stop train or slacken speed when cattle are discovered on the track.
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2110. Further of the precautions to be taken upon discovering the animals upon the track.

## SECTION

2111. Precautions prescribed by statutes after discovering the animals on the track.
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2113. Circumstances under which the engineer ought to increase the speed of the train.
2114. Duty as to carrying headlight.
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2119. Facts which have been held evidence of negligence.
2120. Facts which have been held not evidence of negligence.
2121. Facts which were held evidence of "willful negligence."

§ 2100. **Duty to Exercise Ordinary Care to Avoid Injuring Cattle: Extraordinary Care to Avoid Injuring Passengers.**—It is the duty of a railway company to exercise ordinary care to avoid injury to stock on the track. "Not ordinary, but extraordinary, diligence is required



as to *passengers*, and the company is responsible for the utmost care and watchfulness, and answerable for the smallest negligence."<sup>1</sup>

§ 2101. **Duty as to Speed of Train—High Speed not of Itself Negligence.**<sup>2</sup>—To run a railway train at a high rate of speed is not, in itself, negligence.<sup>3</sup> A company may adopt a schedule rate of speed without consideration of the danger to stock, provided the convenience and business of the public demand a rapid transportation, and the condition of the track and the usage of railways generally justify it. Meanwhile, the agents of the company are in no degree to relax their efforts to prevent injury.<sup>4</sup>

§ 2102. **But may Become Evidence of Negligence for the Jury.**—But there are circumstances under which the rate of speed is evidence of negligence.<sup>5</sup> Thus, where a drove of cattle were crossing the track of a railroad on a highway, and some of them were injured by a train which approached the crossing at the rate of twenty-five or thirty miles an hour, it was held that the company was liable for the injury.<sup>6</sup> It is negligence for the employes of a railway company to approach, at a high rate of speed, a point where cattle are in the habit of congregating, and where they have reason to anticipate that they will find some on the track.<sup>7</sup> And where eight head of cattle were struck by a train and scattered for some distance along the track on a clear moonlight night on Sunday, when the track was not patrolled, and just after a severe storm, of which the trainmen had full knowledge,—it was held that there was sufficient evidence to support a finding that the train was running at a negligent rate of speed.<sup>8</sup> While a high rate of speed without ringing a bell or blowing a whistle does not, as matter of law, constitute negligence, yet such acts furnish very competent

<sup>1</sup> Sandham v. Chicago & C. R. Co., 38 Ill. 88. See also Bemis v. Connecticut & C. R. Co., 42 Vt. 375; Louisville & C. R. Co. v. Ballard, 2 Metc. (Ky.) 177; Pierce on Rys., 332; Mexican & C. R. Co. v. Lauricella, 87 Tex. 277; s. c. 28 S. W. Rep. 277.

<sup>2</sup> This section is cited in § 2385.

<sup>3</sup> *Ante*, §§ 1395, 1396, 1397, 1878, *et seq.*

<sup>4</sup> New Orleans & C. R. Co. v. Field, 46 Miss. 574; Burton v. Philadelphia & C. R. Co., 4 Harr. (Del.) 252; Chicago & C. R. Co. v. Patchin, 16 Ill. 198; Central Ohio R. Co. v. Lawrence, 13 Ohio St. 67; Edson v. Central R. Co., 40 Iowa 47; McKonkey v. Chicago & C. R. Co., 40 Iowa 205; Toledo & C. R. Co. v. Barlow, 71 Ill.

640; Morse v. Rutland & C. R. Co., 27 Vt. 49; Potter v. Hannibal & C. R. Co., 18 Mo. App. 694; Wallace v. St. Louis & C. R. Co., 74 Mo. 594; Grand Island & C. R. Co. v. Phipps, 48 Neb. 493; s. c. 67 N. W. Rep. 441; Stern v. Michigan & C. R. Co., 76 Mich. 591; s. c. 43 N. W. Rep. 587; Courson v. Chicago & C. R. Co., 71 Iowa 28; s. c. 32 N. W. Rep. 8.

<sup>5</sup> *Ante*, §§ 1874, 1875, 1876.

<sup>6</sup> Reeves v. Delaware & C. R. Co., 30 Pa. St. 454. See also Louisville & C. R. Co. v. Cochrane, 105 Ala. 354.

<sup>7</sup> Campbell v. Missouri & C. R. Co., 59 Mo. App. 151; s. c. 1 Mo. App. Rep. 3.

<sup>8</sup> Baker v. Chicago & C. R. Co., 73 Iowa 389; s. c. 35 N. W. Rep. 460.



and pertinent evidence of negligence, from which the jury may find the existence of negligence as a fact.<sup>9</sup> A decision of the Supreme Court of Alabama is authority for the doctrine that it is negligence to run a train at night at such a high rate of speed as will prevent the train being stopped within the distance at which the engineer can perceive an obstruction on the track by aid of the "headlight."<sup>10</sup> But, if the intervention of unusual natural causes, such as fog, rain, or snow, prevents the discovery of the obstruction in time to avoid an accident, the railway company will not be liable, provided those in charge of the train were otherwise in the exercise of due care.<sup>11</sup>

§ 2103. **Prohibited Rate of Speed is Negligence per se.**—The running of a railroad train, within city limits, at a *prohibited rate of speed*, constitutes negligence *per se*.<sup>12</sup> A person about to cross the track of a railroad on a street has a right to presume, until the contrary is made apparent, that the company will not run its trains in violation of such an ordinance.<sup>13</sup> Evidence that the defendant's train was running at a prohibited rate of speed within the corporate limits of a town, at the time of the accident, is admissible in an action for injuries to stock, though it is not specially averred in the declaration that the rate of speed at which defendant's train was running was prohibited by city ordinance.<sup>14</sup> But, to render the company liable, it must appear that the injury complained of was the result of the prohibited rate of

<sup>9</sup> *Edson v. Central R. Co.*, 40 Iowa 47; *Indianapolis & C. R. Co. v. Hamilton*, 44 Ind. 76; *Burton v. Philadelphia & C. R. Co.*, 4 Harr. (Del.) 252; *Chicago & C. R. Co. v. Engle*, 84 Ill. 397; *Pacific R. Co. v. Houts*, 12 Kan. 328.

<sup>10</sup> *Memphis & C. R. Co. v. Lyon*, 62 Ala. 71; *Birmingham & C. R. Co. v. Harris*, 98 Ala. 326; s. c. 13 South. Rep. 377; *Louisville & C. R. Co. v. Kelton*, 112 Ala. 533; s. c. 21 South. Rep. 819. Compare *ante*, §§ 1879, 1880.

<sup>11</sup> *Central R. & C. Co. v. Ingram*, 98 Ala. 395; s. c. 12 South. Rep. 801.

<sup>12</sup> *Correll v. Burlington & C. R. Co.*, 38 Iowa 120; *Indianapolis & C. R. Co. v. Peyton*, 76 Ill. 340; *Houston & C. R. Co. v. Terry*, 42 Texas 451; *Monahan v. Keokuk & C. R. Co.*, 45 Iowa 523; *Toledo & C. R. Co. v. Deacon*, 63 Ill. 92; *Chicago & C. R. Co. v. Reidy*, 66 Ill. 45; *Cleveland & C. R. Co. v. Ahrens*, 42 Ill. App. 434; *Goodwin v. Chicago & C. R. Co.*, 75 Mo. 73;

*Backenstoe v. Wabash & C. R. Co.*, 23 Mo. App. 148. See also *Story v. Chicago & C. R. Co.*, 79 Iowa 402; s. c. 44 N. W. Rep. 690.

<sup>13</sup> *Correll v. Burlington & C. R. Co.*, 38 Iowa 120.

<sup>14</sup> *Chicago & C. R. Co. v. Reidy*, 66 Ill. 44; *Chicago & C. R. Co. v. Richardson*, 28 Neb. 118; s. c. 44 N. W. Rep. 103. Before such evidence is admissible on the question of negligence, it should appear that the damage was due to the violation of the statute: *Brusberg v. Milwaukee & C. R. Co.*, 50 Wis. 231; *Bennett v. Missouri & C. R. Co.*, 11 Tex. Civ. App. 423; s. c. 32 S. W. Rep. 834. But it has been held that, where the prohibition is contained in an ordinance, it is inadmissible on the question of negligence under any circumstances: *Southern R. Co. v. Wood (Ky.)*, 52 S. W. Rep. 796. See also *Louisville & C. R. Co. v. Dalton*, 102 Ky. 290; s. c. 43 S. W. Rep. 431.



speed;<sup>15</sup> and, whether it was or not, is a question for the jury.<sup>16</sup> In some States there is a *presumption* that it was, arising from proof of the prohibited rate of speed and the accident, which puts upon the defendant the *burden* of proving that it was not.<sup>17</sup> Such a presumption, however, is rebutted by evidence that the accident happened at a place where the statute did not apply, and that the animal came suddenly on the track so near in front of the locomotive, that, notwithstanding all possible efforts, the train could not be stopped before the animal was struck.<sup>18</sup> It is not a defense to an action under the statute that, at the instant of the accident, the train had been checked up to the required speed, when just previously it had been running at a prohibited rate of speed.<sup>19</sup> Nor is a railway company relieved from liability for violating a statute, limiting the rate of speed in municipalities, because the municipality in which the injury complained of occurred was twelve miles long, contained but ten families including the railroad section gang, and the municipal organization was incomplete and the authorities inactive.<sup>20</sup>

**§ 2104. Validity of Statutes and Ordinances Limiting Rate of Speed.**—But in Alabama it has been held that, the general railroad law having provided how a train shall enter and leave incorporated towns, the municipal authorities have no right to make any regulations in the premises, and that evidence that a train by which stock was injured was running at a rate of speed prohibited by city ordinance is inadmissible.<sup>21</sup>

**§ 2105. Duty to Ring Bell and Sound Steam Whistle at Railway Crossings.**—In many States there are statutes requiring railway companies to ring a bell or sound a whistle on approaching a highway crossing.<sup>22</sup> An omission to comply with such statutes renders a railway company liable for resulting damage to stock injured upon the crossing. To fasten liability upon the company, it must appear, not only that the statute has been violated, but also that the violation was

<sup>15</sup> Louisville &c. R. Co. v. Caster (Miss.), 5 South. Rep. 388; Harlan v. Wabash &c. R. Co., 18 Mo. App. 483; Judd v. Wabash &c. R. Co., 23 Mo. App. 56; s. c. 5 West. Rep. 67.

<sup>16</sup> Jones v. Illinois &c. R. Co., 75 Miss. 970; s. c. 23 South. Rep. 358; 1 Miss. Dec. (No. 19) 168.

<sup>17</sup> Vol. I, § 11; Jones v. Illinois &c. R. Co., 75 Miss. 970; s. c. 23 South. Rep. 358; 1 Miss. Dec. (No. 19) 168; Central &c. R. Co. v. Neidlinger, 110 Ga. 329; s. c. 35 S. E. Rep. 364; Chicago &c. R. Co. v. Smedley, 65 Ill. App. 644; St. Louis &c. R. Co. v.

Morgan, 12 Ill. App. 256; Cleveland &c. R. Co. v. Ahrens, 42 Ill. App. 434.

<sup>18</sup> Central &c. R. Co. v. Neidlinger, 110 Ga. 329; s. c. 35 S. E. Rep. 364. See also Nashville &c. R. Co. v. Hem-bree, 85 Ala. 481; s. c. 5 South. Rep. 173.

<sup>19</sup> Illinois &c. R. Co. v. Jordan, 63 Miss. 458.

<sup>20</sup> Bell v. Kansas City &c. R. Co. (Miss.), 9 South. Rep. 289.

<sup>21</sup> Nashville &c. R. Co. v. Comans, 45 Ala. 437.

<sup>22</sup> *Ante*, § 1554, *et seq.*



the *proximate cause* of the injury complained of,<sup>23</sup> and that the accident happened at a highway crossing. The statute does not apply at other points.<sup>24</sup> Wherever it is shown that the statute has been violated, it raises a "presumption of negligence," in the sense that the railway company is not allowed a discretion in breaking the law, and exonerated whenever the injury was not the natural and probable consequence of its transgression; but a violation of the statute, resulting in an injury, which would not otherwise have happened, establishes its liability.<sup>25</sup> But the term "presumption of negligence" is often used to describe a presumption that the injury was the result of the breach of duty. In some States it is held that proof of the injury and of the omission of the statutory duty raises such a presumption.<sup>26</sup> Under a Missouri statute requiring railway companies to ring a bell "or" sound a whistle on approaching public crossings, it is necessary, in order to recover, to show that *both* signals were omitted.<sup>27</sup> Unlike

<sup>23</sup> Hilliker-Krebs Build. &c. Co. v. Birmingham &c. R. Co., 100 Ala. 424; s. c. 14 South. Rep. 200; St. Louis &c. R. Co. v. Hendricks, 53 Ark. 201; s. c. 13 S. W. Rep. 699; St. Louis &c. R. Co. v. Hurst, 25 Ill. App. 181; Pittsburgh &c. R. Co. v. Shaw, 15 Ind. App. 173; s. c. 43 N. E. Rep. 957; Western &c. R. Co. v. Main, 64 Ga. 649; Holman v. Chicago &c. R. Co., 62 Mo. 562; Goodwin v. Chicago &c. R. Co., 75 Mo. 73; Alexander v. Hannibal &c. R. Co., 76 Mo. 494; Braxton v. Hannibal &c. R. Co., 77 Mo. 455; Smith v. Wabash &c. R. Co., 19 Mo. App. 120; Long v. St. Louis &c. R. Co., 23 Mo. App. 178; Downing v. Missouri &c. R. Co., 70 Mo. App. 657; Kirkpatrick v. Missouri &c. R. Co., 71 Mo. App. 263; Central &c. R. Co. v. Nycum (Tex. Civ. App.), 34 S. W. Rep. 460; Houston &c. R. Co. v. Malone (Tex. Civ. App.), 37 S. W. Rep. 640; Houston &c. R. Co. v. Red Cross Stock Farm, 22 Tex. Civ. App. 114; s. c. 53 S. W. Rep. 834; Toudy v. Norfolk &c. R. Co., 38 W. Va. 694; s. c. 18 S. E. Rep. 896; Illinois &c. R. Co. v. Phelps, 29 Ill. 447; Illinois &c. R. Co. v. Goodwin, 30 Ill. 117; Toledo &c. R. Co. v. Fergusson, 42 Ill. 449; Owens v. Hannibal &c. R. Co., 58 Mo. 387; Missouri &c. R. Co. v. Stevens, 35 Kan. 622; Colorado &c. R. Co. v. Caldwell, 11 Colo. 545; Rockford &c. R. Co. v. Linn, 67 Ill. 109; Chicago &c. R. Co. v. Henderson, 66 Ill. 494; Great Western R. Co. v. Geddis, 33 Ill. 304; Indianapolis &c. R. Co. v. Blackman,

63 Ill. 117; Chicago &c. R. Co. v. McDaniels, 63 Ill. 122; Quincy &c. R. Co. v. Wellhoener, 72 Ill. 60.

<sup>24</sup> Georgia R. &c. Co. v. Partee, 107 Ga. 789; s. c. 33 S. E. Rep. 668; Georgia R. &c. Co. v. Burke, 93 Ga. 319; s. c. 20 S. E. Rep. 318; Lake Shore &c. R. Co. v. Van Auken, 1 Ind. App. 492; s. c. 27 N. E. Rep. 119; Wasson v. McCook, 80 Mo. App. 483; s. c. 2 Mo. App. Rep. 493; Southern &c. R. Co. v. New, 105 Ga. 481; s. c. 30 S. E. Rep. 665; 14 Am. & Eng. Rail. Cas. (N. S.) 19. It has been held, however, that the violation of the statute may be considered by the jury on the question of negligence, where the accident happened beyond the crossing: Western &c. R. Co. v. Jones, 65 Ga. 631.

<sup>25</sup> Kendrick v. Chicago &c. R. Co., 81 Mo. 521; Chicago &c. R. Co. v. Hahley, 26 Ill. App. 351; Illinois &c. R. Co. v. Gillis, 68 Ill. 317.

<sup>26</sup> Western &c. R. Co. v. Steadly, 65 Ga. 263; St. Louis &c. R. Co. v. Morgan, 12 Ill. App. 256; Howenstein v. Pacific R. Co., 55 Mo. 33; Persinger v. Wabash &c. R. Co., 82 Mo. 196. In some States there are statutes providing that the fact of the killing of stock upon the track, when satisfactorily established, raises a presumption of negligence on the part of the company. Such a presumption would seem to include both the others. As to the effect of such a presumption, see *post*, § 2148.

<sup>27</sup> Van Note v. Hannibal &c. R. Co., 70 Mo. 641; Milligan v. Chicago &c.



the fencing statutes, these signal statutes are not construed as imposing an absolute liability, and contributory negligence is admitted as a defense.<sup>28</sup> The gist of the action under these statutes is the omission to give the statutory signals, and the care of the engineer to prevent the injury after he discovers the danger has no bearing on the case.<sup>29</sup> In the absence of a statute, it is a question for the jury, whether the exercise of due care requires a railway company to ring a bell or sound a whistle at a highway crossing.<sup>30</sup>

§ 2106. Duty to Keep a Lookout for Animals on the Track.<sup>31</sup>—

A railway company is bound to keep a reasonable lookout, upon approaching public or private crossings, to discover stock which may be upon the track in the rightful use of such crossings, and is liable for injuries done to such stock when, by the exercise of ordinary care, they could have been discovered in time to avoid the accident.<sup>32</sup> So, also, where it is lawful for cattle to run at large, and railway companies are not required to fence their tracks, they are under a duty to exercise ordinary care and watchfulness to discover cattle upon the track.<sup>33</sup> But where it is unlawful for cattle to run at large, the railway company is not bound to anticipate that they will trespass on its right of way; it is under no duty to be on the watch for trespassing animals

R. Co., 79 Mo. App. 393; s. c. 2 Mo. App. Rep. 459; *Halferty v. Wabash &c. R. Co.*, 82 Mo. 90; *Cathcart v. Hannibal &c. R. Co.*, 19 Mo. App. 113.

<sup>28</sup> *Chicago &c. R. Co. v. Fenn*, 3 Ind. App. 250; 29 N. E. Rep. 790. See also *ante*, § 2069. That contributory negligence is generally a defense to statutory negligence,—see *ante*, § 1606.

<sup>29</sup> *Milligan v. Chicago &c. R. Co.*, 79 Mo. App. 393; s. c. 2 Mo. App. Rep. 459.

<sup>30</sup> *Indianapolis &c. R. Co. v. Hamilton*, 44 Ind. 76; *Flattes v. Chicago &c. R. Co.*, 35 Iowa 191; *Plaster v. Illinois &c. R. Co.*, 35 Iowa 449. See also *Jackson v. Chicago &c. R. Co.*, 36 Iowa 451; *Edson v. Central R. Co.*, 40 Iowa 47; *Gates v. Burlington &c. R. Co.*, 39 Iowa 45.

<sup>31</sup> This section is cited in §§ 2014, 2109, 2111.

<sup>32</sup> *Wasson v. McCook*, 70 Mo. App. 393; *Chicago &c. R. Co. v. Nash*, 1 Ind. App. 298; s. c. 24 N. E. Rep. 884; *Buster v. Hannibal &c. R. Co.*, 18 Mo. App. 578; *Hill v. Missouri &c. R. Co.*, 49 Mo. App. 520; *Bishop v.*

*Chicago &c. R. Co.*, 4 N. Dak. 536; s. c. 62 N. W. Rep. 605; *Brooks v. Hannibal &c. R. Co.*, 35 Mo. App. 571; *Chicago &c. R. Co. v. Kellam*, 92 Ill. 245; *Atchison &c. R. Co. v. Conlon*, 60 Kan. 859; s. c. 57 Pac. Rep. 1063; *Whittier v. Chicago &c. R. Co.*, 26 Minn. 484; *Missouri &c. R. Co. v. Farrington* (Indian Terr.), 43 S. W. Rep. 946; *Kansas City &c. R. Co. v. Deaton* (Miss.), 9 South. Rep. 828; *Kent v. Louisville &c. R. Co.*, 67 Miss. 608; s. c. 7 South. Rep. 391; *Alabama &c. R. Co. v. Boyd*, 124 Ala. 525; s. c. 27 South. Rep. 408.

<sup>33</sup> *Gulf &c. R. Co. v. Washington*, 49 Fed. Rep. 347; s. c. 4 U. S. App. 121; 1 C. C. A. 286; *Gulf &c. R. Co. v. Ellidge*, 49 Fed. Rep. 356; s. c. 4 U. S. App. 136; 1 C. C. A. 295; *Gulf &c. R. Co. v. Johnson*, 54 Fed. Rep. 474; s. c. 10 U. S. App. 629; *Gulf &c. R. Co. v. Ellis*, 54 Fed. Rep. 481; s. c. 10 U. S. App. 640; *Wilson v. Norfolk &c. R. Co.*, 90 N. C. 69; *Flannery v. Kansas City &c. R. Co.*, 23 Mo. App. 120; s. c. 4 West. Rep. 469; *Washington v. Baltimore &c. R. Co.*, 17 W. Va. 190.



any more than for trespassing men;<sup>34</sup> and it is hence liable only for failing to use ordinary care to avoid injuring them *after they are actually discovered*.<sup>35</sup> The same rule applies where fences along the right of way have been properly built and maintained pursuant to statutory requirements. The company has a right to presume that its track is clear at such places.<sup>36</sup> In some States, however, there are statutes requiring the employés of a railway company in charge of a train to keep a diligent watch for cattle upon the track. Under such statutes, it is the duty of an engineer to maintain a steady lookout upon the track as far as is consistent with his other duties.<sup>37</sup> The company is liable for injuries to stock, which the engineer, in the proper exercise of this duty, could have discovered in time to avoid an accident;<sup>38</sup> and it is immaterial, that, at the time he actually did discover them, it was impossible to avoid the accident.<sup>39</sup> The company is

<sup>34</sup> Vol. I, § 955; *ante*, § 1706.

<sup>35</sup> *Harrison v. Chicago & C. R. Co.*, 6 S. Dak. 100; s. c. 60 N. W. Rep. 405; rehearing denied in s. c. 62 N. W. Rep. 376; *Memphis & C. R. Co. v. Kerr*, 52 Ark. 162; s. c. 5 L. R. A. 429; 12 S. W. Rep. 329; 46 Am. & Eng. Rail. Cas. 171; *Jones v. Chicago & C. R. Co.*, 77 Wis. 585; s. c. 46 N. W. Rep. 884; *Moore v. Northern & C. R. Co.*, 69 Minn. 90; s. c. 71 N. W. Rep. 905; *Illinois & C. R. Co. v. Noble*, 142 Ill. 578; s. c. 32 N. E. Rep. 684; *rev'd* s. c. 42 Ill. App. 509; *Palmer v. Northern & C. R. Co.*, 37 Minn. 223; s. c. 33 N. W. Rep. 707; 5 Am. St. Rep. 839 (where the animal was wrongfully on the highway at the highway crossing); *Suckling v. Illinois & C. R. Co.*, 10 S. Dak. 560; *International & C. R. Co. v. Dunham*, 68 Tex. 231 (stock law in force). That a railroad company is under no obligation to keep a lookout for trespassing human beings, even children,—see *ante*, §§ 1706, 1805, 1808.

<sup>36</sup> *Mears v. Chicago & C. R. Co.*, 103 Iowa 203; s. c. 72 N. W. Rep. 509; *Hill v. Missouri & C. R. Co.*, 66 Mo. App. 184; *Dennis v. Louisville & C. R. Co.*, 116 Ind. 42; s. c. 1 L. R. A. 448; 18 N. E. Rep. 179; 15 West. Rep. 547; *San Antonio & C. R. Co. v. Robinson*, 17 Tex. Civ. App. 400. See also *Home Constr. Co. v. Church*, 14 Ky. L. Rep. 807 (where the fence was maintained by the adjoining owner under agreement with the railway company). The existence of a defect in the fence does not make

necessary a greater degree of care to avoid striking animals than the company would be held to in any event: *Stacey v. Winona & C. R. Co.*, 42 Minn. 158; *Illinois & C. R. Co. v. Walker*, 63 Miss. 13; *Magee v. Northern P. R. Co.*, 78 Cal. 430; s. c. 21 Pac. Rep. 114.

<sup>37</sup> *Western R. Co. v. Lazarus*, 88 Ala. 453; s. c. 6 South. Rep. 877; *East Tennessee & C. R. Co. v. Baker*, 94 Ala. 632; s. c. 10 South. Rep. 211; *East Tennessee & C. R. Co. v. Bayliss*, 77 Ala. 429; *Kansas City & C. R. Co. v. Watson*, 91 Ala. 483; *St. Louis & C. R. Co. v. Russell*, 62 Ark. 182. The fact that for a short time neither the engineer nor the fireman, while necessarily engaged in the performance of other duties, kept a lookout on the track, will not render the company liable: *Rogers v. Georgia R. Co.*, 100 Ga. 699; s. c. 28 S. E. Rep. 457; 62 Am. St. Rep. 351; *Howard v. Louisville & C. R. Co.*, 67 Miss. 247; *St. Louis & C. R. Co. v. Russell*, 62 Ark. 182; s. c. 34 S. W. Rep. 1059.

<sup>38</sup> *Louisville & C. R. Co. v. Rice*, 101 Ala. 676; s. c. 14 South. Rep. 639; *Louisville & C. R. Co. v. Posey*, 96 Ala. 262; s. c. 11 South. Rep. 423; *Central R. & C. Co. v. Lee*, 96 Ala. 444; s. c. 11 South. Rep. 424; *Kansas City & C. R. Co. v. Watson*, 91 Ala. 483; s. c. 8 South. Rep. 793.

<sup>39</sup> *East Tennessee & C. R. Co. v. Watson*, 90 Ala. 41; s. c. 7 South. Rep. 813; *Alabama & C. R. Co. v. Moody*, 92 Ala. 279; s. c. 9 South. Rep. 238.



not liable, however, where natural causes, such as imperfect light, fog,<sup>40</sup> or the gathering of frost upon the window pane of the engineer's cab, prevent the timely discovery of cattle upon the track.<sup>41</sup> Of course, to establish any liability whatever, it must appear that the failure to comply with the statute was the *cause* of the injury complained of,<sup>42</sup> and whether it was or not, is a question for the determination of the jury.<sup>43</sup> A statute of this kind, requiring a constant lookout for cattle "upon the track," has been construed to include cattle approaching and so near as to be within the range of vision while looking along the track.<sup>44</sup>

§ 2107. **Duty to Give Alarm and Stop Train or Slacken Speed when Cattle are Discovered on the Track.**<sup>45</sup>—Whatever may be the railway company's duty with regard to keeping a lookout, *after cattle have been actually discovered upon the track* it is bound to use ordinary care to avoid injuring them,<sup>46</sup> even though they may be trespassers,<sup>47</sup>

<sup>40</sup> St. Louis &c. R. Co. v. Vincent, 36 Ark. 451; Georgia R. &c. Co. v. Wall, 80 Ga. 202; s. c. 7 S. E. Rep. 639; Kansas City &c. R. Co. v. King, 66 Ark. 439; s. c. 51 S. W. Rep. 319.

<sup>41</sup> Alabama &c. R. Co. v. McAlpine, 75 Ala. 113. See also East Tennessee &c. R. Co. v. Bayliss, 75 Ala. 466.

<sup>42</sup> Kansas City &c. R. Co. v. Watson, 91 Ala. 483; s. c. 8 South. Rep. 793; Vol. I, § 43, *et seq.*

<sup>43</sup> Kansas City &c. R. Co. v. Watson, 91 Ala. 483; s. c. 8 South. Rep. 793.

<sup>44</sup> St. Louis &c. R. Co. v. Russell, 64 Ark. 236; s. c. 41 S. W. Rep. 807.

<sup>45</sup> This section is cited in § 2014.

<sup>46</sup> Lake Erie &c. R. Co. v. Norris, 60 Ill. App. 112; Chicago &c. R. Co. v. Smedley, 65 Ill. App. 644; Chicago &c. R. Co. v. Patterson, 72 Ill. App. 428; Lawson v. Chicago &c. R. Co., 57 Iowa 672; Lane v. Kansas City &c. R. Co., 31 Kan. 525; Wallace v. St. Louis &c. R. Co., 74 Mo. 594; Beatyville &c. R. Co. v. Maloney, 20 Ky. L. Rep. 1541; s. c. 49 S. W. Rep. 445; 14 Am. & Eng. Rail. Cas. (N. S.) 29; Davis v. Wabash &c. R. Co., 46 Mo. App. 477; Castor v. Kansas City &c. R. Co., 65 Mo. App. 359; s. c. 2 Mo. App. Rep. 1193; Jewett v. Kansas City &c. R. Co., 50 Mo. App. 547; Lake Erie &c. R. Co. v. Weisel, 55 Ohio St. 155; s. c. 44 N. E. Rep. 923; 36 Ohio L. J. 220; International &c. R. Co. v. Cocke, 64

Tex. 151; Missouri &c. R. Co. v. Meithvein (Tex. Civ. App.), 33 S. W. Rep. 1093; Woodland v. Union &c. R. Co. (Utah), 26 Pac. Rep. 298; Kirk v. Norfolk &c. R. Co., 41 W. Va. 722; s. c. 32 L. R. A. 416; 24 S. E. Rep. 639; 4 Am. & Eng. Rail. Cas. (N. S.) 105; Lapine v. New Orleans &c. R. Co., 20 La. An. 158; Aycock v. Wilmington &c. R. Co., 6 Jones L. (N. C.) 232; Jones v. North Carolina R. Co., 70 N. C. 626; Bemis v. Connecticut &c. R. Co., 42 Vt. 375; Searles v. Milwaukee &c. R. Co., 35 Iowa 490; Savannah &c. R. Co. v. Geiger, 21 Fla. 669; Cleveland &c. R. Co. v. Rice, 48 Ill. App. 51; Gilman &c. R. Co. v. Spencer, 76 Ill. 192; Missouri P. R. Co. v. Wilson, 28 Kan. 637; Heard v. Chesapeake &c. R. Co., 26 W. Va. 455; Molair v. Port Royal &c. R. Co., 29 S. C. 152; s. c. 7 S. E. Rep. 60; Mooers v. Northern &c. R. Co., 69 Minn. 90; Overton v. Indiana &c. R. Co., 1 Ind. App. 436; s. c. 27 N. E. Rep. 651; Kansas City &c. R. Co. v. Cantrell, 70 Miss. 329; s. c. 10 South. Rep. 580; Brinkley v. Wilmington &c. R. Co., 126 N. C. 88; s. c. 35 S. E. Rep. 238; Louisville &c. R. Co. v. Hall, 110 Ga. 49; s. c. 35 S. E. Rep. 159; Chicago &c. R. Co. v. Bunker, 81 Ill. App. 616; Gilchrist v. Reg., 2 Can. Exch. 300.

<sup>47</sup> Memphis &c. R. Co. v. Kerr, 52 Ark. 162; s. c. 5 L. R. A. 429; 12 S. W. Rep. 329; Denver &c. R. Co. v. Nye, 9 Colo. App. 94; s. c. 47 Pac. Rep. 654; Chicago &c. R. Co. v. Hill, 24 Ill. App. 619; Delta Electric Co.



or at large in violation of a statute,<sup>48</sup> and regardless of the condition of statutory fences or gates.<sup>49</sup>

§ 2108. **Duty on Discovering them Approaching the Track.**—This duty extends, not only to cattle upon the track, but also to cattle seen *approaching the track* with the evident purpose of crossing it.<sup>50</sup> Mere proximity to the track, however, does not require the company to take any measures to prevent an accident, if the circumstances do not indicate that they will attempt to go upon the track,<sup>51</sup> unless they are so near to it that a collision is naturally to be expected.<sup>52</sup> But it is the duty of an engineer, when he discovers cattle near the track, to keep a reasonably close watch of them to see whether they are likely to attempt to cross.<sup>53</sup>

§ 2109. **When Company not Liable for Injuring Animals after Discovering them on the Track.**—On the other hand, a railway company

v. Whitcamp, 58 Ill. App. 141; Pierce v. Wright, 73 Ill. App. 512; Hoffman v. Missouri &c. R. Co., 24 Mo. App. 546; Brooks v. Hannibal &c. R. Co., 27 Mo. App. 573; Jewett v. Kansas City &c. R. Co., 38 Mo. App. 48; Igo v. Chicago &c. R. Co., 38 Mo. App. 377; St. Louis &c. R. Co. v. Hanks, 78 Tex. 300; s. c. 11 L. R. A. 383; 14 S. W. Rep. 691; 45 Am. & Eng. Rail. Cas. 251; Texas &c. R. Co. v. Smith (Tex. Civ. App.), 41 S. W. Rep. 83; St. Louis &c. R. Co. v. Stapp, 53 Ill. App. 600; Mills &c. Lumber Co. v. Chicago &c. R. Co., 94 Wis. 336; Chicago &c. R. Co. v. Barrie, 55 Ill. 227; Rockford &c. R. Co. v. Linn, 67 Ill. 110; Illinois &c. R. Co. v. Wren, 43 Ill. 78; Rockford &c. R. Co. v. Rafferty, 73 Ill. 58.

<sup>48</sup> Roberts v. Mobile &c. R. Co., 74 Miss. 334; s. c. 21 South. Rep. 10; 7 Am. & Eng. Rail. Cas. (N. S.) 93; Galveston &c. R. Co. v. Balkam (Tex. Civ. App.), 20 S. W. Rep. 860.

<sup>49</sup> Baker v. Chicago &c. R. Co., 73 Iowa 389; s. c. 35 N. W. Rep. 460; Louisville &c. R. Co. v. Simmons, 85 Ky. 151; s. c. 3 S. W. Rep. 10. That contributory negligence is not a defense under such circumstances, —see *ante*, § 1997.

<sup>50</sup> Kean v. Chenault, 19 Ky. L. Rep. 448; s. c. 41 S. W. Rep. 24; Wabash R. Co. v. Aarvig, 66 Ill. App. 146; Illinois &c. R. Co. v. Person, 65 Miss. 319; s. c. 3 South. Rep. 375; Kendig

v. Chicago &c. R. Co., 79 Mo. 207; Bunnell v. Rio Grande &c. R. Co., 13 Utah 314; s. c. 44 Pac. Rep. 927; Missouri &c. R. Co. v. Gedney, 44 Kan. 329; s. c. 24 Pac. Rep. 464. See also Young v. Hannibal &c. R. Co., 79 Mo. 336. Compare, as to human beings, *ante*, § 1734, *et seq.*

<sup>51</sup> Yazoo &c. R. Co. v. Whittington, 74 Miss. 410; s. c. 21 South. Rep. 249; New Orleans &c. R. Co. v. Bourgeois, 66 Miss. 3; s. c. 5 South. Rep. 629; Yazoo &c. R. Co. v. Brumfield, 64 Miss. 637; New Orleans &c. R. Co. v. Thornton, 65 Miss. 256; Grant v. Hannibal &c. R. Co., 25 Mo. App. 227; Savannah &c. R. Co. v. Rice, 23 Fla. 575; s. c. 3 South. Rep. 170; Bunnell v. Rio Grande &c. R. Co., 13 Utah 314; s. c. 44 Pac. Rep. 927; Cincinnati &c. R. Co. v. Bagby, 16 Ky. L. Rep. 533; s. c. 29 S. W. Rep. 320; Wasson v. McCook, 2 Mo. App. Rep. 736; Louisville &c. R. Co. v. Bowen, 18 Ky. L. Rep. 1099; s. c. 39 S. W. Rep. 31.

<sup>52</sup> St. Louis &c. R. Co. v. Russell, 39 Ill. App. 443; Snowden v. Norfolk &c. R. Co., 95 N. C. 93; Elmsley v. Georgia &c. R. Co. (Miss.), 10 South. Rep. 41; Chattanooga &c. R. Co. v. Wilson, 124 Ala. 444; s. c. 27 South. Rep. 486; Alabama &c. R. Co. v. Powers, 73 Ala. 244; Edison v. Central R. Co., 40 Iowa 47.

<sup>53</sup> Missouri &c. R. Co. v. Reynolds, 31 Kan. 132. See also Louisville &c. R. Co. v. Rice, 101 Ala. 676.



is not liable for injuring animals on its track, if, after discovering them, it was impossible, by the use of due diligence, to avoid an accident;<sup>54</sup> or if due diligence was used to avoid it, but without avail,<sup>55</sup>—provided it was guilty of no breach of duty in failing to discover them sooner.<sup>56</sup> What constitutes due diligence, depends, as in other relations, upon the circumstances of each case. When an engineer sees frightened stock on the track running towards a bridge, it is his duty to bring his train under control, and stop it, if necessary to avoid running them down or forcing them onto the trestle-work of the bridge;<sup>57</sup> but if, in spite of such precaution, they persist in going on the bridge and are injured, the company will not be liable.<sup>58</sup>

**§ 2110. Further of the Precautions to be Taken upon Discovering the Animals upon the Track.**—It is not sufficient to sound an alarm whistle without any effort to check the speed of the train,<sup>59</sup> unless there is good reason to believe that the mere blowing of the whistle will avert the danger.<sup>60</sup> But, if it seems necessary, the train must be

<sup>54</sup> *Yazoo & C. R. Co. v. Smith*, 68 Miss. 359; s. c. 8 South. Rep. 508; *Mobile & C. R. Co. v. Weems*, 74 Miss. 513; s. c. 21 South. Rep. 306; *Illinois & C. R. Co. v. Greaves*, 75 Miss. 360; s. c. 22 South. Rep. 804; 1 Miss. Dec. (No. 6) 4; *Sloop v. St. Louis & C. R. Co.*, 22 Mo. App. 593; s. c. 4 West. Rep. 906; *Judd v. Wabash R. Co.*, 23 Mo. App. 56; *Perse v. Atchison & C. R. Co.*, 51 Mo. App. 171; *Missouri & C. R. Co. v. Willis*, 17 Tex. Civ. App. 228; s. c. 42 S. W. Rep. 371; *Missouri & C. R. Co. v. Palmer* (Tex. Civ. App.), 27 S. W. Rep. 889; *Lovejoy v. Chesapeake & C. R. Co.*, 41 W. Va. 693; s. c. 24 S. E. Rep. 599; *Hyer v. Chamberlain*, 46 Fed. Rep. 341; *Wasson v. McCook*, 2 Mo. App. Rep. 736; *St. Louis & C. R. Co. v. Zackery* (Ind. Terr.), 53 S. W. Rep. 327; *Seawell v. Raleigh & C. R. Co.*, 106 N. C. 272.

<sup>55</sup> *Little Rock & C. R. Co. v. Holland*, 40 Ark. 336; *Little Rock & C. R. Co. v. Turner*, 41 Ark. 161; *Gray v. Fremont & C. R. Co.*, 5 Dak. 514; s. c. 41 N. W. Rep. 757; *Western & C. R. Co. v. Trimmer*, 84 Ga. 112; s. c. 10 S. E. Rep. 503; *Gay v. Wadley*, 86 Ga. 103; s. c. 12 S. E. Rep. 298; *Kansas & C. R. Co. v. Lane*, 33 Kan. 702; *Yazoo & C. R. Co. v. Brumfield*, 64 Miss. 637; s. c. 1 South. Rep. 905; *Georgia & C. R. Co. v. Money* (Miss.), 8 South. Rep. 646; *Kansas City & C. R. Co. v. Meyers*

(Miss.), 7 South. Rep. 321; *Louisville & C. R. Co. v. Smith*, 67 Miss. 15; s. c. 7 South. Rep. 212; *Jewett v. Kansas City & C. R. Co.*, 50 Mo. App. 547; *Warren v. Chicago & C. R. Co.*, 59 Mo. App. 367; s. c. 1 Mo. App. Rep. 37; *St. Louis & C. R. Co. v. Felton* (Tex. Civ. App.), 14 S. W. Rep. 1072.

<sup>56</sup> As to what constitutes such duty, see *ante*, § 2106.

<sup>57</sup> *Atchison & C. R. Co. v. Bartlett*, 2 Kan. App. 167; s. c. 43 Pac. Rep. 284; *Newman v. Vicksburg & C. R. Co.*, 64 Miss. 115.

<sup>58</sup> *Pittsburgh & C. R. Co. v. Stuart*, 71 Ind. 500; *Barnhart v. Chicago & C. R. Co.*, 97 Iowa 654; s. c. 66 N. W. Rep. 902.

<sup>59</sup> *Shuman v. Indianapolis & C. R. Co.*, 11 Ill. App. 472; *Quinn v. Southern R. Co.* (Miss.), 21 South. Rep. 6; *Bullington v. Newport News & C. Co.*, 32 W. Va. 436; s. c. 9 S. E. Rep. 876; *Bedford v. Louisville & C. R. Co.*, 65 Miss. 385; s. c. 4 South. Rep. 121; *Pontiac & C. R. Co. v. Brady*, *Montreal L. Rep.* 4 Q. B. 346. See also *Brinkley v. Wilmington & C. R. Co.*, 126 N. C. 88; s. c. 35 S. E. Rep. 238.

<sup>60</sup> *Little Rock & C. R. Co. v. Trotter*, 37 Ark. 593; *Ohio & C. R. Co. v. Stribling*, 38 Ill. App. 17. It has been held that a railway company is not, as matter of law, free from negligence in failing to give signals



*stopped or its speed slackened.*<sup>61</sup> There is no presumption that an animal will leave the track in time to avoid injury, as in the case of adult persons,<sup>62</sup> but the circumstances may be such as to justify the engineer in believing that it will do so.<sup>63</sup>

§ 2111. **Precautions Prescribed by Statutes after Discovering the Animals on the Track.**—In some States there are statutes requiring the employés of a railway company in charge of its trains, on discovering an obstruction on the track, to use all possible means to stop the train and avoid an accident. Such a statute has been construed as not requiring the same degree of diligence, where stock are discovered in dangerous proximity to the track, as where they are actually upon it;<sup>64</sup> and the negligence of the railway company, in omitting to comply with the statutory requirements under such circumstances, is a *question for the jury*.<sup>65</sup> The railway company is not

to scare animals from the track, when they are discovered for the first time at a distance of only one hundred or one hundred and fifty feet ahead: *Houston &c. R. Co. v. Dyer* (Tex. Civ. App.), 38 S. W. Rep. 218 (no off. rep.).

<sup>61</sup> *Berkley v. Chicago &c. R. Co.* (Mo. App.), 3 West. Rep. 765. It has been held that, where cattle are on a straight track at a distance of two hundred and fifty rods ahead, with nothing to obstruct the view, and run some distance ahead of the train before being struck, the company is *prima facie* guilty of negligence in not stopping the train: *Timm v. Northern R. Co.*, 3 Wash. Terr. 299; s. c. 13 Pac. Rep. 415. See also *Blankenship v. Kanawha &c. R. Co.*, 43 W. Va. 135; s. c. 27 S. E. Rep. 355.

<sup>62</sup> *Dennis v. Louisville &c. R. Co.*, 116 Ind. 42; s. c. 1 L. R. A. 448; 18 N. E. Rep. 179; 15 West. Rep. 547; *Grimmel v. Chicago &c. R. Co.*, 73 Iowa 93; s. c. 34 N. W. Rep. 758; *Fisher v. Pennsylvania R. Co.*, 126 Pa. St. 293; s. c. 17 Atl. Rep. 607. See also *Potter &c. Co. v. New York &c. R. Co.*, 22 Misc. (N. Y.) 10; s. c. 48 N. Y. Supp. 446.

<sup>63</sup> *Hot Springs R. Co. v. Newman*, 36 Ark. 607; *Lynch v. Northern &c. R. Co.*, 84 Wis. 348; s. c. 54 N. W. Rep. 610. It has been held that, where an engineer, seeing a boy on horse-back facing him on the track at a highway crossing, and supposing that they will get off before

he reaches them, neither whistles nor attempts to stop the train, the railway company is not liable for killing the horse, which the boy was unable to drive away and was compelled to abandon: *Wabash &c. R. Co. v. Krough*, 13 Ill. App. 431. The company was relieved of liability, also, in a case where an engineer, perceiving that another employé was attempting to drive a number of animals from the track, and relying on his probable success, failed to check the speed of his train and killed one of them: *Magilton v. New York &c. R. Co.*, 82 Hun (N. Y.) 308; s. c. 63 N. Y. St. Rep. 571; 31 N. Y. Supp. 241. In another case, where a cow, which had been frightened from the track by the whistle, ran along a fence parallel with the railroad and was killed while trying to cross over to the other side, the negligence of the railway company in not slackening the speed of its train after the cow was driven from the track was held to be a *question for the jury*: *Mobile &c. R. Co. v. Holt*, 62 Miss. 170.

<sup>64</sup> *Western R. Co. v. Lazarus*, 88 Ala. 453; s. c. 6 South. Rep. 877; *Alabama &c. R. Co. v. Chapman*, 80 Ala. 615.

<sup>65</sup> *Louisville &c. R. Co. v. Reidmond*, 11 Lea (Tenn.) 205; *East Tennessee &c. R. Co. v. Watson*, 90 Ala. 41; s. c. 7 South. Rep. 813. It has been held that *dogs* are within the protection of such a statute: *Fink v. Evans*, 95 Tenn. 413.



liable under these statutes if, after the danger was discovered, the employes used all means in their power to avoid the accident;<sup>66</sup> or if, at the time of its discovery, it was impossible to avoid it;<sup>67</sup> provided there was no breach of duty in failing to discover it sooner.<sup>68</sup> Some courts, however, seem to allow the engineer a *discretion* in judging of the possibility or impossibility of avoiding an accident, and hold the company liable for a failure to comply with the statute only when he has not used reasonable care in his judgment;<sup>69</sup> while other courts refuse to permit any speculation on the subject whatever, and hold that, where an employé has failed to use all means in his power to prevent an accident, the statute has been violated, whether he had good reason to believe it useless or not, and that the company is liable, if such violation was the cause of the injury complained of.<sup>70</sup>

**§ 2112. No Duty to Stop or Slacken Speed where it will Endanger the Public.**—It should, however, be remembered that the first duty of a common carrier of passengers and freight is to the public, whose lives and property it has in charge, and that it is under no obligation to disarrange its time-table, and thus endanger both, in order to stop the train or slacken the speed and drive cattle off the track.<sup>71</sup>

**§ 2113. Circumstances under which the Engineer ought to Increase the Speed of the Train.**—The doctrine has been carried further than

<sup>66</sup> *Mobile &c. R. Co. v. Caldwell*, 83 Ala. 196; s. c. 3 South. Rep. 445; *Fink v. Evans*, 95 Tenn. 413; s. c. 32 S. W. Rep. 307; *St. Louis &c. R. Co. v. Landers*, 67 Ark. 514; s. c. 55 S. W. Rep. 940. See also *St. Louis &c. R. Co. v. Vincent*, 36 Ark. 451; *Savannah &c. R. Co. v. Wideman*, 99 Ga. 245.

<sup>67</sup> *Alabama &c. R. Co. v. Moody*, 90 Ala. 46; s. c. 8 South. Rep. 57; 45 Am. & Eng. Rail. Cas. 524; *Moye v. Wrightsville &c. R. Co.*, 83 Ga. 669; s. c. 10 S. E. Rep. 441; *South Carolina &c. R. Co. v. Powell*, 108 Ga. 437; s. c. 33 S. E. Rep. 994.

<sup>68</sup> *Savannah &c. R. Co. v. Jarvis*, 95 Ala. 149; s. c. 10 South. Rep. 323. See also *ante*, § 2106.

<sup>69</sup> *Alabama &c. R. Co. v. Chapman*, 80 Ala. 615; *Alabama &c. R. Co. v. Moody*, 92 Ala. 279; s. c. 9 South. Rep. 238; *Nashville &c. R. Co. v. Hembree*, 85 Ala. 481; s. c. 5 South. Rep. 173; *Alabama &c. R. Co. v. Smith*, 85 Ala. 208; s. c. 3 South. Rep. 795.

<sup>70</sup> *Mobile &c. R. Co. v. Thompson*, 101 Tenn. 197; s. c. 47 S. W. Rep. 151; *Memphis &c. R. Co. v. Scott*, 87 Tenn. 494; s. c. 11 S. W. Rep. 317; *Hill v. Louisville &c. R. Co.*, 9 Heisk. (Tenn.) 823; *Nashville &c. R. Co. v. Thomas*, 5 Heisk. (Tenn.) 262. See also *Smith v. Nashville &c. R. Co.*, 6 Heisk. (Tenn.) 174; *Stone v. Louisville &c. R. Co.*, 7 Heisk. (Tenn.) 468.

<sup>71</sup> *Smith v. Chicago &c. R. Co.*, 34 Iowa 506; *Louisville &c. R. Co. v. Ballard*, 2 Metc. (Ky.) 177; *Darling v. Boston &c. R. Co.*, 121 Mass. 118; *Eames v. Salem &c. R. Co.*, 98 Mass. 560; *Maynard v. Boston &c. R. Co.*, 115 Mass. 458; *McDonnell v. Pittsfield &c. R. Co.*, 115 Mass. 564; *Kirk v. Norfolk &c. R. Co.*, 41 W. Va. 722; s. c. 32 L. R. A. 416; 24 S. E. Rep. 639; 4 Am. & Eng. Rail. Cas. (N. S.) 105; *Witherell v. Milwaukee &c. R. Co.*, 24 Minn. 410; *Denver &c. R. Co. v. Dibelbiss* (Colo.), 57 Pac. Rep. 743.



this. In some cases, it is held that if it appear that there is less danger to the train and its contents from a collision with stock on the track while running at a high rate of speed than at a slower rate, it is the duty of the engineer, upon coming in sight of the animals, if it is not possible to stop the train before coming up with them, to *increase the rate of speed*, notwithstanding the escape of the animals may thereby be rendered more difficult.<sup>72</sup>

§ 2114. **Duty as to Carrying Headlight.**—If carrying a headlight is conducive to the safety of the train, it is the right and duty of the company to see that such headlight is carried, although it has a tendency, in the twilight, to contract the range of the engineer's vision, and to prevent him seeing cattle as readily as he otherwise might do.<sup>73</sup>

§ 2115. **Failing to Maintain Watchman.**—The failure to keep a watchman at a station which is passed without stopping, and at a rate of speed of six miles or more per hour, is not negligence *per se*, but it may go to the jury as evidence of negligence.<sup>74</sup>

§ 2116. **Permitting Bushes to Grow, Concealing the Approach of Cattle.**—An instruction to the effect that permitting bushes to grow on the side of the right of way, contrary to the regulations of the company, whereby the approach of cattle was concealed, is negligence,—was held to be properly refused, because, if given, it would have taken the question of negligence from the jury.<sup>75</sup> A railway company was held liable to a passenger in one case,<sup>76</sup> and to the owner of the stock in another,<sup>77</sup> for allowing bushes to grow along the track so that they concealed the stock until it was too late to prevent an accident. But the company is not required to keep its entire right of way clear of all obstructions which might conceal stock.<sup>78</sup>

<sup>72</sup> Kerwhaker v. Cleveland &c. R. Co., 3 Ohio St. 172; s. c. 1 Thomp. Neg., 1st ed., 472; Owens v. Hannibal &c. R. Co., 58 Mo. 387; Bemis v. Connecticut &c. R. Co., 42 Vt. 375; Louisville &c. R. Co. v. Milton, 14 B. Mon. (Ky.) 75; Louisville &c. R. Co. v. Ballard, 2 Metc. (Ky.) 177; Bunnell v. Rio Grande &c. R. Co., 13 Utah 314; s. c. 44 Pac. Rep. 927; Chicago &c. R. Co. v. Jones, 59 Miss. 465.

<sup>73</sup> Bellefontaine &c. R. Co. v. Schruyhart, 10 Ohio St. 116. Compare *ante*, §§ 1908, 1945.

<sup>74</sup> Latty v. Burlington &c. R. Co., 38 Iowa 250. Compare *ante*, §§ 1535, 1536, 1537, 1538, 1982.

<sup>75</sup> Woolfolk v. Macon &c. R. Co., 56 Ga. 458. Compare *ante*, §§ 1507, 1508.

<sup>76</sup> Eames v. Texas &c. R. Co., 63 Tex. 660.

<sup>77</sup> Ward v. Wilmington &c. R. Co., 113 N. C. 566; s. c. 18 S. E. Rep. 211.

<sup>78</sup> Kansas City &c. R. Co. v. Kirksey, 48 Ark. 366. See also Ward v. Wilmington &c. R. Co., 109 N. C. 358. In a case in Missouri it has been held that, where cattle, stopped upon a crossing by a standing train, were killed by another train on an adjoining track, the obstruction caused by the standing



§ 2117. **Attracting Cattle by Allowing Salt to be Spilled upon the Track or Right of Way.**—Where a railroad company permits the waste, on and about its track, of any article which in itself is very attractive to stock, and animals are thereby attracted to the track, and are injured by the sudden starting or rapid running of the cars, without any precautions being taken, by signals, etc., to prevent injury, and drive them from the track, this constitutes such negligence, in those States where stock are permitted to run at large, as will render the company liable in damages.<sup>79</sup> In a Missouri case, the company was held liable where there was no other evidence of negligence than that *salt* was spilled upon the track and suffered to remain there, by which cattle were attracted, and a cow was killed by the cars.<sup>80</sup> But the circumstances must be such as to charge the railway company with negligence in allowing the attractive article to remain on its right of way. Thus, it has been held, that a railway company is not liable for killing a cow attracted by *salt* stored by its agent on his own account in a warehouse belonging to others, but standing on its right of way,<sup>81</sup> unless it has been kept there long enough to charge the company with notice.<sup>82</sup> *Corn*, spilled upon the track while transferring it from a grain elevator to a train,<sup>83</sup> or a carload of *hay*, allowed to stand on a side track over night, will not, as matter of law, render the company liable for killing stock attracted thereby.<sup>84</sup> But where *cotton seed* had been permitted to accumulate for some time near the track, it was held that an obligation was created to exercise reasonable care to prevent injury to cattle that might be attracted by it.<sup>85</sup> And where a solution of *salt* had been allowed to drain from a large refrigerator and deposit on the right of way for more than a year, it was held sufficient to charge the railway company with notice and make it guilty of negligence in failing to remove it.<sup>86</sup> A railway company's first duty, however, is to its passengers; and if the use of *salt* is the only effective means of keeping its switches clear of ice, it may be used for that purpose, and no liability will be incurred to the owner of cattle attracted by it.<sup>87</sup> Nor is it necessary to stop trains before reaching switches,

train was too remote a cause of injury to render the company liable: *Brown v. Wabash & C. R. Co.*, 20 Mo. App. 222.

<sup>79</sup> *Page v. North Carolina R. Co.*, 71 N. C. 222.

<sup>80</sup> *Crafton v. Hannibal & C. R. Co.*, 55 Mo. 580.

<sup>81</sup> *Whitesides v. St. Louis & C. R. Co.*, 58 Mo. App. 655.

<sup>82</sup> *Burger v. St. Louis & C. R. Co.*, 123 Mo. 679; rev'g s. c. 52 Mo. App. 119.

<sup>83</sup> *Gilliland v. Chicago & C. R. Co.*, 19 Mo. App. 411.

<sup>84</sup> *Harlan v. Wabash & C. R. Co.*, 18 Mo. App. 483. See also *Schooling v. St. Louis & C. R. Co.*, 75 Mo. 518.

<sup>85</sup> *Little Rock & C. R. Co. v. Dick*, 52 Ark. 402; s. c. 12 S. W. Rep. 785; 42 Am. & Eng. Rail. Cas. 591.

<sup>86</sup> *Morrow v. Hannibal & C. R. Co.*, 29 Mo. App. 432.

<sup>87</sup> *Kirk v. Norfolk & C. R. Co.*, 41 W. Va. 722; s. c. 32 L. R. A. 416; 24 S. E. Rep. 639; 4 Am. & Eng. Rail. Cas. (N. S.) 105.



where *salt* has been used, in order to avoid possible injury to animals that may have been lured to the spot by the smell of the salt.<sup>88</sup>

**§ 2118. Care in Rescuing Animals which have Fallen into Trestles.**—Ordinary care is all that is required. If those in charge of a train have used ordinary care to avoid driving a horse upon a trestle and to extricate him after he has fallen into it, the company will not be liable for his death, although, by extraordinary diligence and the adoption of different means, the life of the horse might have been saved.<sup>89</sup> In a California case, it appeared that the plaintiff's mare got upon the track, without the fault of the defendant; that upon the approach of the train and sound of the whistle it sprang off at the top of its speed, and ran along the track until it came to a trestle-bridge, upon which it leaped and fell near its center. The train stopped within about twenty yards of the bridge. The mare was lying with one fore leg resting upon the rail and the other upon a tie, with the hindleg doubled up under its body and resting upon a tie, and the other hanging down between two ties. It weighed about a thousand pounds. Being unable to extricate it in any other way, they sawed off the ties and let it drop through the bridge, a distance of seven feet. After striking the ground, it sprang up and ran off, as though unhurt by the fall. The court held that due diligence had been exercised in its removal.<sup>90</sup>

**§ 2119. Facts which have been Held Evidence of Negligence.**—Leaving two empty cars standing, insecurely fastened, over night upon an incline, where they could easily be started, whereby one of them escaped and ran down the incline with accelerated motion, and killed the plaintiff's mule, was held negligence.<sup>91</sup> A herd of the plaintiff's beasts were being driven, at eleven o'clock, P. M., along an occupation road to some fields. The road crossed a side track on a level. While the cattle were crossing, the defendant's servants sent some trucks down the siding, which divided the cattle into two lots, and frightened them, and they rushed away, with the drivers after them. Most of them were recovered, but six escaped to another part of the track, and were killed or injured. It being admitted that the negligence of the defendant's servants caused the drivers to lose control over the cattle, and that the plaintiff's men had done all that they

<sup>88</sup> Louisville & C. R. Co. v. Phillips (Miss.), 12 South. Rep. 825.

<sup>89</sup> Richmond & C. R. Co. v. Buice, 88 Ga. 180; s. c. 14 S. E. Rep. 205.

<sup>90</sup> Needham v. San Francisco & C.

R. Co., 37 Cal. 410. See also Fort Wayne & C. R. Co. v. O'Keefe, 4 Ind. App. 249; s. c. 30 N. E. Rep. 916.

<sup>91</sup> Battle v. W. & W. R. Co., 66 N. C. 343.



could to recover control of the beasts, it was held that their death or injury was the consequence of the defendant's negligence, and that the damage was not too remote.<sup>92</sup>

**§ 2120. Facts which have been Held not Evidence of Negligence.**—A train was running through depot grounds, at the usual rate of speed. The bell upon the locomotive was ringing. A colt ran upon the track, from behind a building which stood so close to the track as to conceal the animal until too late to check the engine. As soon as the engineer saw the colt, he blew the whistle and put down the brakes. It was held that there was no negligence.<sup>93</sup> If it is proved that the train employes did everything in their power, after the animal was in danger, to avoid the injury, a verdict of a jury for plaintiff, based upon such evidence, will be set aside.<sup>94</sup>

**§ 2121. Facts which were Held Evidence of "Willful Negligence."**—The facts in an Indiana case form an excellent illustration of the use of the terms "gross negligence" and "willful mischief." The track of a railroad passed through a cut eighty rods long. When the engine approached the cut, the horse of an adjoining land-owner was near the track, at the entrance of the cut. The whistle was sounded, and the horse ran upon the track into the cut, whence it could not escape up the sides. The engine was run on without slackening speed, and the whistle continued to sound, frightening the horse and driving it through the cut, until it jumped into a trestle-work at the other end of the cut and was killed. The engine could have been stopped after the horse was in the cut and before it jumped into the trestle-work. On this evidence the court held that the defendant was guilty of "willful negligence."<sup>95</sup>

<sup>92</sup> *Sneesby v. Lancashire &c. R. Co.*, L. R. 9 Q. B. 263; s. c. 43 L. J. (Q. B.) 69; 30 L. T. (N. S.) 492; affirmed on appeal, 1 Q. B. Div. 42.

<sup>93</sup> *Galena &c. R. Co. v. Griffin*, 31 Ill. 303.

<sup>94</sup> *Peoria &c. R. Co. v. Champ*, 75 Ill. 578; *Wattson v. The Railroad*, 7

*Phila. (Pa.)* 249; *Cincinnati &c. R. Co. v. Bartlett*, 58 Ind. 572.

<sup>95</sup> *Indianapolis &c. R. Co. v. McBrown*, 46 Ind. 229. As to *willful negligence*, see Vol. I, §§ 206, 265, 266, 276, 948; *ante*, §§ 1606, 1627, 1713, 1747, 1760, 1826, 1848, 2000.



## CHAPTER LXVII.

## LIABILITY FOR INJURY TO ANIMALS WITHOUT CONTACT WITH TRAIN.

## SECTION

2124. This liability under statutes.

2125. Statutes which are construed as contemplating contact.

2126. Statutes which are construed as not requiring contact with the animal.

## SECTION

2127. Liability independent of statute for injuries resulting from frightening animals.

§ 2124. **This Liability under Statutes.**<sup>1</sup>—Questions have arisen, in cases where the injury resulted rather from the *alarm* caused by the presence of the locomotives and cars than by actual contact with them, as to the liability of the company under particular statutes. The determination of these seems to depend, in each instance, upon the wording of the statute itself.

§ 2125. **Statutes which are Construed as Contemplating Contact.**—Fencing statutes, which prescribe, as a penalty for their violation, a liability for all stock injured by the agents, engines, or cars of the delinquent railway company, are generally construed as contemplating the *actual contact* of the engine or cars with the stock.<sup>2</sup> Under such statutes, it is held that, where cattle, which have entered upon the track through an insufficient fence, are injured by being caught between the ties,<sup>3</sup> or by taking fright at an approaching train and run-

<sup>1</sup> This section is cited in § 2168.

<sup>2</sup> *Indianapolis &c. R. Co. v. McBrown*, 46 Ind. 229; *Peru &c. R. Co. v. Hasket*, 10 Ind. 409; *Ohio &c. R. Co. v. Cole*, 41 Ind. 331; *Louisville &c. R. Co. v. Smith*, 58 Ind. 575; *Baltimore &c. R. Co. v. Thomas*, 60 Ind. 107; *Louisville &c. R. Co. v. Thomas*, 106 Ind. 10; *Pennsylvania Co. v. Dunlap*, 112 Ind. 93; s. c. 13 N. E. Rep. 403; 11 West. Rep. 87; *Chicago &c. R. Co. v. Tilton*, 120 Ill. 667; s. c. 12 N. E. Rep. 207; 9 West. Rep. 741; *Sinard v. Southern R. Co.*, 101 Tenn. 473; *Lafferty v. Hannibal &c. R. Co.*, 44 Mo. 292; *Moshier v. Utica &c. R. Co.*, 3 Barb. (N. Y.) 428; *International &c. R. Co. v. Texas*, 68 Tex. 290; s. c. 4 S. W. Rep. 492.

<sup>3</sup> *Nelson v. Chicago &c. R. Co.*, 30 Minn. 74. See also *Knight v. New York &c. R. Co.*, 99 N. Y. 25; rev'g s. c. 30 Hun (N. Y.) 415. In this case it is suggested that this is the construction to be given to the New York statute. The case, however, was rested on the ground that, as the animal in question was trespassing on the adjoining land, the company owed its owner no duty of maintaining the fence. In *French v. Western &c. R. Co.*, 72 Hun (N. Y.) 469, and *Graham v. Delaware &c. R. Co.*, 46 Hun (N. Y.) 386, owners of adjoining land, entitled to the benefit of the act, were allowed to recover in a statutory action, though there was no contact of the train with the animal.



ning into a wire fence,<sup>4</sup> or upon a bridge or trestle, the company is not liable, if the injured animal was not touched by the engine or cars.<sup>5</sup> Although there can be no recovery under the statute in such a case, the circumstances may be such as to sustain a common law action for negligence.<sup>6</sup>

§ 2126. **Statutes which are Construed as not Requiring Contact with the Animal.**—But where, as in Iowa, the statute, requiring the construction of right-of-way fences, gives a remedy for “stock injured or killed by the reason of the want of such fence,”<sup>7</sup> it is construed as not requiring contact with the animal in order to establish the statutory liability. Under that law, it was held that if the stock got upon the track through a defect in the fence, and injury or death resulted from their alarm and attempts to escape, the company was liable.<sup>8</sup> The terms of a Kansas statute are even broader. It makes railway companies liable for injuries to stock “by the engines or cars on such railway, or in any other manner in operating such railway.”<sup>9</sup> This was held to include injuries inflicted in removing cattle (which came upon the track through a defect in the fence) from a bridge, in which they had become entangled upon the approach of a train.<sup>10</sup> And, where a mare, entering upon an unfenced track, was frightened by the blowing of the steam whistle of an approaching engine, and ran into a barbed wire fence in an effort to escape, the railway company was held liable for her injuries under this statute.<sup>11</sup>

§ 2127. **Liability Independent of Statute for Injuries Resulting from Frightening Animals.**<sup>12</sup>—Creating noises, calculated to frighten

<sup>4</sup> *Schertz v. Indianapolis &c. R. Co.*, 107 Ill. 577; aff’g s. c. 12 Ill. App. 304; *Colbert v. Missouri &c. R. Co.*, 78 Mo. App. 176; s. c. 2 Mo. App. Rep. 186. *Double damages* can not be recovered under such circumstances, but single damages may be recovered under another statute: *Briggs v. St. Louis &c. R. Co.*, 111 Mo. 168; s. c. 20 S. W. Rep. 32.

<sup>5</sup> *Chicago &c. R. Co. v. Taylor*, 8 Ill. App. 108; *Siebert v. Missouri &c. R. Co.*, 72 Mo. 565; *Foster v. St. Louis &c. R. Co.*, 90 Mo. 116; *Burlington &c. R. Co. v. Shoemaker*, 13 Neb. 369; *Nashville &c. R. Co. v. Sadler* (Tenn.), 19 S. W. Rep. 618; *Stump v. Chicago &c. R. Co.*, 84 Ill. App. 28. It has been held that the violation of the fencing statute does not make the company liable for the loss of flesh of cattle while on the company’s land: *Dooley v.*

*Missouri &c. R. Co.*, 36 Mo. App. 381.

<sup>6</sup> *Indianapolis &c. R. Co. v. McBrown*, 46 Ind. 229; *Colorado Central R. Co. v. Caldwell*, 11 Colo. 545; *Boggs v. Missouri R. Co.*, 18 Mo. App. 274. See also *ante*, § 2069; *post*, § 2127.

<sup>7</sup> Code Iowa 1873, § 1289.

<sup>8</sup> *Young v. St. Louis &c. R. Co.*, 44 Iowa 172; *Van Slyke v. Chicago &c. R. Co.*, 80 Iowa 620; s. c. 45 N. W. Rep. 396. See also *Chicago &c. R. Co. v. Cox*, 51 Neb. 479; *Meeker v. Northern &c. R. Co.*, 21 Ore. 513.

<sup>9</sup> *Dassl. Kan. Stat.*, § 4605; *Laws* 1874, ch. 93, § 1.

<sup>10</sup> *Atchison &c. R. Co. v. Edwards*, 20 Kan. 531; *Atchison &c. R. Co. v. Jones*, 20 Kan. 527.

<sup>11</sup> *Missouri &c. R. Co. v. Gill*, 49 Kan. 441; s. c. 30 Pac. Rep. 414.

<sup>12</sup> This section is cited in § 2125.



animals in the vicinity of the track, such as blowing whistles and letting off steam, when not necessary for the proper operation of the road, and not required by statute, constitutes negligence on the part of a railway company, and renders it liable for injuries to stock resulting therefrom.<sup>13</sup> It is no excuse that it was done without any intention of frightening the animals in question.<sup>14</sup> A railway company is not liable, however, for injuries to stock frightened by noises incident to the proper management of the road, or required by a duty imposed by statute.<sup>15</sup> But due care must be used to avoid accidents. Thus, it has been held that an engineer is not, as a matter of law, free from negligence in giving a prolonged whistle, though required by a rule of the company, when he knows that horses are working only a short distance from the track.<sup>16</sup> Reasonable care must be exercised to prevent a violent escape of steam while in the vicinity of a much used street or highway crossing.<sup>17</sup> And a railway company has been held liable for frightening a team of horses by blowing a whistle immediately after they had passed over a crossing, though it was necessary to avoid an accident at a crossing further on, where the dangerous position of the team was due to the fact that the train was running at a prohibited

<sup>13</sup> *Pittsburgh &c. R. Co. v. Hite*, 81 Va. 767; *Rogers v. Baltimore &c. R. Co.*, 150 Ind. 397; s. c. 49 N. E. Rep. 453; 9 Am. & Eng. Rail. Cas. (N. S.) 726; *Chicago &c. R. Co. v. Parks*, 59 Kan. 709; s. c. 54 Pac. Rep. 1052; 5 Am. Neg. Rep. 35; *Everett v. Richmond &c. R. Co.*, 121 N. C. 519; s. c. 27 S. E. Rep. 991; 8 Am. & Eng. Rail. Cas. (N. S.) 523; rehearing denied in s. c. 30 S. E. Rep. 334; *Gulf &c. R. Co. v. Singer* (Tex. Civ. App.), 40 S. W. Rep. 1004; *Southern R. Co. v. Pool*, 103 Ga. 808; s. c. 34 S. E. Rep. 141; *Yazoo &c. R. Co. v. Lambuth*, 74 Miss. 758; s. c. 21 South. Rep. 801. Compare *ante*, § 1908, *et seq.*

<sup>14</sup> *Weil v. St. Louis &c. R. Co.*, 64 Ark. 535; s. c. 43 S. W. Rep. 976; 9 Am. & Eng. Rail. Cas. (N. S.) 721. But, if it was the act of a malicious servant, and done solely for the purpose of frightening the animals, he alone will be responsible: *International &c. R. Co. v. Yarbrough* (Tex. Civ. App.), 39 S. W. Rep. 1096; s. c. 7 Am. & Eng. Rail. Cas. (N. S.) 733; 2 Am. Neg. Rep. 656. Although, if done in the discharge of his duty, the company will be liable, notwithstanding his

malicious purpose: *International &c. R. Co. v. Yarbrough* (Tex. Civ. App.), 39 S. W. Rep. 1096; s. c. 7 Am. & Eng. Rail. Cas. (N. S.) 733; 2 Am. Neg. Rep. 656 (no off. rep.). See also *Central R. Co. v. Hollingshead*, 81 Ga. 208; s. c. 7 S. E. Rep. 172.

<sup>15</sup> *Southern R. Co. v. Torian*, 95 Va. 453; s. c. 28 S. E. Rep. 569; *Dewey v. Chicago &c. R. Co.*, 99 Wis. 455; s. c. 75 N. W. Rep. 74; 11 Am. & Eng. Rail. Cas. (N. S.) 275; 4 Am. Neg. Rep. 92; *Stanton v. Louisville &c. R. Co.*, 91 Ala. 382; s. c. 8 South. Rep. 789; *Douglas v. East Tennessee &c. R. Co.*, 88 Ga. 282; s. c. 14 S. E. Rep. 616; *Port Royal &c. R. Co. v. Phinizy*, 83 Ga. 192; s. c. 9 S. E. Rep. 609. Compare *ante*, § 1908, *et seq.*

<sup>16</sup> *Flynn v. Boston &c. R. Co.*, 169 Mass. 305; s. c. 47 N. E. Rep. 1012; 8 Am. & Eng. Rail. Cas. (N. S.) 691. See also *Ocheltree v. Chicago &c. R. Co.*, 96 Iowa 246; s. c. 64 N. W. Rep. 788.

<sup>17</sup> *Louisville &c. R. Co. v. Schmidt*, 147 Ind. 638; s. c. 46 N. E. Rep. 344; 6 Am. & Eng. Rail. Cas. (N. S.) 571; *Boothby v. Boston &c. R. Co.*, 90 Me. 308; s. c. 38 Atl. Rep. 155.



rate of speed, and that no warning signal was given at the first crossing.<sup>18</sup> To warrant a recovery for an injury resulting from fright, and incurred without actual contact with the cars of the defendant, the facts must be so *pleaded*.<sup>19</sup>

<sup>18</sup> Ward v. Chicago &c. R. Co., 97 Iowa 50; s. c. 65 N. W. Rep. 999.

<sup>19</sup> Houston &c. R. Co. v. Terry, 42 Texas 451.



## CHAPTER LXVIII.

## INJURIES TO THE RAILWAY COMPANY BY ANIMALS.

| SECTION  | SECTION   |
|--|---|
| 2129. Where the common law rule requiring owners to restrain their animals prevails. | 2131. Where the injury is due to the failure of the railway company to fence. |
| 2130. Where the law allows domestic animals to run at large.                         |   |

§ 2129. **Where the Common Law Rule Requiring Owners to Restrain their Animals Prevails.**—In some instances, railroad companies have sought to recover of the stock-owner for injuries sustained by their locomotives and cars from a collision with cattle on the track. In Connecticut, where the English rule prevails,<sup>1</sup> it was held that the owner of stock, permitting it to stray upon the track, whereby a train was wrecked, was guilty of such negligence as to render him liable to the company for the injuries sustained.<sup>2</sup>

§ 2130. **Where the Law Allows Domestic Animals to Run at Large.**—In Missouri, where the owner of stock is under no obligation to confine them to his own premises, a petition alleging that the defendant's mules, by reason of his negligence, entered and were upon the railroad at a point where it was not the duty of the defendant to maintain fences, and that, without any negligence on the part of defendant, a train was wrecked, was held, on demurrer, to state a good cause of action, because there might be other negligence than merely permitting his stock to run at large.<sup>3</sup>

§ 2131. **Where the Injury is Due to the Failure of the Railway Company to Fence.**—Of course, where the injury is consequent upon a failure in the statutory duty to fence the road, the plaintiff can not

<sup>1</sup> Vol. I, § 914; *ante*, § 1999.

<sup>2</sup> *Housatonic &c. R. Co. v. Knowles*, 30 Conn. 313. See also *Railroad Co. v. Skinner*, 19 Pa. St. 298; *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 101; *Drake v. Phila. &c. R. Co.*, 51 Pa. St. 240; *Annapolis &c. R. Co. v. Baldwin*, 60 Md. 88; s. c.

45 Am. Rep. 711 (predicating liability only where defendant has been negligent in the care of his cattle). See generally as to liability for trespassing animals, Vol. I, § 904, *et seq.*

<sup>3</sup> *Hannibal &c. R. Co. v. Kenney*, 41 Mo. 271.



recover. In an English case, an employé returning from his work on a hand-car was injured in consequence of a collision with two pigs which had escaped upon the track, through a defect in a fence which the railroad company was bound to maintain. It was held that he could not recover damages of the owner of the pigs, because he was identified with the railroad company whose line he was using for their purposes, and by whose negligence the pigs were upon the track.\*

\*Child v. Hearn, L. R. 9 Exch. 176; s. c. 43 L. J. (Exch.) 100.



## CHAPTER LXIX.

## REMEDIES AND PROCEDURE IN CASES OF RAILWAY INJURIES TO CATTLE.

## ART. I. At Common Law, §§ 2133-2158.

SUBDIV. 1. *Pleading*, §§ 2133-2141.SUBDIV. 2. *Evidence of Negligence*, §§ 2143-2149.SUBDIV. 3. *Various Rulings as to Competency and Relevancy of Evidence*, §§ 2151-2158.

## ART. II. Under Statutes Requiring Railway Companies to Fence Roads, §§ 2160-2199.

SUBDIV. 1. *Questions of Jurisdiction*, §§ 2160-2164.SUBDIV. 2. *Questions of Pleading*, §§ 2166-2185.SUBDIV. 3. *Questions of Evidence*, §§ 2188-2195.SUBDIV. 4. *Questions of Law and Fact*, §§ 2197-2199.

## ART. III. Notice to Company of Claim, §§ 2201-2206.

## ARTICLE I. AT COMMON LAW.

SUBDIVISION 1. *Pleading*.

## SECTION

2133. Pleading before justices of the peace: complaint must state a cause of action.

2134. Must aver negligence in the defendant.

2135. Whether the plaintiff can waive the tort and sue in *assumpsit*.

2136. What complaints have been held sufficient.

2137. What complaints have been held defective.

## SECTION

2138. General averment of negligence is sufficient to let in evidence of negligence or gross negligence.

2139. Necessity of averring that plaintiff was without fault.

2140. Averring failure to ring bell, sound whistle, slacken speed.

2141. Particularity in pleading contributory negligence.

§ 2133. **Pleading before Justices of the Peace: Complaint must State a Cause of Action.**—A large proportion of the cases on this subject are brought originally before justices of the peace. Procedure before these officers is regulated by the statutes of the respective States. But points concerning that procedure occasionally arise, which deserve mention here, being in their nature dependent upon general principles of pleading and procedure. The complaint or



statement filed with the justice, though not subject to the technical rules of pleading, must set forth a substantial cause of action.<sup>1</sup>

§ 2134. **Must Aver Negligence in the Defendant.**—The Alabama court hold that such a complaint or statement, in an action to recover damages for killing stock, which fails to aver that the killing was negligent, or the result of negligence on the part of the railroad company or its servants or agents, does not contain a substantial cause of action.<sup>2</sup> This ruling does not apply generally to statutory actions grounded on a failure to fence.

§ 2135. **Whether the Plaintiff can Waive the Tort and Sue in Assumpsit.**—In Mississippi, a plaintiff whose stock has been killed by the negligence of railway employes may waive the *tort*, and sue the company in *assumpsit* for the value of the animals. But he can not thereby gain any benefit under a statute which provides for a final judgment by default, for “want of appearance or plea,” in actions founded on an instrument in writing ascertaining the sum due, or “on open account, when a copy of the account is filed with the declaration,” etc. He can not take final judgment by default; because, although the form of his action is *assumpsit*, the *gravamen* of it is still *tort*, notwithstanding its changed form.<sup>3</sup>

§ 2136. **What Complaints have been Held Sufficient.**<sup>4</sup>—As to what particularity is necessary in charging the defendant with negligence, no general rule can be stated, but a few illustrations will convey suggestions to the careful pleader:—A complaint alleging that, through the fault, misconduct, and negligence of the servants and employes of the defendant, in running the locomotive and train out of the regular time, and at a high rate of speed,—to wit, at the rate of forty miles per hour,—and without giving any proper signals, the locomotive struck and killed two mules of the plaintiff, and injured a third, then and there upon the railroad track, without the fault of the plaintiff, at a point where a public highway crossed the railroad,—was held to contain a sufficient statement of negligence.<sup>5</sup> The simple averment that “defendant, by its servants and agents, carelessly and negligently caused one of defendant’s locomotives, with a train of cars attached

<sup>1</sup> Indiana &c. R. Co. v. Leamon, 18 Ind. 173; Kansas Pacific R. Co. v. Taylor, 17 Kan. 566; Bellefontaine R. Co. v. Reed, 33 Ind. 477; Norton v. Hannibal &c. R. Co., 48 Mo. 387; Wood v. St. Louis &c. R. Co., 58 Mo. 109.

<sup>2</sup> Mobile &c. R. Co. v. Williams, 53 Ala. 595.

<sup>3</sup> Mississippi &c. R. Co. v. Fort, 44 Miss. 423.

<sup>4</sup> This section is cited in § 2138.

<sup>5</sup> Indianapolis &c. R. Co. v. Hamilton, 44 Ind. 76.



thereto, to strike a milch cow, the property of plaintiff," etc., was also held to be a sufficient allegation of negligence.<sup>6</sup> A declaration in an action for the killing of the plaintiff's cow, by the defendants' carelessly and unskillfully running their locomotive against it, contained no averment that this was done on the defendants' railroad track. The court held that such an averment was unnecessary.<sup>7</sup> A complaint alleging that the servants of a railway company *willfully* killed plaintiff's animal by striking and running upon it with a locomotive and train, states a cause of action.<sup>8</sup> But where the complaint alleges that the injury was *willfully* committed, the plaintiff can not recover upon the theory that the defendant was *negligent*, without amending his pleading.<sup>9</sup> A complaint which omits to state the time when the injury occurred has been held sufficient, where the statute of limitations was not set up as a special defense.<sup>10</sup>

§ 2137. **What Complaints have been Held Defective.**—A complaint containing but one count, alleging the killing and crippling of a mare and a mule, but not averring which animal was killed and which crippled, is defective. This defect, however, is cured by a subsequent averment that they were both lost to the plaintiff.<sup>11</sup>

§ 2138. **General Averment of Negligence is Sufficient to Let In Evidence of Negligence or Gross Negligence.**—An averment of negligence is sufficient to sustain evidence of *gross* negligence. Thus, where the plaintiff simply avers negligence, and there is proof of contributory negligence on his part, he may prove gross negligence in the defendant and recover under such a declaration.<sup>12</sup> But it has been held that an averment of *willful killing* is not sustained by evidence of mere negligence.<sup>13</sup> An allegation that the animal was "willfully and willingly killed" is sufficient to show an intentional killing.<sup>14</sup> But the term "reckless" is not equivalent to "willful."<sup>15</sup> It does not imply in-

<sup>6</sup> *McPheeters v. Hannibal &c. R. Co.*, 45 Mo. 23. See also *Western R. Co. v. Lazarus*, 88 Ala. 453; s. c. 6 South. Rep. 877; *East Tennessee &c. R. Co. v. Watson*, 90 Ala. 41; s. c. 7 South. Rep. 813; *Jacksonville &c. R. Co. v. Garrison*, 30 Fla. 557; s. c. 11 South. Rep. 929; *Ohio &c. R. Co. v. Craycraft*, 6 Ind. App. 335; s. c. 32 N. E. Rep. 297; *Berkley v. Chicago &c. R. Co.* (Mo. App.), 3 West. Rep. 765.

<sup>7</sup> *Housatonic R. Co. v. Waterbury*, 23 Conn. 101. See also *Chicago &c. R. Co. v. Nash*, 1 Ind. App. 298; s. c. 27 N. E. Rep. 564.

<sup>8</sup> *Chicago &c. R. Co. v. Nash* (Ind.), 24 N. E. Rep. 884.

<sup>9</sup> *Indiana &c. R. Co. v. Overton*, 117 Ind. 253; s. c. 20 N. E. Rep. 147.

<sup>10</sup> *Revelle v. St. Louis &c. R. Co.*, 74 Mo. 438.

<sup>11</sup> *Toledo &c. R. Co. v. Cole*, 50 Ill. 185.

<sup>12</sup> *Rockford &c. R. Co. v. Phillips*, 66 Ill. 548.

<sup>13</sup> *Ante*, § 2136.

<sup>14</sup> *Chicago &c. R. Co. v. Nash*, 1 Ind. App. 298; s. c. 27 N. E. Rep. 564.

<sup>15</sup> Compare Vol. I, § 208.



tention; hence a complaint alleging a negligent, careless and reckless killing, is not demurrable for repugnancy.<sup>16</sup>

§ 2139. **Necessity of Averring that Plaintiff was Without Fault.**<sup>17</sup>—Prior to a recent statute in Indiana, in a complaint for damages, alleged to have resulted from the negligence of the defendant, there must have been an averment that the plaintiff was without fault;<sup>18</sup> and this rule of pleading exists in several other States.<sup>19</sup> But if the allegation is that the injury was done “willfully,” no such averment is necessary.<sup>20</sup>

§ 2140. **Averring Failure to Ring Bell, Sound Whistle, Slacken Speed.**—As regards other statutory provisions than that concerning fences, it has been held that an allegation that the defendants neglected their duty to ring a bell or sound a whistle, and otherwise so carelessly conducted their train, by not slackening the speed, and not giving warning of its approach, as to cause the injury complained of,—was sufficient to sustain evidence of the violation of a city ordinance regulating the speed of trains.<sup>21</sup>

§ 2141. **Particularity in Pleading Contributory Negligence.**—The defendant, in pleading *contributory negligence*, must allege with particularity the circumstances constituting such negligence, in those jurisdictions where the burden of showing it is upon the defendant.<sup>22</sup>

## SUBDIVISION 2. *Evidence of Negligence.*

### SECTION

2143. Plaintiff has the burden of proving negligence.

2144. Whether the fact of injury is evidence tending to show negligence.

2145. Qualification that the cattle must have been rightfully on the track.

2146. Rule not applicable in cases of injuries to dogs.

### SECTION

2147. Applicable where railway company builds its road over plaintiff's land without condemnation.

2148. Effect of statutes making the fact of killing or injuring *prima facie* evidence of negligence.

2149. Presumption that the trainmen did their duty.

<sup>16</sup> Louisville &c. R. Co. v. Barker, 96 Ala. 435; s. c. 11 South. Rep. 453; Kansas City &c. R. Co. v. Crocker (Ala.), 11 South. Rep. 262; Indiana &c. R. Co. v. Overton, 117 Ind. 253; s. c. 20 N. E. Rep. 147.

<sup>17</sup> This section is cited in § 2176.

<sup>18</sup> Vol. I, § 206; Toledo &c. R. Co. v. Bevin, 26 Ind. 443; Louisville &c. R. Co. v. Smith, 58 Ind. 575; Indianapolis &c. R. Co. v. Candle, 60 Ind. 112; Toledo &c. R. Co. v. Har-

ris, 49 Ind. 119. No such averment is necessary in the statutory action for failure to fence: See *post*, § 2175.

<sup>19</sup> Vol. I, §§ 365, 370.

<sup>20</sup> Indianapolis &c. R. Co. v. Petty, 30 Ind. 262.

<sup>21</sup> Chicago &c. R. Co. v. Reidy, 66 Ill. 43. See also Nutter v. Chicago &c. R. Co., 22 Mo. App. 328.

<sup>22</sup> Jeffersonville &c. R. Co. v. Dunlap, 29 Ind. 426; Cairo &c. R. Co. v. Woolsey, 85 Ill. 370.



§ 2143. **Plaintiff has the Burden of Proving Negligence.**—In an action at common law against a railway company for injuries to stock, the plaintiff has, of course, the burden of proving the negligence of the company.<sup>23</sup>

§ 2144. **Whether the Fact of Injury is Evidence Tending to Show Negligence.**—What is sufficient evidence to charge a company with negligence for killing stock is a question upon which the various decisions are not by any means unanimous. In a number of cases it has been held that the simple fact of injury of the animals by a train of the defendant, unaccompanied by anything which tends to show positive negligence or misconduct of the company's agents, is insufficient to charge the company.<sup>24</sup> This is the rule where the company is not bound to fence its track, and where stock is permitted to run at large upon uninclosed lands without thereby rendering the owner liable as a trespasser.<sup>25</sup>

§ 2145. **Qualification that the Cattle must have been Rightfully on the Track.**—Roundly stated, the rule seems to be that if the cattle are *rightfully upon the railroad track* at the time of the injury, proof of such fact and of the injury, makes a *prima facie* case of negligence, and shifts the burden of proof to the defendant to exculpate itself by showing that it was by no fault of its servants, but by some accident, or by the fault of plaintiff.<sup>26</sup>

<sup>23</sup> *Montgomery &c. R. Co. v. Perryman*, 91 Ala. 413; s. c. 8 South. Rep. 669; *Burlington &c. R. Co. v. Shelter*, 6 Colo. App. 246; s. c. 40 Pac. Rep. 157; *Illinois &c. R. Co. v. Weathersby*, 63 Miss. 581; *Robinson v. St. Louis &c. R. Co.*, 21 Mo. App. 141; *Galveston &c. R. Co. v. Dromgoole* (Tex. Civ. App.), 24 S. W. Rep. 372; *Maynard v. Norfolk &c. R. Co.*, 40 W. Va. 331; s. c. 21 S. E. Rep. 733; *Eddy v. Lafayette*, 49 Fed. Rep. 798; s. c. 4 U. S. App. 243; *Denver &c. R. Co. v. Priest*, 9 Colo. App. 103; s. c. 47 Pac. Rep. 653.

<sup>24</sup> *Mobile &c. R. Co. v. Hudson*, 50 Miss. 572; *Chicago &c. R. Co. v. Patchin*, 16 Ill. 198; *Bethje v. Houston &c. R. Co.*, 26 Texas 604; *New Orleans &c. R. Co. v. Enochs*, 42 Miss. 603; *Great Western R. Co. v. Morthland*, 30 Ill. 451; *Schneir v. Chicago &c. R. Co.*, 40 Iowa 337; *Indianapolis &c. R. Co. v. Means*, 14 Ind. 30; *Walsh v. Virginia &c. R. Co.*, 8 Nev. 111; *Grand Rapids &c. R. Co. v. Judson*, 35 Mich. 507; *Brown v. Hannibal &c. R. Co.*, 33 Mo. 309; *Terry v. New York &c. R. Co.*, 22

*Barb. (N. Y.)* 575; *Lyndsay v. Connecticut R. Co.*, 27 Vt. 643; *Scott v. Wilmington &c. R. Co.*, 4 Jones L. (N. C.) 432; *Savannah &c. R. Co. v. Geiger*, 21 Fla. 669; *McKissock v. St. Louis &c. R. Co.*, 73 Mo. 456; *Lord v. Chicago &c. R. Co.*, 82 Mo. 139; *Atchison &c. R. Co. v. Watson*, 3 N. M. 319; s. c. 9 Pac. Rep. 351. Compare, as to the maxim *res ipsa loquitur*, Vol. I, § 15. In Missouri it is held that the injury of the cattle, accompanied by the failure of the company's employés to ring the bell or sound the whistle, was insufficient to make a *prima facie* case of negligence: *Holman v. Chicago &c. R. Co.*, 62 Mo. 662.

<sup>25</sup> *Bethje v. Houston &c. R. Co.*, 26 Texas 604; *Savannah &c. R. Co. v. Geiger*, 21 Fla. 669; s. c. 58 Am. Rep. 697; *Gulf &c. R. Co. v. Ellige* (Tex. Civ. App.), 28 S. W. Rep. 912.

<sup>26</sup> *White v. Concord R. R.*, 30 N. H. 207; *Danner v. South Carolina R. Co.*, 4 Rich. L. (S. C.) 330; *Murray v. South Carolina R. Co.*, 10 Rich. L. (S. C.) 227; *Roof v. Rail-*



§ 2146. Rule not Applicable in Cases of Injuries to Dogs.—In South Carolina this rule was held inapplicable to the case of an injury to a *yard dog*.<sup>27</sup>

§ 2147. Applicable where Railway Company Builds its Road over Plaintiff's Land without Condemnation.—When a railroad company goes upon a man's land without his permission, and without proceedings to condemn a right of way as prescribed by its charter, and builds its road and operates the same, it is guilty of a *trespass*; and if it injures his stock while so operating its road, is *prima facie* liable for damages.<sup>28</sup>

§ 2148. Effect of Statutes Making the Fact of Killing or Injuring *Prima Facie* Evidence of Negligence.<sup>29</sup>—In several of the States there are *statutes* making the fact of killing or injuring stock *prima facie* evidence of negligence, and shifting to the defendant the burden of showing, by positive evidence, that due diligence and care were used to prevent the injury. Under these statutes, the company must assume the burden of proving that the accident happened notwithstanding the exercise of due care and diligence on its part, or the negative proposition that it was guilty of no negligence: it is not sufficient to show that there was *probably* no negligence.<sup>30</sup> But it is the order of

road Co., 4 S. C. 61; Galpin v. Chicago &c. R. Co., 19 Wis. 604; McCoy v. California &c. R. Co., 40 Cal. 532; Smith v. Eastern R. Co., 35 N. H. 357.

<sup>27</sup> Wilson v. Wilmington &c. R. Co., 10 Rich. L. (S. C.) 52. Compare Vol. I, § 892.

<sup>28</sup> Mathews v. St. Paul &c. R. Co., 18 Minn. 434.

<sup>29</sup> This section is cited in § 2105.

<sup>30</sup> Mobile &c. R. Co. v. Williams, 53 Ala. 595; East Tennessee &c. R. Co. v. Bayliss, 74 Ala. 150; Mobile &c. R. Co. v. Caldwell, 83 Ala. 196; s. c. 3 South. Rep. 445; Nashville &c. R. Co. v. Hembree, 85 Ala. 481; s. c. 5 South. Rep. 173; Louisville &c. R. Co. v. Kelsey, 89 Ala. 287; s. c. 7 South. Rep. 648; 42 Am. & Eng. Rail. Cas. 584; Louisville &c. R. Co. v. Barker, 96 Ala. 435; s. c. 11 South. Rep. 453; Birmingham Mineral R. Co. v. Harris, 98 Ala. 326; s. c. 13 South. Rep. 377; Little Rock &c. R. Co. v. Payne, 33 Ark. 816; St. Louis &c. R. Co. v. Hagan, 42 Ark. 122; Little Rock &c. R. Co. v. Dick, 52 Ark. 402; s. c. 12 S. W. Rep. 785;

42 Am. & Eng. Rail. Cas. 591; St. Louis &c. R. Co. v. Lindsay, 55 Ark. 281; s. c. 18 S. W. Rep. 59; St. Louis &c. R. Co. v. Taylor, 57 Ark. 136; s. c. 20 S. W. Rep. 1083; Volkman v. Chicago &c. R. Co., 5 Dak. 69; Savannah &c. R. Co. v. Geiger, 21 Fla. 669; Georgia &c. R. Co. v. Monroe, 49 Ga. 373; Georgia &c. R. Co. v. Bird, 76 Ga. 13; Louisville &c. R. Co. v. Simmons, 85 Ky. 151; s. c. 3 S. W. Rep. 10; Forkner v. Kean (Ky.), 32 S. W. Rep. 265; s. c. 17 Ky. L. Rep. 654; Illinois &c. R. Co. v. Weathersby, 63 Miss. 581; Louisville &c. R. Co. v. Smith, 67 Miss. 15; s. c. 7 South. Rep. 212; Battle v. Wilmington &c. R. Co., 66 N. C. 343; Pippen v. Wilmington &c. R. Co., 75 N. C. 54; Randall v. Richmond &c. R. Co., 107 N. C. 748; s. c. 12 S. E. Rep. 605; 11 L. R. A. 460; Fuller v. Port Royal &c. R. Co., 24 S. C. 132; Walker v. Columbia &c. R. Co., 25 S. C. 141; Joyner v. South Carolina R. Co., 26 S. C. 49; Molair v. Port Royal &c. R. Co., 31 S. C. 510; Long v. Southern R. Co., 50 S. C. 49; s. c. 27 S. E. Rep. 531; Horne



proof and not the basis of liability that is changed.<sup>31</sup> Under the Kentucky Code, the effect of such a statute is to give the closing argument to the defendant.<sup>32</sup> The gist of the action is the negligence of the defendant, and the plaintiff still has the burden of proof when the statutory presumption has been overcome.<sup>33</sup> In case the defendant fails to overcome it, however, the presumption itself, raised by satisfactory proof of the killing or injuring by defendant, is sufficient to sustain a judgment for the plaintiff.<sup>34</sup> The presumption is rebuttable by proof of due diligence under the circumstances, and of a compliance with the statutory requirements.<sup>35</sup> This may be established by the undisputed testimony of the company's servants,<sup>36</sup> or by necessary inference from the facts proved.<sup>37</sup> Proof that the accident could not have been avoided after the animal was discovered, is not sufficient, where the employes were under the duty of keeping a proper lookout. It should appear that this duty was performed.<sup>38</sup> Nor is the presumption rebutted by showing that the animal was hobbled with a chain,<sup>39</sup> or that a stock law was in force requiring stock to be kept

v. Memphis &c. R. Co., 1 Coldw. (Tenn.) 72; Gulf &c. R. Co. v. Ellis, 54 Fed. Rep. 481; s. c. 10 U. S. App. 640; Clark v. Western &c. R. Co., Wins. (N. C.) 109; Brentner v. Chicago &c. R. Co., 68 Iowa 530; Durham v. Wilmington &c. R. Co., 82 N. C. 352.

<sup>31</sup> Jacksonville &c. R. Co. v. Garrison, 30 Fla. 557; s. c. 11 South. Rep. 929; Huber v. Chicago &c. R. Co., 6 Dak. 392; s. c. 43 N. W. Rep. 819; 40 Am. & Eng. Rail. Cas. 188.

<sup>32</sup> Louisville &c. R. Co. v. Brown, 13 Bush (Ky.) 475.

<sup>33</sup> Harrison v. Chicago &c. R. Co., 6 S. Dak. 100; s. c. 60 N. W. Rep. 405; rehearing denied in s. c. 62 N. W. Rep. 376.

<sup>34</sup> Jacksonville &c. R. Co. v. Garrison, 30 Fla. 557; Vicksburg &c. R. Co. v. Hamilton, 62 Miss. 503. And it has been held that marks upon the track and the position of the remains may make the "satisfactory proof" required: Chicago &c. R. Co. v. Packwood, 59 Miss. 280.

<sup>35</sup> Alabama &c. R. Co. v. McAlpine, 80 Ala. 73; Savannah &c. R. Co. v. Jarvis, 95 Ala. 149; s. c. 10 South. Rep. 323; St. Louis &c. R. Co. v. Basham, 47 Ark. 321; Hebron v. Chicago &c. R. Co., 4 S. Dak. 538; s. c. 57 N. W. Rep. 494.

<sup>36</sup> Alabama &c. R. Co. v. Blevins, 92 Ga. 522; s. c. 17 S. E. Rep. 836;

Memphis &c. R. Co. v. Shoecraft, 53 Ark. 96; s. c. 13 S. W. Rep. 422; Kentucky Central R. Co. v. Talbot, 78 Ky. 421; Georgia &c. R. Co. v. Bowman, 108 Ga. 798; s. c. 33 S. E. Rep. 984; Georgia &c. R. Co. v. Harris, 83 Ga. 393; s. c. 9 S. E. Rep. 786. This conclusion is unsound. There is no rule of law which requires affirmative testimony to be believed, which from its nature, is always under suspicion. The servants of the railway company testify under the influence of their master; they are interested in clearing themselves from the imputation of negligence; and experience tends to show that they lie oftener than tell the truth.

<sup>37</sup> Hardison v. Atlantic &c. R. Co., 120 N. C. 492; s. c. 26 S. E. Rep. 630; Norman v. Chicago &c. R. Co. (Iowa), 81 N. W. Rep. 597.

<sup>38</sup> Louisville &c. R. Co. v. Posey, 96 Ala. 262; s. c. 11 South. Rep. 423; Central R. &c. Co. v. Lee, 96 Ala. 444; s. c. 11 South. Rep. 424; Memphis &c. R. Co. v. Davis (Ala.), 14 South. Rep. 643; Little Rock &c. R. Co. v. Chriscoe, 57 Ark. 192; s. c. 21 S. W. Rep. 431; St. Louis &c. R. Co. v. Hendricks, 53 Ark. 201; s. c. 13 S. W. Rep. 699.

<sup>39</sup> Georgia R. Co. v. Fisk, 65 Ga. 714.



inclosed.<sup>40</sup> It has been held that the question, as to when the presumption raised by these statutes is overcome, is a *question of law for the court*, and not one of fact for the jury;<sup>41</sup> but this view, which commits to the judge the decision of a question of fact, and of the whole case, exhibits a complete misunderstanding of the principles of trial by jury.

§ 2149. **Presumption that the Trainmen Did their Duty.**—Where there is nothing to prevent the persons in charge of the train from seeing obstructions on the track, it is presumed that the duty to keep a lookout ahead of the train was fulfilled, and that the obstacles were seen.<sup>42</sup> It is presumed, too, in the absence of evidence on the subject, that the engineer's duty to sound the whistle, ring the bell, etc., was performed.<sup>43</sup>

### SUBDIVISION 3. *Various Rulings as to Competency and Relevancy of Evidence.*

#### SECTION

2151. Testimony of experts.

2152. Statutory disqualifications of defendant's employés as witnesses.

2153. Incompetency of defendant's employés at common law.

2154. Evidence as to the character and skill of defendant's employés.

#### SECTION

2155. Evidence of offers to compromise.

2156. Evidence of value indispensable.

2157. Inference from the absence at the trial of defendant's employés.

2158. Relevancy of other circumstances.

§ 2151. **Testimony of Experts.**<sup>44</sup>—The testimony of persons experienced in the running and management of railway trains is competent to show whether, under an assumed state of facts, which the evidence tends to prove, all judicious and proper precautions were taken by the company and its agents to prevent injuries.<sup>45</sup> The opinion of the engineer in charge of the train, if he is an expert, is admissible to show that it was impossible to avoid the injury after discovering the animals on the track.<sup>46</sup>

<sup>40</sup> Jones v. Columbia &c. R. Co., 20 S. C. 249; Simpkins v. Columbia &c. R. Co., 20 S. C. 258.

<sup>41</sup> Volkman v. Chicago &c. R. Co., 5 Dak. 69; s. c. 37 N. W. Rep. 731.

<sup>42</sup> Jones v. North Carolina R. Co., 70 N. C. 826.

<sup>43</sup> Waldron v. Rensselaer &c. R. Co., 8 Barb. (N. Y.) 394.

<sup>44</sup> This section is cited in § 2191.

<sup>45</sup> Cincinnati &c. R. Co. v. Smith, 22 Ohio St. 227.

<sup>46</sup> Bellefontaine &c. R. Co. v. Bailey, 11 Ohio St. 333.



§ 2152. **Statutory Disqualifications of Defendant's Employes as Witnesses.**—By a statute in Tennessee, which puts the burden of proof upon the company, it is provided that “the engineer, agent, or employé of the company shall in no case be a witness for it.”<sup>47</sup> These terms were held to exclude the testimony only of the particular servant of the company through whose negligence and carelessness the injury occurred.<sup>48</sup> In a later case, the court declared competency to be restored by such a *release* by the defendant as freed such servants from any liability over to the company for the consequence of their negligence, and thus divested them of interest in the determination of the controversy.<sup>49</sup>

§ 2153. **Incompetency of Defendant's Employes at Common Law.**—In Illinois, while the common law rule excluding interested witnesses prevailed, such liability over rendered the engineer incompetent as a witness, without the aid of the statute.<sup>50</sup>

§ 2154. **Evidence as to the Character and Skill of Defendant's Employes.**—It is the duty of railroad companies to employ engineers and train-hands of reasonable skill and competency in the management of trains, engines, etc., and a failure in this regard is negligence.<sup>51</sup> It follows that evidence of the general character of such employés as to carefulness and trustworthiness is relevant and competent.<sup>52</sup>

§ 2155. **Evidence of Offers to Compromise.**—In a Georgia case, it appeared that the company, when applied to for payment for the cattle, offered to pay for them, which offer was refused because deemed inadequate. The court held that this evidence was sufficient to cast upon the company the *onus* of proving that the injury was not the result of its negligence.<sup>53</sup>

§ 2156. **Evidence of Value Indispensable.**—It is necessary, of course, to show damages; and it has been held that where there is absolutely no evidence of the value of a horse alleged to have been killed, the verdict can not be sustained.<sup>54</sup> Judgment for the full value of a mule alleged to have been killed by the negligence of a railroad com-

<sup>47</sup> Code Tenn., § 1169.

<sup>48</sup> Horn v. Memphis &c. R. Co., 1 Coldw. (Tenn.) 72.

<sup>49</sup> Nashville &c. R. Co. v. Fugett, 3 Coldw. (Tenn.) 402.

<sup>50</sup> Chicago &c. R. Co. v. Hutchins, 34 Ill. 108.

<sup>51</sup> Parker v. Dubuque &c. R. Co., 34 Iowa 399.

<sup>52</sup> Vicksburg &c. R. Co. v. Patton, 31 Miss. 157.

<sup>53</sup> Georgia R. &c. Co. v. Willis, 28 Ga. 317.

<sup>54</sup> Chicago &c. R. Co. v. Rice, 71 Ill. 567; Southern R. Co. v. Varn, 102 Ga. 764; s. c. 29 S. E. Rep. 822.



pany can not be based on evidence alone that the mule's leg was broken, without any proof tending to show that it died, or that the injury was such that, with proper treatment, the mule might not have been cured or made of some value.<sup>55</sup>

§ 2157. **Inference from the Absence at the Trial of Defendant's Employees.**—An absence from the trial of the employés of defendant who were on the cars and present at the time of the accident, and were witnesses of the injury, raises a strong presumption of negligence against the company.<sup>56</sup> But, where an employé is in court, no inference is to be drawn against the company because it does not use him as a witness.<sup>57</sup>

§ 2158. **Relevancy of Other Circumstances.**—Evidence to show that there had been much trouble in the neighborhood with the company, about the right of way, is clearly improper.<sup>58</sup> Evidence of the usual speed of a train where the accident occurred, at times before and after the killing of an animal, is inadmissible for the purpose of showing its speed at the time of the accident.<sup>59</sup>

## ARTICLE II. UNDER STATUTES REQUIRING RAILWAY COMPANIES TO FENCE ROADS.

### SUBDIVISION 1. *Questions of Jurisdiction.*

#### SECTION

2160. Whether these statutes will be enforced in the courts of another State.

2161. Venue of statutory actions.

2162. Venue of common law actions.

#### SECTION

2163. Jurisdiction as dependent upon value: uniting causes of action to obtain jurisdiction.

2164. Service of process upon what agents.

§ 2160. **Whether these Statutes will be Enforced in the Courts of Another State.**—It seems that an action arising under a statute of another State, of the kind here under consideration, can not be maintained in Wisconsin. The court will not treat distinct averments of that statute as mere surplusage, and regard the action as a transitory one for tort.<sup>60</sup>

<sup>55</sup> St. Louis &c. R. Co. v. Evans, 78 Tex. 369; s. c. 14 S. W. Rep. 798.

<sup>56</sup> Murray v. South Carolina R. Co., 10 Rich. L. (S. C.) 227.

<sup>57</sup> Davis v. Central R. Co., 75 Ga. 645.

<sup>58</sup> Rockford &c. R. Co. v. Rafferty, 73 Ill. 58.

<sup>59</sup> Houston &c. R. Co. v. Jones, 16 Tex. Civ. App. 179; s. c. 40 S. W. Rep. 745.

<sup>60</sup> Bettys v. Milwaukee &c. R. Co., 37 Wis. 323.



§ 2161. **Venue of Statutory Actions.**—In order to give the court jurisdiction of an action under such a statute, it is necessary that the declaration should aver, and that the evidence should show, that the injury occurred in the county where the action is brought.<sup>61</sup> But, if the locality appear by necessary inference from the language of the complaint, it is sufficient.<sup>62</sup> By the Constitution of Georgia, it is provided that the defendant can be sued only in the county in which he resides. It was held that a statute making a railroad company, suable for injuries to stock in any county where the injury complained of occurred was not in conflict with this constitutional provision; in effect, it made the county where the injury occurred the residence of the defendant for the purposes of the suit.<sup>63</sup>

§ 2162. **Venue of Common Law Actions.**—But the common law action for injuries to stock through the negligence of the defendant, is a transitory action, and may be brought in any county through which the road passes.<sup>64</sup>

§ 2163. **Jurisdiction as Dependent upon Value: Uniting Causes of Action to Obtain Jurisdiction.**—Where the jurisdiction is dependent upon the value of the animal or animals killed or injured, it has been held that this means the value of the animal or animals the killing or injury of which constitutes a separate and distinct cause of action, and that it is not allowable to unite causes of action in one complaint, each of which is for damages less than the requisite amount, and thus obtain jurisdiction.<sup>65</sup>

§ 2164. **Service of Process upon what Agents.**—Under the Indiana statute, service of process may be had, in actions against railroad companies for killing stock, upon conductors;<sup>66</sup> but such service is not re-

<sup>61</sup> 1 Gavin & Hord Stat. Ind. 523, § 1; Toledo &c. R. Co. v. Milligan, 52 Ind. 506; Indianapolis &c. R. Co. v. Renner, 17 Ind. 135; Indianapolis &c. R. Co. v. Wilsey, 20 Ind. 229; Indianapolis &c. R. Co. v. Solomon, 23 Ind. 534; Evansville &c. R. Co. v. Epperson, 59 Ind. 438; St. Louis &c. R. Co. v. Byron, 24 Kan. 350; Kansas City &c. R. Co. v. Burge, 40 Kan. 734; s. c. 19 Pac. Rep. 719; Briggs v. St. Louis &c. R. Co., 111 Mo. 168; s. c. 20 S. W. Rep. 32; Backenstoe v. Wabash &c. R. Co., 23 Mo. App. 148.

<sup>62</sup> Louisville &c. R. Co. v. Davis, 83 Ind. 89; Louisville &c. R. Co. v. Wilkerson, 83 Ind. 153; Louisville &c. R. Co. v. Kiouss, 82 Ind. 357.

<sup>63</sup> Davis v. Central &c. R. Co., 17 Ga. 323.

<sup>64</sup> Toledo &c. R. Co. v. Milligan, 52 Ind. 506.

<sup>65</sup> Jeffersonville &c. R. Co. v. Brevoort, 30 Ind. 325; Toledo &c. R. Co. v. Tilton, 27 Ind. 71; Indianapolis &c. R. Co. v. Elliott, 20 Ind. 430; Indianapolis &c. R. Co. v. Kercheval, 24 Ind. 139.

<sup>66</sup> Acts 1853, p. 113; 2 Gavin & Hord Stat. Ind. 62, note.



quired, and service as provided for in the Code in other cases is good.<sup>67</sup> Nor is the provision for such service unconstitutional because enacted by the Legislature subsequently to the incorporation of the company. Such a law pertains to the remedy, and impairs no contract.<sup>68</sup> But such service is confined to railroad *corporations*, and was early held insufficient to bring into court *individuals* who were operating the road at the time of the injury, as lessees, in whose employ the conductor was at the time of service.<sup>69</sup> Later, the statute was amended by making "lessees, assignees, receivers, and other persons running or controlling any railroad," liable for stock killed, etc.<sup>70</sup> The court held, under this statute, that a company whose road was in the hands of a *receiver* might be sued by service had upon a conductor, although the latter was employed by the receiver, and the company had nothing to do with him.<sup>71</sup> The authority of this decision, however, is subject to grave doubts.<sup>72</sup> Under the Missouri law, the service of the summons issued by a justice of the peace is properly made upon a *station agent*.<sup>73</sup>

## SUBDIVISION 2. *Questions of Pleading.*

### SECTION

- 2166. Form of action usually tort.
- 2167. Cases in which the form of action is contract.
- 2168. Necessity of stating the facts on which the statute predicates liability.
- 2169. Negating the exceptions of statute.
- 2170. What negative averments of exceptions in the statute sufficient.
- 2171. What exceptions in the statute form matters of defense merely.
- 2172. General allegations of failure to fence sufficient.

### SECTION

- 2173. When necessary to state the character of the land at the place where the road was not fenced.
- 2174. Particularity in stating how damage occurred.
- 2175. Whether necessary for the plaintiff to negative his own negligence.
- 2176. What allegations are surplusage.
- 2177. Stating a cause of action at common law, no recovery under the statute.
- 2178. Declaration must be complete either at common law or under the statute.

<sup>67</sup> *Jeffersonville &c. R. Co. v. Dunlap*, 29 Ind. 426; *New Albany &c. R. Co. v. McNamara*, 11 Ind. 543; *New Albany &c. R. Co. v. Tilton*, 12 Ind. 3; *New Albany &c. R. Co. v. Powell*, 13 Ind. 373.

<sup>68</sup> *New Albany &c. R. Co. v. McNamara*, 11 Ind. 543.

<sup>69</sup> *Wright v. Gossett*, 15 Ind. 119.

<sup>70</sup> Act March 4, 1863; Rev. Stat. Ind. 1876, p. 753, § 2.

<sup>71</sup> *Louisville &c. R. Co. v. Cauble*, 46 Ind. 277.

<sup>72</sup> *Ante*, § 2049.

<sup>73</sup> *Hudson v. St. Louis &c. R. Co.*, 53 Mo. 525.



## SECTION

2179. When plaintiff entitled to prove either a common law or a statutory cause of action.

2180. Effect of stating a cause of action at common law and amending by stating a cause of action under the statute.

2181. Separate injuries create separate causes of action.

## SECTION

2182. "One action for the tear and another for the scratch."

2183. What allegations sufficient in a complaint before a justice of the peace.

2184. Form of action when brought before a justice of the peace.

2185. Variance between pleading and proof.

§ 2166. **Form of Action Usually Tort.**—The form of the action for injuries to cattle resulting from negligence in the running of the trains, or from failure to comply with the statutory duty to fence its road, is usually in tort.

§ 2167. **Cases in which the Form of Action is Contract.**—But where the injury is immediately caused by a failure on the part of the defendant to perform some duty arising under a contract with the adjoining land-owner, the proper action will be on the contract, for damages. Thus, where the company was proceeding to erect draw-bars at a farm crossing, and the land-owner refused to permit it to do so, and demanded that it should erect gates, and it appeared that it promised so to do, but failed, and left the space open, and in consequence the land-owner's animal was killed, it was held that he could not recover in an action of tort for trespass, but must sue upon the contract, for damages for the breach thereof.<sup>74</sup>

§ 2168. **Necessity of Stating the Facts on which the Statute Predicates Liability.**—In actions arising under a statute, the general rule of pleading seems to be simply to state the facts upon which the statutory duty arises, a breach of that duty, and the resulting damages. This rule will, of course, vary somewhat in the different States.<sup>75</sup> The elements of liability under these statutes are, a failure to perform the duty imposed and an injury resulting from such failure. In order, therefore, to make out a cause of action, it is necessary to allege that the statute has been violated, and that the violation

<sup>74</sup> Hurd v. Rutland &c. R. Co., 25 Vt. 117.

<sup>75</sup> Jeffersonville &c. R. Co. v. Lyon, 55 Ind. 477; Mumpower v. Hannibal &c. R. Co., 59 Mo. 245; Smith v. Eastern R. Co., 35 N. H. 357; Norton v. Hannibal &c. R. Co., 48 Mo. 387; Cecil v. Pacific R. Co., 47

Mo. 246; Bigelow v. North Missouri R. Co., 48 Mo. 510; Powell v. Hannibal &c. R. Co., 35 Mo. 457; Rockford &c. R. Co. v. Phillips, 66 Mo. 548; Kansas Pacific R. Co. v. Taylor, 17 Kan. 566; Baltimore &c. R. Co. v. Wilson, 31 Ohio St. 555.



was the cause of the damage for which recovery is sought. The complaint must show that the track was not fenced as the statute requires.<sup>76</sup> But it is not necessary that there should be an express allegation to this effect. It is sufficient if, from the facts alleged, it can be fairly inferred that the place in question was one that should have been, but was not, fenced.<sup>77</sup> If the fact appears by necessary implication, there is no need of an express averment that such place was not a highway crossing,<sup>78</sup> or within the limits of a municipality.<sup>79</sup> The complaint must also show that the neglect to maintain the statutory fence was the cause of the injury complained of. This also need not be stated in express terms. It is sufficient, if it is expressly alleged that the animals injured entered upon the track at a point where it was not properly fenced,<sup>80</sup> or if that fact can be reasonably inferred from all the other circumstances.<sup>81</sup> It is the condition of the fence at the point of entry, however, and not at the point of injury, which controls the liability of the company.<sup>82</sup> A complaint is, therefore, insufficient, which merely alleges that, at the point where the animal in question was killed, the railway company had failed to construct a lawful fence.<sup>83</sup> The words, "that the railroad aforesaid

<sup>76</sup> *Rowland v. St. Louis &c. R. Co.*, 75 Mo. 619; *Sloan v. Missouri P. R. Co.*, 74 Mo. 47; *Bates v. St. Louis &c. R. Co.*, 74 Mo. 60; *Morrow v. Kansas City &c. R. Co.*, 82 Mo. 169; *Tickell v. St. Louis &c. R. Co.*, 90 Mo. 296; *Eaton v. Oregon &c. R. Co.*, 19 Or. 371; s. c. 24 Pac. Rep. 413.

<sup>77</sup> *McClellan v. St. Louis &c. R. Co.* (Mo. App.), 4 West. Rep. 754; *Ringo v. St. Louis &c. R. Co.*, 91 Mo. 667; s. c. 4 S. W. Rep. 396; 10 West. Rep. 268.

<sup>78</sup> *Clare v. Chicago &c. R. Co.*, 79 Mo. 39; *Jantzen v. Wabash &c. R. Co.*, 83 Mo. 171; *Mayfield v. St. Louis &c. R. Co.*, 91 Mo. 296; s. c. 8 West. Rep. 264; *Tickell v. St. Louis &c. R. Co.*, 90 Mo. 296; s. c. 6 West. Rep. 866; *Kinney v. Hannibal &c. R. Co.*, 27 Mo. App. 610.

<sup>79</sup> *Perriquez v. Missouri &c. R. Co.*, 78 Mo. 91; *Meyers v. Union Trust Co.*, 82 Mo. 237; *Williams v. Hannibal &c. R. Co.*, 80 Mo. 597; *Ringo v. St. Louis &c. R. Co.*, 91 Mo. 667; *Rozzelle v. Hannibal &c. R. Co.*, 79 Mo. 349. In Indiana, however, it is unnecessary to aver the company's duty to fence at the point in question. It is sufficient to state that there was no fence where the animals entered. If there is no duty to fence at that point, that is en-

tirely a matter of defense. See *post*, § 2191.

<sup>80</sup> *Louisville v. Overman*, 88 Ind. 115; *Ohio &c. R. Co. v. Heady*, 5 Ind. App. 328; s. c. 32 N. E. Rep. 213; *Wabash R. Co. v. Ferris*, 6 Ind. App. 30; s. c. 32 N. E. Rep. 112; *Busby v. St. Louis &c. R. Co.*, 81 Mo. 43; *Moore v. Wabash &c. R. Co.*, 81 Mo. 499; *Nicholson v. Hannibal &c. R. Co.*, 82 Mo. 73; *Manz v. St. Louis &c. R. Co.*, 87 Mo. 278; *Wilson v. Wabash &c. R. Co.*, 18 Mo. App. 258.

<sup>81</sup> *Bowen v. Hannibal &c. R. Co.*, 75 Mo. 426; *Belcher v. Missouri P. R. Co.*, 75 Mo. 514; *Terry v. Missouri &c. R. Co.*, 77 Mo. 254; *Kronski v. Missouri &c. R. Co.*, 77 Mo. 362; *Fields v. Wabash &c. R. Co.*, 80 Mo. 203; *Briggs v. Missouri &c. R. Co.*, 82 Mo. 37; *McBride v. Kansas City &c. R. Co.*, 20 Mo. App. 216; *Briscoe v. Missouri P. R. Co.*, 25 Mo. App. 468; *Blomberg v. Stewart*, 67 Wis. 455.

<sup>82</sup> *Ehret v. Kansas City &c. R. Co.*, 20 Mo. App. 251. See also *ante*, § 2051.

<sup>83</sup> *Louisville &c. R. Co. v. Quade*, 91 Ind. 295; *Johnson v. St. Louis &c. R. Co.*, 76 Mo. 553; *Nance v. St. Louis &c. R. Co.*, 79 Mo. 196; *Hudgens v. Hannibal &c. R. Co.*, 79 Mo. 418; *Asher v. St. Louis &c. R. Co.*,



was not securely fenced in, and the fence properly maintained," contained in the declaration, were held to imply, by the doctrine of intentment after verdict, that the road was not securely fenced at the point where the animals entered upon it.<sup>84</sup> But such an averment is insufficient, if objected to before the verdict.<sup>85</sup> In jurisdictions where the statute is construed as contemplating contact of the train with the animal, it is necessary that the killing complained of should be alleged to have been done by the defendant's locomotive or cars, for this is the gist of the action.<sup>86</sup>

**§ 2169. Negating the Exceptions of Statute.**<sup>87</sup>—The enacting clause of a statute of Illinois contains exceptions to its provisions,<sup>88</sup> and it has been held that a declaration under that statute must negative these exceptions.<sup>89</sup> But nothing else than the exceptions need be negated,—as, the possibility that the injury occurred at a farm crossing.<sup>90</sup>

**§ 2170. What Negative Averments of Exceptions in the Statute Sufficient.**—As to what is a sufficient negative averment of such exceptions, a clearer idea may be formed from the following illustrations: In regard to time, an allegation that "nevertheless, more than six months after said railroad was in use, to wit, on the 1st day of May, 1864, the said defendant neglected to erect," etc., was held, on general demurrer, to be a sufficient averment.<sup>91</sup> An averment that the animal "strayed and got on said railroad without the limit of

79 Mo. 432; *Dryden v. Smith*, 79 Mo. 525; *Ward v. St. Louis & C. R. Co.*, 91 Mo. 168; s. c. 8 West. Rep. 284; *Smith v. Missouri & C. R. Co.*, 29 Mo. App. 65.

<sup>84</sup> *Indianapolis & C. R. Co. v. Petty*, 30 Ind. 262. See also *Toledo & C. R. Co. v. Fowler*, 22 Ind. 316; *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340. See also *Louisville & C. R. Co. v. Goodbar*, 102 Ind. 596; s. c. 1 West. Rep. 133, 317; *Edwards v. Kansas City & C. R. Co.*, 74 Mo. 117. <sup>85</sup> *Bellefontaine R. Co. v. Suman*, 29 Ind. 40; *Cecil v. Pacific R. Co.*, 47 Mo. 246; *Wabash & C. R. Co. v. Brown*, 2 Bradw. (Ill. App.) 516.

<sup>86</sup> *Pittsburgh & C. R. Co. v. Hannon*, 60 Ind. 417. But an omission to state it will be cured by verdict: *Louisville & C. R. Co. v. Harrington*, 92 Ind. 457. As to the construction of statutes in this respect, see *ante*, § 2124, *et seq.*

<sup>87</sup> This section is cited in § 2051.

<sup>88</sup> These exceptions are: (1) where the road has not been opened for use for the period of six months prior to the injury; and (2) in the language of the act, "Except at the crossings of public roads and highways, and within the limits of towns, cities, and villages."

<sup>89</sup> *Chicago & C. R. Co. v. Carter*, 20 Ill. 390; *Ohio & C. R. Co. v. Brown*, 23 Ill. 94; *Galena & C. R. Co. v. Sumner*, 24 Ill. 631; *Great Western R. Co. v. Bacon*, 30 Ill. 347; *Toledo & C. R. Co. v. Lavery*, 71 Ill. 522; *Great Western R. Co. v. Hanks*, 36 Ill. 281; *Illinois & C. R. Co. v. Williams*, 27 Ill. 48; *Cannon v. Louisville & C. R. Co.*, 34 Ill. App. 640.

<sup>90</sup> *Great Western R. Co. v. Helm*, 27 Ill. 98.

<sup>91</sup> *Great Western R. Co. v. Hanks*, 36 Ill. 281.



towns, cities, and villages, and not at the road crossings or public highways," sufficiently negatives the exceptions of the statute.<sup>92</sup>

§ 2171. **What Exceptions in the Statute Form Matters of Defense Merely.**—An exception contained in any other clause of the act is matter of defense purely, to be pleaded and shown in evidence by the defendant.<sup>93</sup> In Indiana, the fact that the company is not bound to fence at the place where the killing or injury occurs is purely a matter of defense, and need not be negated in the complaint.<sup>94</sup> And where the answer sets up such a defense, it must state the grounds on which it claims exemption from the statutory duty.<sup>95</sup>

§ 2172. **General Allegations of Failure to Fence Sufficient.**—Very general allegations of a failure to fence in accordance with the requirements of the statute seem to be sufficient. An allegation that the place where the animal entered upon the track and was killed was not "securely fenced in, and said fence maintained by said company, or by any other person at its special instance and request,"—was held to be sufficient, and to contain no implication that the road was fenced by some other person, not at its instance and request, which is a matter of defense to be pleaded by the defendant.<sup>96</sup> In Wisconsin, an allegation that defendant "so carelessly and negligently ran and managed the said locomotive and cars, and the said railroad track, grounds, and fences, that its said locomotive and cars ran against and over said horses and colts," etc., preceded by an averment that they got casually on the track, was held to be insufficient to support evidence of the statutory liability.<sup>97</sup> An allegation "that said railroad was not, at the time and place aforesaid, fenced in by said defendant in manner and form as in the statute provided," was held to be a sufficient averment of a failure to erect and maintain suitable fences.<sup>98</sup> The exact wording of the statute need

<sup>92</sup> Great Western R. Co. v. Hanks, 36 Ill. 281.

<sup>93</sup> Chicago &c. R. Co. v. Carter, 20 Ill. 390; Toledo &c. R. Co. v. Lavery, 71 Ill. 522.

<sup>94</sup> Jeffersonville &c. R. Co. v. Brevoort, 30 Ind. 325; Louisville &c. R. Co. v. Detrick, 91 Ind. 519; Louisville &c. R. Co. v. Hall, 93 Ind. 245; Louisville &c. R. Co. v. Harrigan, 94 Ind. 245; Louisville &c. R. Co. v. Goodbar, 102 Ind. 596; s. c. 1 West. Rep. 133, 317; Lake Erie &c. R. Co. v. Fishback, 5 Ind. App. 403; s. c. 32 N. E. Rep. 346; Chicago &c. R. Co. v. Brannegan, 5 Ind. App. 540; s. c. 32 N. E. Rep. 790.

<sup>95</sup> Pennsylvania Co. v. Zwick, 1 Ind. App. 280; s. c. 27 N. E. Rep. 508; Pennsylvania Co. v. Cook (Ind. App.), 27 N. E. Rep. 509; Pennsylvania Co. v. Hayworth (Ind. App.), 27 N. E. Rep. 509.

<sup>96</sup> Fort Wayne &c. R. Co. v. Mussetter, 48 Ind. 286. See also Jeffersonville &c. R. Co. v. Lyon, 55 Ind. 477; Kansas &c. R. Co. v. Taylor, 17 Kan. 566; Indianapolis &c. R. Co. v. Adkins, 23 Ind. 340.

<sup>97</sup> Antisdel v. Chicago &c. R. Co., 26 Wis. 147.

<sup>98</sup> Toledo &c. R. Co. v. Fowler, 22 Ind. 316.



not be followed in setting forth a cause of action. Where a complaint alleged that a track was not "sufficiently fenced," it was held that these words were equivalent to the statutory phrase "securely fenced."<sup>99</sup> An allegation that the track is not "securely fenced," has been construed to mean that it was not inclosed with the "good and lawful fence" required by the statute.<sup>100</sup> And a statement that the "right of way" is not securely fenced, is sufficient, though the statute requires the "road" to be fenced.<sup>101</sup> It has been held that an allegation that the road is "unfenced," is supported by proof that the fence had been destroyed and never rebuilt.<sup>102</sup>

**§ 2173. When Necessary to State the Character of the Land at the Place where the Road was not Fenced.**—In Missouri, in such an action, it is necessary to indicate the character of the land where the injury occurred, and where the road is unfenced; for unless it be inclosed or cultivated fields, or uninclosed prairie, no action lies.<sup>103</sup>

**§ 2174. Particularity in Stating how Damage Occurred.**—The averment that, by means of the failure of the company to fence its railroad track, the plaintiff suffered damages in various ways, and, among others, "damages done to this plaintiff's stock by defendant's engines passing over said railroad," has been held not precise enough to warrant a recovery for a colt run over and killed by defendant's train. That was a specific act, not so necessarily caused by the neglect of fencing that defendant could be expected to meet the charge without having it pointed out directly.<sup>104</sup> But it has been held that an allegation that defendant killed plaintiff's stock by purposely and willfully running its locomotive against them, is sufficient, without stating the specific facts connected with the injury.<sup>105</sup>

**§ 2175. Whether Necessary for the Plaintiff to Negative his Own Negligence.**<sup>106</sup>—This may depend upon the rule of the jurisdiction as to the burden in respect of contributory negligence, as shown in the first volume. In Indiana, it is not necessary for the plaintiff to

<sup>99</sup> *Evansville &c. R. Co. v. Tipton*, 101 Ind. 197.

<sup>100</sup> *Missouri &c. R. Co. v. Morrow*, 36 Kan. 495.

<sup>101</sup> *Louisville &c. R. Co. v. Hixon*, 101 Ind. 337.

<sup>102</sup> *Fritz v. Kansas City &c. R. Co.*, 61 Iowa 323.

<sup>103</sup> *Davis v. Missouri &c. R. Co.*, 65 Mo. 441; *Musick v. Atlantic &c.*

*R. Co.*, 57 Mo. 134; *Board v. St. Louis &c. R. Co.*, 36 Mo. App. 151; *Wood v. Kansas City &c. R. Co.*, 39 Mo. App. 63.

<sup>104</sup> *Grand Rapids &c. R. Co. v. Southwick*, 30 Mich. 444.

<sup>105</sup> *Louisville &c. R. Co. v. Hart*, 2 Ind. App. 130; s. c. 28 N. E. Rep. 218.

<sup>106</sup> This section is cited in § 2139.



aver that he was guilty of no negligence contributing to the injury, as formerly in the common law actions in that State.<sup>107</sup>

§ 2176. **What Allegations are Surplusage.**—When the cause of action, as stated, is complete under the statute, allegations of *negligence* on the part of the defendant in the running and management of its trains are mere surplusage, and evidence sought to be introduced thereunder inadmissible, because irrelevant.<sup>108</sup> This is true, of course, only in those instances in which the evidence sustains the cause of action as alleged.

§ 2177. **Stating a Cause of Action at Common Law, no Recovery under the Statute.**—Where the declaration shows a cause of action at common law, and the evidence shows a state of facts entitling the plaintiff to recover, if at all, under the statute, he can not recover.<sup>109</sup>

§ 2178. **Declaration must be Complete either at Common Law or under the Statute.**—In order to entitle the plaintiff to recover at all, his declaration must be complete, either under the statute or at common law.<sup>110</sup> Thus, a declaration charging negligence and willfulness, and alleging, also, that the road was not fenced, and that there were no cattle-guards at the crossing, but which failed to state whether the injury occurred at a place where the company might lawfully fence its track, or at a public place where the maintenance of a fence would not be lawful, was held insufficient, because it neither stated a cause of action under the statute nor at common law.<sup>111</sup>

§ 2179. **When Plaintiff Entitled to Prove either a Common Law or a Statutory Cause of Action.**—But, it has been held that a declaration averring that defendant failed to fence its road, and that it so

<sup>107</sup> *Jeffersonville &c. R. Co. v. Lyon*, 55 Ind. 477; *Toledo &c. R. Co. v. Harris*, 49 Ind. 119. See *ante*, § 2139.

<sup>108</sup> *Cary v. St. Louis &c. R. Co.*, 60 Mo. 209; *Crutchfield v. St. Louis &c. R. Co.*, 64 Mo. 255; *Rockford &c. R. Co. v. Lynch*, 67 Ill. 149; *Collins v. Atlantic &c. R. Co.*, 65 Mo. 230; *Edwards v. Hannibal &c. R. Co.*, 66 Mo. 567; *Cleveland &c. R. Co. v. De Bolt*, 10 Ind. App. 174; s. c. 37 N. E. Rep. 737; *Asbach v. Chicago &c. R. Co.*, 74 Iowa 248; s. c. 37 N. W. Rep. 182.

<sup>109</sup> *Terre Haute &c. R. Co. v. Augustus*, 21 Ill. 186; *Luckie v. Chicago &c. R. Co.*, 67 Mo. 245.

<sup>110</sup> *Calvert v. Hannibal &c. R. Co.*, 34 Mo. 242; *Garner v. Hannibal &c. R. Co.*, 34 Mo. 235; *Aubuchon v. St. Louis &c. R. Co.*, 52 Mo. 522; *Smith v. Eastern R. Co.*, 35 N. H. 357; *Cooley v. Brainard*, 38 Vt. 394; *Indianapolis &c. R. Co. v. Sparr*, 15 Ind. 440; *Baltimore &c. R. Co. v. Anderson*, 58 Mo. 413; *Indianapolis &c. R. Co. v. Brucey*, 21 Ind. 215; *Indianapolis &c. R. Co. v. Taffe*, 11 Ind. 458.

<sup>111</sup> *Miles v. Hannibal &c. R. Co.*, 31 Mo. 407.



carelessly ran, conducted, and directed its train that it struck and killed the plaintiff's horse, was good, either as a declaration under the statute or at common law.<sup>112</sup> Such a declaration is liable to demurrer for duplicity; but if the general issue is pleaded, the plaintiff is entitled to prove either cause of action.<sup>113</sup>

**§ 2180. Effect of Stating a Cause of Action at Common Law and Amending by Stating a Cause of Action under the Statute.**—The causes of action for injuries to stock, at common law and under the statute, are separate and distinct. Where an action was brought before a justice of the peace, in which the statement set out a cause of action at common law, and, upon appeal to the Circuit Court, an amended statement was filed, alleging facts which constituted a cause of action under the statute, it was held that the whole cause of action was changed, and that a motion to strike out the statement for this reason was properly sustained.<sup>114</sup>

**§ 2181. Separate Injuries Create Separate Causes of Action.**—The killing or injury of animals at different times is each a separate and distinct cause of action, which should be stated in separate paragraphs of the complaint. If the complaint indicates but one cause of action, the plaintiff will be confined, in his evidence, to a single cause of action.<sup>115</sup> But it has been held that one, whose land has suffered repeated acts of depredation by reason of the railway company's failure to fence, may sue for the entire damage in one count and can not be compelled to *elect* which trespass or neglect he will proceed upon.<sup>116</sup>

**§ 2182. "One Action for the Tear and Another for the Scratch."**—And, in Missouri, it has been held that there can not be a recovery in the same action for the killing of a horse and an injury to the harness.<sup>117</sup>

**§ 2183. What Allegations Sufficient in a Complaint before a Justice of the Peace.**—In actions before justices of the peace, the

<sup>112</sup> *Stewart v. Manhattan &c. R. Co.*, 27 Kan. 631; *Chicago &c. R. Co. v. Magee*, 60 Ill. 529.

<sup>113</sup> *Chicago &c. R. Co. v. Magee*, 60 Ill. 529.

<sup>114</sup> *Hansberger v. Pacific R. Co.*, 43 Mo. 196. See also *Gregory v. Wabash &c. R. Co.*, 20 Mo. App. 448; s. c. 3 West. Rep. 279.

<sup>115</sup> *Jeffersonville &c. R. Co. v. Brevoort*, 30 Ind. 325; *Indianapolis &c.*

*R. Co. v. Elliott*, 20 Ind. 430; *Indianapolis &c. R. Co. v. Kercheval*, 24 Ind. 139; *Bricker v. Missouri &c. R. Co.*, 83 Mo. 391; *Puckett v. St. Louis &c. R. Co.*, 25 Mo. App. 650; *Louisville &c. R. Co. v. Cofer*, 110 Ala. 491; s. c. 18 South. Rep. 110.

<sup>116</sup> *Ray v. St. Louis &c. R. Co.*, 25 Mo. App. 104.

<sup>117</sup> *Dillard v. St. Louis &c. R. Co.*, 58 Mo. 70.



technical rules of pleading are not enforced, but the statement of the cause of action usually required must be sufficiently explicit to apprise the defendant of the nature of the injury, and whether it is under the statute or at common law.<sup>118</sup> A complaint before a justice of the peace, alleging that the defendant, "by its locomotive and train of cars then running on its railroad, at a point on its said road, in said county, where its railroad track was not securely fenced, ran over and killed two hogs of the plaintiff, of the value of \$50, wherefore," etc., was held to be a sufficient statement of facts.<sup>119</sup> Under the Missouri statute, the statement in an action before a justice of the peace must allege, by direct averment or necessary implication, that the stock got upon the track at a point where, by law, the defendant was bound to maintain a fence.<sup>120</sup>

§ 2184. **Form of Action when Brought before a Justice of the Peace.**—Such an action before a justice of the peace may be brought in the ordinary form for collecting a money-demand.<sup>121</sup> And where the statute provides that, on appeals from justices of the peace, "no objection shall be taken to the form or service of the summons," but that the case shall be decided on its merits,—the summons will not be insufficient merely because it does not more specifically designate the character of the action, even though the recovery is for a penal sum.<sup>122</sup>

§ 2185. **Variance between Pleading and Proof.**—An allegation that the fence which the defendant was bound to maintain was defective, will not support evidence that a gate was left open, through which the animal strayed upon the railroad, and was injured.<sup>123</sup> Nor will an allegation that defendant failed to construct cattle-guards sustain a recovery for an injury resulting from a failure to build fences.<sup>124</sup> The rule that the *allegata* and *probata* must agree has been applied with much strictness to actions arising under the Mis-

<sup>118</sup> Ohio &c. R. Co. v. Miller, 46 Ind. 215; Toledo &c. R. Co. v. Reed, 23 Ind. 101; Toledo &c. R. Co. v. Lurch, 23 Ind. 10; Wabash &c. R. Co. v. Lash, 103 Ind. 80; s. c. 1 West. Rep. 307.

<sup>119</sup> Bellefontaine R. Co. v. Reed, 33 Ind. 477. See also Ohio &c. R. Co. v. Miller, 46 Ind. 215; Talbot v. Minneapolis &c. R. Co., 82 Mich. 66; s. c. 45 N. W. Rep. 1113.

<sup>120</sup> Cunningham v. Hannibal &c. R. Co., 70 Mo. 202; McIntosh v. Hannibal &c. R. Co., 26 Mo. App. 377; Summers v. Hannibal &c. R. Co., 29

Mo. App. 41; Brassfield v. Patton, 32 Mo. App. 572.

<sup>121</sup> Cairo &c. R. Co. v. Murray, 82 Ill. 77; Indianapolis &c. R. Co. v. Sims, 92 Ind. 496; Minter v. Hannibal &c. R. Co., 82 Mo. 128; St. Louis &c. R. Co. v. Denson (Tex. Civ. App.), 26 S. W. Rep. 265.

<sup>122</sup> Cairo &c. R. Co. v. Murray, 82 Ill. 77.

<sup>123</sup> Illinois &c. R. Co. v. McKee, 43 Ill. 120.

<sup>124</sup> Parker v. Rensselaer &c. R. Co., 16 Barb. (N. Y.) 315.



souri statute. It was held in that State, where the petition alleged that the defendant carelessly and negligently ran its train over the stock, at a point which was not the crossing of any public road or highway, where the railway ran through uninclosed prairie lands, and was not fenced, that the action was exclusively under the forty-third section of the railroad law, and that evidence of negligence in running the train, or evidence to prove that the killing occurred within eighty rods of a public crossing, and that the whistle was not blown or the bell rung, as required by the thirty-eighth section, was irrelevant.<sup>125</sup> The rule in Illinois is to the same effect.<sup>126</sup> But the doctrine of the earlier Missouri cases was far more lax. It was held that, although the petition alleged facts showing a common law liability, still, evidence of facts constituting a statutory liability was admissible.<sup>127</sup>

### SUBDIVISION 3. *Questions of Evidence.*

| SECTION  | SECTION  |
|--|--|
| 2188. Burden of proof on the plaintiff.  | 2192. What evidence sufficient to sustain actions under these statutes.                    |
| 2189. Burden of proof as to negative averment as to statutory exceptions, on the defendant.    | 2193. What evidence tends to show that the fence was defective.                            |
| 2190. Inferential evidence sufficient to prove such negative allegations.                      | 2194. Circumstantial evidence that the animals were struck by the train.                   |
| 2191. Necessity of proving that the animals came upon the track where the fence was defective. | 2195. Admissibility of evidence of the action or non-action of the railroad commissioners. |

§ 2188. **Burden of Proof on the Plaintiff.**—In actions under the statute, the burden of showing that the defendant comes within its provisions is, of course, upon the plaintiff.<sup>128</sup> Here, as elsewhere, the rule is, that he who makes an allegation must produce evidence to sustain it.

<sup>125</sup> Collins v. Atlantic &c. R. Co., 65 Mo. 230.

<sup>126</sup> Illinois &c. R. Co. v. Middlesworth, 43 Ill. 65.

<sup>127</sup> Brown v. Hannibal &c. R. Co., 33 Mo. 309; Calvert v. Hannibal &c. R. Co., 34 Mo. 242; s. c. 38 Mo. 467.

<sup>128</sup> Indianapolis &c. R. Co. v. Means, 14 Ind. 30; Indianapolis &c. R. Co. v. Penry, 48 Ind. 128; Rogers v. Newburyport R. Co., 1 Allen (Mass.) 16; Toledo &c. R. Co. v.

Logan, 71 Ill. 191; Baxter v. Boston &c. R. Co., 102 Mass. 384; Kansas &c. R. Co. v. Ball, 19 Kan. 535; Morrison v. New York &c. R. Co., 32 Barb. (N. Y.) 569; Indianapolis &c. R. Co. v. Stallman, 15 Ind. 205; St. Louis &c. R. Co. v. Washburn, 7 Reporter 142; Summers v. Hannibal &c. R. Co., 20 Mo. App. 41; Warren v. Chicago &c. R. Co., 59 Mo. App. 367; s. c. 1 Mo. App. Rep. 37.



§ 2189. **Burden of Proof as to Negative Averment as to Statutory Exceptions, on the Defendant.**—Negative allegations of statutory exceptions and others are not excluded from the operation of this rule. But where it happens that the opposite party is in possession of plenary evidence to disprove such negative averment, and it appears that such proof is not in the control of the other party, the law will presume that the fact does not exist, unless the evidence to establish it is adduced. Thus, the burden of proof is not upon the plaintiff, in an action for injuries to stock under the Illinois statute, to show that there was no contract between the company and the owner of the ground that the latter should build the fence at the place where the injury occurred, such a contract being one of the statutory exceptions, and therefore negatively averred.<sup>129</sup> If the case falls within one of the exceptions of the statute not contained in the enacting clause, the burden of averring and proving it is upon the defendant.<sup>130</sup>

§ 2190. **Inferential Evidence Sufficient to Prove Such Negative Allegations.**—In another case, inferential evidence has been held sufficient to prove a negative allegation of such exception.<sup>131</sup>

§ 2191. **Necessity of Proving that the Animals Came upon the Track where the Fence was Defective.**—It being a necessary allegation of the petition, that the animals came upon the track at the place where the statutory fence should have been, but was not, maintained,<sup>132</sup> it follows that it must be shown in evidence that such was the fact.<sup>133</sup> It is not sufficient to show that the fence on each side of the road was poor and defective.<sup>134</sup> And if the animal got upon the track at a point where the company was not bound to maintain a fence, and was driven to a place where a fence should have been maintained, and was there killed, it is immaterial whether, at the place of the killing, there was a fence or not;<sup>135</sup> for it has been held that it

<sup>129</sup> Great Western R. Co. v. Bacon, 30 Ill. 347.

<sup>130</sup> Toledo &c. R. Co. v. Pence, 68 Ill. 525; Jeffersonville &c. R. Co. v. O'Connor, 37 Ind. 95; Ewing v. Chicago &c. R. Co., 72 Ill. 25; Indianapolis &c. R. Co. v. Penry, 48 Ind. 128; Comstock v. Des Moines &c. R. Co., 32 Iowa 376; Flint &c. R. Co. v. Lull, 28 Mich. 510; Union &c. R. Co. v. Dyche, 28 Kan. 200; Cincinnati &c. R. Co. v. Parker, 109 Ind. 235; Toledo &c. R. Co. v. Jackson, 5 Ind. App. 547; s. c. 32 N. E. Rep. 793.

<sup>131</sup> Rockford &c. R. Co. v. Spillers, 67 Ill. 167.

<sup>122</sup> Ante, § 2051.

<sup>123</sup> Illinois &c. R. Co. v. Finney, 42 Ill. App. 390; Lake Erie &c. R. Co. v. Kneadle, 94 Ind. 454; Kyser v. Kansas City &c. R. Co., 56 Iowa 207; Henson v. St. Louis &c. R. Co., 34 Mo. App. 636; Roberts v. Quincy &c. R. Co., 49 Mo. App. 164; Crenshaw v. St. Louis &c. R. Co., 54 Mo. App. 233; Maberry v. Missouri R. Co., 83 Mo. 664; Bremmer v. Green Bay &c. R. Co., 61 Wis. 114.

<sup>124</sup> Wabash R. Co. v. Brown, 2 Bradw. (Ill. App.) 516.

<sup>125</sup> Great Western R. Co. v. Morthland, 30 Ill. 451.



is not sufficient to show merely that the fence was defective, but it must appear that the animal got upon the track in consequence of such defect. If the evidence shows merely that possibly the animal so got upon the track, the plaintiff must be nonsuited.<sup>136</sup> But such is not the rule in Missouri, where the court say: "If the plaintiff's horse is shown to have been killed at a point where the road is required to be fenced, and where it is not fenced, it will be presumed, in the absence of any evidence to the contrary, that the damages were occasioned by the failure of the railroad to fence its track."<sup>137</sup> Direct evidence that the animal in question entered upon the track where the statutory fence was defective, is not required. *Circumstantial evidence* is sufficient.<sup>138</sup> Where the railway company negligently permits its fence to remain in such a condition as to allow cattle to pass through, the jury may infer that cattle kept in the adjoining field, which were killed by the company's train, entered upon the track through such defective fence.<sup>139</sup> But it has been held that the defective construction of a gate, which was closed the night before the accident, does not raise the presumption that the defect caused the accident, so as to cast upon the defendant the burden of disproving it to defeat a recovery.<sup>140</sup>

**§ 2192. What Evidence Sufficient to Sustain Actions under these Statutes.**—As to what is sufficient evidence to sustain an action under the statute, it has been held that evidence that the fence was defective on the 22d of the month is not sufficient to show that it was defective on the 20th, the date of the accident, and thereby charge the company without showing negligence.<sup>141</sup> Nor is evidence of the condition of the fence at a place, other than the point where the right of way was entered, admissible.<sup>142</sup>

<sup>136</sup> *Morrison v. New York & C. R. Co.*, 32 Barb. (N. Y.) 568; *Bennett v. Chicago & C. R. Co.*, 19 Wis. 145.

<sup>137</sup> *Vories, J., in Walther v. Pacific R. R.*, 55 Mo. 276. Also, *Fickle v. St. Louis & C. R. Co.*, 54 Mo. 219; *Wood v. Kansas City & C. R. Co.*, 43 Mo. App. 294; *Bateman v. Kansas City & C. R. Co.*, 53 Mo. App. 13; *Crenshaw v. St. Louis & C. R. Co.*, 54 Mo. App. 233; *alter, Cecil v. Pacific R. R.*, 47 Mo. 246.

<sup>138</sup> *Evansville & C. R. Co. v. Mosier*, 101 Ind. 597; *Gee v. St. Louis & C. R. Co.*, 80 Mo. 283; *Lepp v. St. Louis & C. R. Co.*, 87 Mo. 139; *Mayfield v. St. Louis & C. R. Co.*, 91 Mo. 296; *Cummings v. St. Louis & C. R. Co.*, 70 Mo. 570; *Archibald v. New York*

*& C. R. Co.*, 38 N. Y. St. Rep. 790; s. c. 14 N. Y. Supp. 801.

<sup>139</sup> *Chisholm v. Northern & C. R. Co.*, 53 Minn. 122; s. c. 54 N. W. Rep. 1061; *Holtz v. Minneapolis & C. R. Co.*, 29 Minn. 384; *Mayfield v. Missouri & C. R. Co.*, 91 Mo. 296; s. c. 8 West. Rep. 264; *Dinwoodie v. Chicago & C. R. Co.*, 70 Wis. 160; s. c. 35 N. W. Rep. 296.

<sup>140</sup> *Johnson v. Chicago & C. R. Co.*, 55 Iowa 707. See also *Bothwell v. Chicago & C. R. Co.*, 59 Iowa 192; *Payne v. Kansas City & C. R. Co.*, 72 Iowa 214; s. c. 33 N. W. Rep. 633.

<sup>141</sup> *Illinois & C. R. Co. v. Whalen*, 42 Ill. 396.

<sup>142</sup> *Coryell v. Hannibal & C. R. Co.*, 82 Mo. 441.



§ 2193. **What Evidence Tends to Show that the Fence was Defective.**—The fact that a horse, maddened with fright, rushed through or over the fence or cattle-guard, is not conclusive evidence that it was defective; but it is a circumstance which the jury have a right to take into consideration, in determining the question of the sufficiency of the fence or cattle-guard.<sup>143</sup>

§ 2194. **Circumstantial Evidence that the Animals were Struck by the Train.**—As to the evidence necessary to sustain an allegation of injury, the defect in the fence being shown, it is sufficient that it appears that the animals were found on the side of the railroad track “badly smashed up,” and that no other reasonable cause could be assigned for the casualty, though no one saw the locomotive strike them. The jury, under such circumstances, are at liberty to infer that the injury was caused by the cars or locomotive of the defendant.<sup>144</sup> But, where a horse was found dead under a trestle, and the facts as proved were as consistent with the theory of his having fallen from the trestle, as with that of his having been thrown from it by a train, and those in charge of the only train that passed the spot after the horse was missed, testified that they saw no horse at the trestle, it was held that there could be no recovery.<sup>145</sup>

§ 2195. **Admissibility of Evidence of the Action or Non-Action of the Railroad Commissioners.**—Evidence offered for the purpose of showing that the Railroad Commissioners were of the opinion that certain cattle-guards were unnecessary, to the effect that the commissioners had frequently passed over that part of the road in the cars, on their official examination of the road, and had never directed or advised that the cattle-guards be made,—it appearing, however, that their attention had never been specially called to the crossing in question,—was held to be admissible; but such evidence was certainly not conclusive.<sup>146</sup>

<sup>143</sup> Chicago &c. R. Co. v. Utley, 38 Ill. 410; Chicago &c. R. Co. v. Hart, 22 Ill. App. 207; Timins v. Chicago &c. R. Co., 72 Iowa 94; s. c. 33 N. W. Rep. 379.

<sup>144</sup> Illinois &c. R. Co. v. Whalen, 42 Ill. 396; Toledo &c. R. Co. v. Delehanty, 71 Ill. 615; Brockert v. Central &c. R. Co., 82 Iowa 369; s. c.

47 N. W. Rep. 1026; Blewett v. Wyandotte &c. R. Co., 72 Mo. 583; Fraysher v. Mississippi &c. R. Co., 66 Mo. App. 573.

<sup>145</sup> Ohio &c. R. Co. v. Atteberry, 43 Ill. App. 80.

<sup>146</sup> Bulkley v. New York &c. R. Co., 27 Conn. 479.



SUBDIVISION 4. *Questions of Law and Fact.*

## SECTION

2197. Duty to fence, a question of law.

2198. Sufficiency of fence a question of fact.

## SECTION

2199. Whether injury was due to defective fence a question of fact.

§ 2197. **Duty to Fence, a Question of Law.**—The question of the obligation of the company to fence the road at a given point is a *question of law*, not of fact, and should not be left to the jury to determine.<sup>147</sup> For instance, it has been decided, as a matter of law, that a railroad company is not bound by the statute to fence its depot-grounds;<sup>148</sup> and it is within the province of the court to determine what are depot-grounds.<sup>149</sup>

§ 2198. **Sufficiency of Fence a Question of Fact.**—But whether or not the company has securely fenced its road at a particular place,—its obligation to do so being determined by the court,—or whether the injury occurred at a particular place, where the company was bound by law to maintain a fence, are questions of fact, to be determined by the jury.<sup>150</sup>

§ 2199. **Whether Injury was Due to Defective Fence a Question of Fact.**—The question whether or not the injury occurred in consequence of the defect,<sup>151</sup> is likewise a question for the jury.

<sup>147</sup> Illinois &c. R. Co. v. Whalen, 42 Ill. 396; Chicago &c. R. Co. v. Engle, 76 Ill. 318; Toledo &c. R. Co. v. Cory, 39 Ind. 218; Indianapolis &c. R. Co. v. Oestel, 20 Ind. 231; Neely v. Charlotte &c. R. Co., 33 S. C. 136; s. c. 11 S. E. Rep. 636.

<sup>148</sup> Davis v. Burlington &c. R. Co., 26 Iowa 550; Rogers v. Chicago &c. R. Co., 26 Iowa 558; Durand v. Chicago &c. R. Co., 26 Iowa 559; Smith v. Chicago &c. R. Co., 34 Iowa 506; Galena &c. R. Co. v. Griffin, 31 Ill. 303; Indianapolis &c. R. Co. v. Oestel, 20 Ind. 231; Cleveland v. Chicago &c. R. Co., 35 Iowa 220; Plaster v. Illinois &c. R. Co., 35 Iowa 449; Latty v. Burlington &c. R. Co., 38 Iowa 250; Lloyd v. Pacific R. Co., 49 Mo. 199; Swearingen v. Missouri &c. R. Co., 64 Mo. 73; Robertson v. Atlantic &c. R. Co., 64 Mo. 412; Packard v. Illinois &c. R. Co., 30 Iowa 474.

<sup>149</sup> Blair v. Milwaukee &c. R. Co., 20 Wis. 254; Davis v. Burlington &c. R. Co., 26 Iowa 549. But, though it is the province of the court to determine this question as one of law,

yet its judgment will not be reversed by an appellate court, unless the facts on which a reversal is sought clearly appear in the record.

<sup>150</sup> Estes v. Atlantic &c. R. Co., 63 Me. 309; Toledo &c. R. Co. v. Cory, 39 Ind. 218; Mumpower v. Hannibal &c. R. Co., 59 Mo. 246; Wabash R. Co. v. Ferris, 6 Ind. App. 30; s. c. 32 N. E. Rep. 112; Butler v. Chicago &c. R. Co., 71 Iowa 206; s. c. 32 N. W. Rep. 262; Peet v. Chicago &c. R. Co., 88 Iowa 520; s. c. 55 N. W. Rep. 508; Taft v. New York &c. R. Co., 157 Mass. 297; s. c. 32 N. E. Rep. 168; Parker v. Lake Shore &c. R. Co., 93 Mich. 607; s. c. 53 N. W. Rep. 834; Schuyler v. Fitchburg R. Co., 47 N. Y. St. Rep. 741; s. c. 20 N. Y. Supp. 287.

<sup>151</sup> Holden v. Rutland &c. R. Co., 30 Vt. 298; Cage v. Louisville &c. R. Co. (Miss.), 7 South. Rep. 509; Missouri &c. R. Co. v. Hall, 87 Fed. Rep. 170; s. c. 58 U. S. App. 685; Johnson v. Baltimore &c. R. Co., 25 W. Va. 570.



ARTICLE III. NOTICE TO THE COMPANY OF CLAIM.

| SECTION   | SECTION  |
|---|--|
| 2201. Statutes requiring notice of demand to be given to the railway company are mandatory. | 2203. Demand for an appraisalment.   |
| 2202. Certainty required in the statutory notice.   | 2204. Service of the notice.   |
|   | 2205. Statutes requiring the railway company to advertise the fact of the killing. |
|   | 2206. Time within which the demand must be made.                                   |

§ 2201. **Statutes Requiring Notice of Demand to be Given to the Railway Company are Mandatory.**—Statutes have been enacted in many States, with the obvious design of preventing frauds upon railroad companies, to the general effect that no action shall be maintained against a railroad company to recover damages for the killing of domestic animals, unless, within a prescribed period, the claimant shall give *notice in writing* to the railroad company, stating the time when and the place where the damage occurred and demanding satisfaction therefor. These statutes are mandatory: no court has the power to set them aside or to relax their provisions; therefore a notice and demand given after the commencement of the action are insufficient.<sup>152</sup>

§ 2202. **Certainty Required in the Statutory Notice.**—Obviously, the notice required by the statute must be *reasonably certain* as to the time when and the place where the animals were killed; otherwise it would fail of the object intended by the statute, namely, the giving of such a notice as would enable the railway company to make an investigation and ascertain the facts, so as to satisfy the claim if well founded, and defend it if ill founded. The requirement of the statute of Wisconsin<sup>153</sup> that the notice of the killing of stock by a railroad train shall state the “time and place at which the damage occurred,” means that it must point to the place of the injury, as directly and

<sup>152</sup> Weed &c. Co. v. Whitcomb, 101 Wis. 226; s. c. 14 Am. & Eng. Rail. Cas. (N. S.) 1; 77 N. W. Rep. 175; Union &c. R. Co. v. Sternberg, 13 Colo. 141; s. c. 2 Denver Leg. N. 274; 21 Pac. Rep. 1021. There can be no recovery under the Alabama statute (Ala. Code, § 1701), unless notice of the claim is presented to some agent of the company, or unless suit is brought thereon within sixty days after the injury: South &c. R. Co. v. Reid, 66 Ala. 250. The

fact that some of the officers or employes of the railroad company may know the time when and place where the damage occurred, does not dispense with the necessity of giving notice of the time and place, as required by the statute: Ryan v. Chicago &c. R. Co., 101 Wis. 506; s. c. 14 Am. & Eng. Rail. Cas. (N. S.) 4; 77 N. W. Rep. 894; construing Wis. Laws 1893, ch. 202.

<sup>153</sup> Wis. Laws 1893, ch. 202.



plainly as is reasonably practicable, having regard to its character and surroundings.<sup>154</sup> A notice which applies equally to any place within a distance of three miles, is not sufficiently certain as to the place of the damage, to satisfy the statute.<sup>155</sup> On the contrary, under a statute of Iowa it is not necessary that the notice and affidavits required to be served upon the railroad company should contain anything more than a statement of the claim and the fact of the injury.<sup>156</sup> The affidavit necessary for securing double damages under a statute of that State, for stock killed by a railroad train, need not designate the place of the injury.<sup>157</sup> Under the Kansas statute the demand upon the agent of the railroad company may be made *orally*, and his *responses* thereto are admissible in evidence on the trial of the action for damages, as a part of the *res gestae*;<sup>158</sup> and where the owner merely states to the claim agent of the railroad company that he wants pay for the killing of his stock, he has made a sufficient demand to satisfy the statute.<sup>159</sup> The written notice required to be given by a later statute,<sup>160</sup> before the commencement of an action, need not specify the particular breach of statutory duty which may be relied on to fix the liability of the company.<sup>161</sup> Under the Kansas statute, a sufficient demand is shown to have been made where the plaintiff informs a station agent of the company thirty days before the suit is brought, of his demand, which the agent takes down and says, "All right," and such demand is transmitted to the claim agent of the company, and a settlement attempted.<sup>162</sup> The notice in writing, required by the statute of Oregon, is not jurisdictional; and hence such a notice is sufficient where it includes a statement of the killing of the plaintiff's stock, for which he seeks to recover, although it includes other stock jointly owned by the plaintiff and another person, and although it is signed by both.<sup>163</sup>

§ 2203. Demand for an Appraisalment.—Some of the statutes provide that the owner of animals killed may give notice to the railway company and demand an appraisalment. Such a statute<sup>164</sup> has been

<sup>154</sup> Ryan v. Chicago &c. R. Co., 101 Wis. 506; s. c. 14 Am. & Eng. Rail. Cas. (N. S.) 4; 77 N. W. Rep. 894.

<sup>155</sup> Ryan v. Chicago &c. R. Co., 101 Wis. 506; s. c. 14 Am. & Eng. Rail. Cas. (N. S.) 4; 77 N. W. Rep. 894.

<sup>156</sup> Mackie v. Central Railroad of Iowa, 54 Iowa 540.

<sup>157</sup> Mundhenk v. Central Iowa R. Co., 57 Iowa 718.

<sup>158</sup> Central Branch &c. R. Co. v. Butman, 22 Kan. 639.

<sup>159</sup> St. Louis &c. R. Co. v. Kinman, 9 Kan. App. 633; s. c. 58 Pac. Rep. 1037 (under the act of 1874).

<sup>160</sup> Kan. Gen. Stat. 1889, § 1253.

<sup>161</sup> Wichita &c. R. Co. v. Hart, 7 Kan. App. 550; s. c. 51 Pac. Rep. 933.

<sup>162</sup> Union &c. R. Co. v. Shelley, 49 Kan. 667; s. c. 31 Pac. Rep. 304.

<sup>163</sup> Brown v. Southern &c. R. Co., 36 Or. 128; s. c. 58 Pac. Rep. 1104.

<sup>164</sup> Dak. Civ. Proc., § 680.



held merely cumulative or permissive, in its character, so that a compliance with it is not a prerequisite to the right to institute a suit for the damages suffered.<sup>165</sup> Under a statute which makes railroad companies absolutely liable, without proof of negligence, for the killing of domestic animals by a moving train upon an unfenced track, neither an appraisal of the animals killed, nor a suit upon the appraisal, is necessary to the right to bring a general action for the damage; but the effect of the appraisal is merely to make out a *prima facie* case for the owner of the animals, as to the amount of damage and of the attorney's fee, in case of a recovery.<sup>166</sup> Under the Alabama statute, the appraisal is evidence of the true value of the animal killed, and can not be explained by showing that, for a certain reason or purpose, the appraisal was not made on the basis of the animal's true value.<sup>167</sup> Under the Kentucky statute, a notice to the railroad company, by the owner of the stock which has been killed, of an application for the appointment of appraisers, is insufficient, where it does not fix the time when the application for the appointment is to be made, and is not addressed to the railway company alleged to have done the killing.<sup>168</sup> In Colorado, if one whose stock is killed by a train fails to observe the statutory requirement of having an appraisal before bringing suit, the fact of the omission may be pleaded in abatement; but if not pleaded in abatement, it can not be taken advantage of afterwards.<sup>169</sup>

§ 2204. **Service of the Notice.**—Under the Tennessee statute,<sup>170</sup> the notice required to be given by the owner of animals killed or injured by a railway train, to the nearest agent of the railway company, of the intention of the owner to apply to a justice of the peace for the appointment of appraisers to assess the damage,—must be given to the agent of the company nearest the place where the accident occurred, no matter whether he lives in the same civil district, or even in the same county.<sup>171</sup> Under an Iowa statute, a notice of a claim of *double damages* for killing or injuring stock by reason of the failure of the railway company to fence its track, has been held to have been

<sup>165</sup> *Volkman v. Chicago &c. R. Co.*, 5 Dak. 69; s. c. 37 N. W. Rep. 371.

<sup>166</sup> *Cincinnati &c. R. Co. v. Russell*, 92 Tenn. 108; s. c. 20 S. W. Rep. 784.

<sup>167</sup> *East Tennessee &c. R. Co. v. Bayliss*, 74 Ala. 150.

<sup>168</sup> *Newport News &c. R. Co. v. Thomas*, 16 Ky. L. Rep. 706; s. c. 29 S. W. Rep. 437.

<sup>169</sup> *Atchison &c. R. Co. v. Lujan*, 6 Colo. 338.

<sup>170</sup> Tenn. Acts 1891, ch. 101, § 4.

<sup>171</sup> *Illinois &c. R. Co. v. Tilman*, 98 Tenn. 573; s. c. 41 S. W. Rep. 937; 7 Am. & Eng. Rail. Cas. (N. S.) 735.



well served when served upon "a station agent," without showing that he was "employed in the management of the business of the corporation," that fact being presumed from the fact of his being its station agent.<sup>172</sup> The general attorney of a railway company is, *prima facie*, a proper agent on whom to serve a notice of a claim for damages for stock killed on the track of the company; and a service on him will be good, in the absence of any attempt on the part of the company to show that he is not its agent for the purpose, or of any objection to proof of demand upon him, on that ground. It was so held under a statute requiring notice to be given "to any general agent or officer of such corporation or person, or to any station, depot, or other agent or officer acting for said corporation in the county where the live stock was killed or injured."<sup>173</sup> Under the Alabama statute presentation of a claim for injury to live stock to the "section boss" of a railroad company is not a presentation to the company.<sup>174</sup>

§ 2205. Statutes Requiring the Railway Company to Advertise the Fact of the Killing.—Statutes have been enacted requiring railway companies, in case domestic animals are killed by their trains, to advertise the fact of the killing in a certain mode and for a certain time: otherwise authorizing a recovery of *double damages*. Construing such a statute, it has been held that double damages are recoverable by the owner of the animals for the failure of the railway company to advertise the fact of the killing, although the owner had *actual knowledge* of the fact, as the statute made no exceptions,<sup>175</sup>—a decision which illustrates either the absurdity of the statute or of the judges. Under the Georgia statute,<sup>176</sup> claims against a railroad company for killing stock and for double the value of the stock killed, because of the failure of the overseer of the company to report the same, must be established by separate proceedings before a justice of the peace.<sup>177</sup>

<sup>172</sup> Schlengerer v. Chicago &c. R. Co., 61 Iowa 235. Substantially to the same effect, see Smith v. Chicago &c. R. Co., 60 Iowa 512. When, therefore, the proof of service recited that the service was made by reading the notice "to the station agent of the road" at a certain place, this was held sufficient: Welsh v. Chicago &c. R. Co., 53 Iowa 632. When the bill of particulars states a demand was made upon the agent of a railroad company by the owner, to pay for injuries to his cow run into by the locomotive and cars of said company, it will be construed

to mean, when first attacked after judgment, that such agent was one upon whom such demand could be made under Kan. Comp. Laws 1879, ch. 84, art. 2: Missouri &c. R. Co. v. Morrow, 36 Kan. 495.

<sup>173</sup> Jacksonville &c. R. Co. v. Harris, 33 Fla. 217; s. c. 14 South. Rep. 726.

<sup>174</sup> Alabama &c. R. Co. v. Killian, 69 Ala. 277.

<sup>175</sup> Memphis &c. R. Co. v. Carley, 39 Ark. 246.

<sup>176</sup> Ga. Code, §§ 3023, 3040, 3045.

<sup>177</sup> Jones v. Americus &c. R. Co., 30 Ga. 803; s. c. 7 S. E. Rep. 117.



§ 2206. **Time within which the Demand must be Made.**—Under a statute of Kansas, where a demand is made for the damage to stock caused by a railway company thirty days prior to the commencement of an action to recover such damage, and the action is commenced within one year after the dismissal of a former action upon the same subject-matter, the demand is made in time, and the cause of action is not barred.<sup>178</sup>

<sup>178</sup> *St. Louis &c. R. Co. v. Kinman*, 9 Kan. App. 633; s. c. 58 Pac. Rep. 1037 (under the act of 1874).



## CHAPTER LXX.

## QUESTIONS AS TO DAMAGES.

| SECTION   | SECTION  |
|---|--|
| 2208. Measure of damages where the animal is killed outright.                           | 2217. Whether interest on value given.                           |
| 2209. Where the animal is killed by the owner to end its misery.                        | 2218. Statutes under which expense of litigation added.          |
| 2210. Whether the value of the carcass, hide, etc., considered in reduction of damages. | 2219. Exemplary damages, when given.                             |
| 2211. Where the animal is merely disabled for a time.                                   | 2220. When verdict set aside because excessive.                  |
| 2212. Value of the animal, how proved.  | 2221. When verdict will not be set aside on question of damages. |
| 2213. Whether admissible to show sales of other similar animals.                        | 2222. Construction of written instruments releasing damages.     |
| 2214. When not admissible to prove value by comparison with other animals.              | 2223. Construction of statutes giving double damages.            |
| 2215. Expert testimony not necessary on question of value.                              | 2224. Procedure under statutes giving double damages.            |
| 2216. What questions as to value have been held improper.                               | 2225. Cost of driving out and herding the stock.                 |

§ 2208. Measure of Damages where the Animal is Killed Outright.—Where stock is killed outright, or rendered entirely valueless, the measure of the damages which the plaintiff is entitled to recover is the value of the stock at the time of the injury.<sup>1</sup>

<sup>1</sup> *Lapine v. New Orleans & c. R. Co.*, 20 La. An. 158; *Indianapolis & c. R. Co. v. Mustard*, 34 Ind. 51; *Toledo & c. R. Co. v. Johnston*, 74 Ill. 83; *Toledo & c. R. Co. v. Arnold*, 43 Ill. 418; *Madison & c. R. Co. v. Herod*, 10 Ind. 2. The measure of damages for cattle negligently killed and injured *during transportation* is, in the absence of any contract of shipment fixing a different measure of damages, or where such contract is an unlawful limitation of liability, the market value of the cattle killed or injured at the time and place of delivery: *Missouri & c. R. Co. v. Ed-*

*wards*, 78 Tex. 307; s. c. 14 S. W. Rep. 607. Under a shipping contract stipulating that the market value at the point of destination shall be taken as liquidated damages, it has been held that the measure of damages which the shipper is entitled to recover, for the negligent killing by the carrier of an animal during transit, is the price agreed to be paid by the consignee on its arrival at the point of destination: *Gulf & c. R. Co. v. Key*, 4 Tex. App. Cas. 448; s. c. 16 S. W. Rep. 106. The value of a *dog* killed in a burning building is not a part of the dam-



§ 2209. **Where the Animal is Killed by the Owner to End its Misery.**—If the animal is so badly injured that it must soon die, and the owner kills it to end its misery, and receives no benefit from it after the injury, the rule is the same.<sup>2</sup>

§ 2210. **Whether the Value of the Carcass, Hide, etc., Considered in Reduction of Damages.**—Evidence of the value of the animal after the injury is not admissible in reduction of damages. A man whose animal is wrongfully killed is not bound to take the dead animal in part payment for the living one.<sup>3</sup> A single exception seems to be made to this rule, in the case of animals which are *fit for beef* after the injury. These it is the owner's duty to dispose of to the best advantage. The criterion of damages, in this case, is the value of the cattle as injured, and their value before the injury.<sup>4</sup> It has been held that the value of the hide or meat of stock killed by a railroad train, which could, by the exercise of reasonable diligence, have been used by the owner after the accident, should be deducted from the value of the living animal, in estimating the damages recoverable for killing it.<sup>5</sup> The owner, however, is only to be charged with the net proceeds of such cattle, after deducting a fair allowance for the time and trouble required in effecting a sale.<sup>6</sup> If the cattle, when discovered, are mangled, swollen, and bruised, the plaintiff is not required to dispose of their bodies to entitle him to recover their full value.<sup>7</sup>

§ 2211. **Where the Animal is merely Disabled for a Time.**—In the case of a span of horses, which are not killed outright, but merely injured so as to render them unfit for use for a time, the owner may recover for the permanent diminution in the market value of the horses, and, in addition thereto, such expenses as he incurred in reasonable attempts to effect a cure, together with a reasonable compensation for the loss of the use of the horses while under treatment, provided the whole damage do not exceed the original value of the property.<sup>8</sup>

ages recoverable by the owner of the building from the railroad company negligently setting it on fire; since the death of the dog is not deemed a proximate result of the negligence: *Serafina v. Galveston &c. R. Co.* (Tex. Civ. App.), 42 S. W. 142 (no off. rep.).

<sup>2</sup> *Indianapolis &c. R. Co. v. Mustard*, 34 Ind. 50.

<sup>3</sup> *Indianapolis &c. R. Co. v. Mustard*, 34 Ind. 51; *Ohio &c. R. Co. v. Hays*, 35 Ind. 173.

<sup>4</sup> *Illinois &c. R. Co. v. Finnigan*, 21 Ill. 646.

<sup>5</sup> *Memphis &c. R. Co. v. Hembree*, 84 Ala. 182; s. c. 4 South. Rep. 392.

<sup>6</sup> *Dean v. Chicago &c. R. Co.*, 43 Wis. 305; s. c. 5 Reporter 608.

<sup>7</sup> *Rockford &c. R. Co. v. Lynch*, 67 Ill. 149.

<sup>8</sup> *Keyes v. Minneapolis &c. R. Co.*, 36 Minn. 290; s. c. 30 N. W. Rep. 888. The measure of damages in case of cattle not killed, but merely injured during transportation, is the



§ 2212. **Value of the Animal, how Proved.**—The value of the animal at the time of the injury may be shown by persons who have seen it within a reasonable time prior to the injury, and can swear to its value at that time, and by supplementing their testimony by that of other witnesses, to the effect that its condition had not changed from that time till the accident.<sup>9</sup> Evidence of value should be confined to the value in the vicinity where the killing occurred, and not at some distant market.<sup>10</sup>

§ 2213. **Whether Admissible to Show Sales of Other Similar Animals.**—In an action for an injury to a colt, in proof of the value of the animal, it was held admissible to show the price for which another colt of the same age, sired by the same horse, but not so good as plaintiff's, sold for in the same neighborhood.<sup>11</sup>

§ 2214. **When not Admissible to Prove Value by Comparison with Other Animals.**—Where, however, the plaintiff has other testimony at hand, he can not prove the value of a colt by comparison with the colts of another person, joined with evidence of the value of the other colts.<sup>12</sup>

§ 2215. **Expert Testimony not Necessary on Question of Value.**—The testimony of *experts* is not always necessary in these cases. Every one is supposed to have some idea of the value of such property, as is in general use; it is not necessary to have a drover or butcher prove the value of a cow.<sup>13</sup>

§ 2216. **What Questions as to Value have been Held Improper.**—It is not competent to ask an expert in the values of horses, "What, on the 10th day of May (the date of the injury), was the value of a horse, fifteen or sixteen hands high, three or three and one-half years old, and sound except ringbone on the hind foot, which had been killed?"<sup>14</sup>

difference between their value in their condition when delivered at their destination, and their value at the point of destination if uninjured; and unless evidence is given as to their value if uninjured at the place of destination, no damages can be recovered: *Galveston & C. R. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. Rep. 298.

<sup>9</sup> *Toledo & C. R. Co. v. Smith*, 25 Ind. 288.

<sup>10</sup> *Warden v. Missouri & C. R. Co.*, 78 Mo. App. 664.

<sup>11</sup> *White v. Concord & C. R. Co.*, 30 N. H. 208.

<sup>12</sup> *Atchison & C. R. Co. v. Harper*, 19 Kan. 529.

<sup>13</sup> *Ohio & C. R. Co. v. Irvin*, 27 Ill. 179.

<sup>14</sup> *Toledo & C. R. Co. v. Smith*, 25 Ind. 288.



§ 2217. **Whether Interest on Value Given.**—In estimating the damages, is the plaintiff entitled to *interest* on the value of the stock from the date of the injury? The rule seems to be that it should not be allowed.<sup>15</sup> There is an intimation to the contrary in an Illinois case,<sup>16</sup> but it is distinctly overruled in a subsequent decision.<sup>17</sup>

§ 2218. **Statutes under which Expense of Litigation Added.**—The Georgia Code permits the plaintiff to recover the *expenses of litigation*, as a part of the damages in an action of *tort*, “if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense.”<sup>18</sup> It has been held that such damages were recoverable in an action for an injury to a cow by a railway train.<sup>19</sup>

§ 2219. **Exemplary Damages, when Given.**—The rule in regard to *exemplary damages* in these cases is the same as in other cases of *tort*. If the evidence shows willful mischief, or gross negligence, or both, the jury may find such punitive or exemplary damages as the case justifies.<sup>20</sup> In the absence of these, no such damages are allowed.

§ 2220. **When Verdict Set Aside because Excessive.**—If the verdict is in excess of the real injury, it will be set aside.<sup>21</sup> The court will not, however, set a verdict aside if it is only slightly in excess of the amount at which the court would have assessed the damages.<sup>22</sup>

§ 2221. **When Verdict will not be Set Aside on Question of Damages.**—It has been held that where the testimony as to the value of an animal killed by a railroad company does not indicate whether the estimate of the value is based upon the market price or the actual value, the appellate court will not set aside the verdict on the mere supposition that the basis was not the market value.<sup>23</sup> One court refused to set aside a verdict for \$200 for killing a horse and wrecking

<sup>15</sup> Meyer v. Atlantic &c. R. Co., 64 Mo. 543; Dean v. Chicago &c. R. Co., 43 Wis. 305; s. c. 5 Reporter 608; Bretner v. Chicago &c. R. Co., 68 Iowa 530; St. Louis &c. R. Co. v. Terry, 22 Tex. Civ. App. 176; s. c. 54 S. W. Rep. 431; St. Louis &c. R. Co. v. Chambliss, 93 Tex. 620; s. c. 53 S. W. Rep. 343.

<sup>16</sup> Chicago &c. R. Co. v. Shultz, 55 Ill. 421. See also Lackin v. Delaware &c. Canal Co., 22 Hun (N. Y.) 309.

<sup>17</sup> Toledo &c. R. Co. v. Johnston, 74 Ill. 83.

<sup>18</sup> Code Ga. 1873, § 2942; Irwin's Ga. Code, § 2891.

<sup>19</sup> Selma &c. R. Co. v. Fleming, 48 Ga. 514.

<sup>20</sup> Vicksburg &c. R. Co. v. Patton, 31 Miss. 197; Toledo &c. R. Co. v. Johnston, 74 Ill. 83.

<sup>21</sup> Toledo &c. R. Co. v. Arnold, 43 Ill. 418.

<sup>22</sup> Rockford &c. R. Co. v. Heflin, 65 Mo. 366.

<sup>23</sup> Jacksonville &c. R. Co. v. Wellman, 26 Fla. 344; s. c. 7 South. Rep. 845.



a wagon and harness, as excessive,—saying that it would not, as a general rule, look closely into small matters relating to the amount of damages, after a jury had passed upon them with the approval of the trial judge.<sup>24</sup>

§ 2222. **Construction of Written Instruments Releasing Damages.**—A general *release* by the land-owner of the right of way, and “all damages, and rights of damages, actions, and causes of action, which I might sustain or be entitled to by reason of anything connected with, or consequent upon, the location or construction of said work, or the repairing thereof when finally established or completed,”—has been construed not to refer in any manner to damages to stock by the running of the cars.<sup>25</sup>

§ 2223. **Construction of Statutes Giving Double Damages.**—The statute of Iowa,<sup>26</sup> allowing double damages for stock killed upon railroads for want of a fence, applies to cases of *insufficient fences*, as well as to cases where the track is *not fenced at all*.<sup>27</sup> Under a statute giving double damages for stock killed by railroad companies on their tracks in case of failure to pay the damages within thirty days after notice, it has been held that the company can not avoid liability for double damages, by merely showing that its failure to pay within thirty days after notice was owing to the owner's absence from home when called upon to adjust and pay the damage, without a further showing of a tender or due diligence in endeavoring to pay or tender the amount within the statutory period.<sup>28</sup>

§ 2224. **Procedure under Statutes Giving Double Damages.**—Under the Missouri statute allowing the plaintiff to recover *double damages*, the proper practice is for the jury to find a verdict for single damages only, and for the court to render judgment for double the amount of the verdict.<sup>29</sup> A justice of the peace may give judgment for double damages in such an action, notwithstanding the amount exceeds his general jurisdiction.<sup>30</sup> In Arkansas either the court or the jury may double the actual damages found.<sup>31</sup>

<sup>24</sup> Central R. Co. v. Russell, 75 Ga. 810.

<sup>25</sup> Cleveland &c. R. Co. v. Crossley, 36 Ind. 371.

<sup>26</sup> Iowa Code, § 1289.

<sup>27</sup> Payne v. Kansas City &c. R. Co., 72 Iowa 214; s. c. 33 N. W. Rep. 633.

<sup>28</sup> Hammons v. Chicago &c. R. Co.,

83 Iowa 287; s. c. 48 N. W. Rep. 978.

<sup>29</sup> Wood v. St. Louis &c. R. Co., 58 Mo. 109; Hollyman v. Hannibal &c. R. Co., 58 Mo. 480.

<sup>30</sup> Parish v. Missouri &c. R. Co., 63 Mo. 284.

<sup>31</sup> Memphis &c. R. Co. v. Carley, 39 Ark. 246.



§ 2225. **Cost of Driving Out and Herding the Stock.**—The damages recoverable from a railroad company for failing to keep sufficient cattle-guards where a railroad track enters or leaves the inclosed land, may include the value of the services of the plaintiff and his children in driving out and herding stock, to prevent additional damages.<sup>32</sup>

<sup>32</sup> *Missouri &c. R. Co. v. Ricketts*, Rail. Cas. (N. S.) 485; 26 Pac. Rep. 45 Kan. 617; s. c. 45 Am. & Eng. 50.







## **TITLE FIFTEEN.**



### **RAILWAY FIRES.**







# TITLE FIFTEEN.

## RAILWAY FIRES.

### CHAPTER

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### CHAPTER LXXI.

#### GENERAL CONSIDERATIONS.

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§ 2230. Such Companies Liable only for Negligence in the Use of Fire.—The statutes of 6 Anne and 14 Geo. III could hardly be construed so as to include railroads, which were unknown at the time of the passage of the later of the two, and for half a century afterward.<sup>1</sup> The common law rule as to the use of dangerous agencies would certainly render him liable for all the consequences, who, knowing the likelihood of fire escaping from a furnace, should propel such a machine through populous cities or combustible forests. He would be liable for the damage resulting from the escape of the fire.<sup>2</sup> But a railroad company chartered by the Legislature, and permitted to use fire, is relieved from this extreme liability by virtue of this power.<sup>3</sup> In *Vaughan v. Taff Vale Railway Company*,<sup>4</sup> the Court of Exchequer held that, as accidents occasionally arise from the use of fire as a means of propelling engines on railroads, the happening of such accidents must be taken to be the natural and necessary consequence of

<sup>1</sup> *Spaulding v. Chicago &c. R. Co.*, 30 Wis. 110; *Vaughan v. Taff Vale R. Co.*, 3 Hurl. & N. 742; 5 Hurl. & N. 678; s. c. 1 Thomp. Neg., 1st ed., 122.

<sup>2</sup> *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 735; *Hammersmith R. Co. v.*

*Brand*, L. R. 4 H. L. 171; *Mosher v. Utica &c. R. Co.*, 8 Barb. (N. Y.) 427.

<sup>3</sup> *Rex v. Pease*, 4 Barn. & Adol. 30.

<sup>4</sup> 3 Hurl. & N. 742; s. c. 1 Thomp. Neg., 1st ed., 122.



the use of fire for such purpose; and that, therefore, railroad companies, by using fire, are responsible for any accident which may result from its use, although they have taken every precaution in their power. But on appeal to the Court of Exchequer Chamber this ruling was reversed, and the doctrine, now undisputed both in England and America, was established, that when the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every reasonable precaution is observed to prevent injury, the sanction of the Legislature carries with it this consequence: that if damage result from the use of such thing, the party using it is not responsible.<sup>6</sup> Therefore, in the case of railroads authorized to propel their cars by steam, the use of fire to generate steam is not a nuisance, but the gist of their liability for injuries caused by the escape of fire is negligence. This is now the law of England<sup>8</sup> and of every State in the Union, except where altered by statute.<sup>7</sup> The principle<sup>8</sup> here applies that a railroad company, being authorized by law to work its engines in the usual and proper way, and, when necessary in the exercise of its rights, to send forth particles of fire from them, is not liable for injuries caused thereby to private property, provided it exercises its rights in a lawful manner and with reasonable care and skill.<sup>9</sup>

<sup>6</sup> *Rex v. Pease*, 4 Barn. & Adol. 30; *State v. Tupper, Dudley* (S. C.) 135; *King v. Morris & C. R. Co.*, 18 N. J. Eq. 397; *Hammersmith R. Co. v. Brand*, L. R. 4 H. L. 711.

<sup>7</sup> *Aldridge v. Great Western R. Co.*, 3 Man. & G. 517; *Piggott v. Eastern & C. R. Co.*, 3 C. B. 229.

<sup>8</sup> *Illinois & C. R. Co. v. Mills*, 42 Ill. 407; *Railroad Co. v. Yeiser*, 8 Pa. St. 366; *Frankford & C. Turnpike Co. v. Phila. & C. R. Co.*, 54 Pa. St. 345; *Phila. & C. R. Co. v. Yerger*, 73 Pa. St. 121; *Indiana & C. R. Co. v. Paramore*, 31 Ind. 143; *Huyett v. Phila. & C. R. Co.*, 23 Pa. St. 373; *Jackson v. Chicago & C. R. Co.*, 31 Iowa 176; *Kansas & C. R. Co. v. Butts*, 7 Kan. 308; *Ellis v. Portsmouth & C. R. Co.*, 2 Ired. (N. C.) 140; *Pittsburg & C. R. Co. v. Culver*, 60 Ind. 469; s. c. 6 Cent. L. J. 498; *Morris & C. R. Co. v. State*, 36 N. J. L. 553; *McCready v. Railroad Co.*, 2 Strobb. (S. C.) 356; *Burroughs v. Housatonic & C. R. Co.*, 15 Conn. 124; *Miller v. Long Island & C. R. Co.*, 9 Hun (N. Y.) 194; *Home Insurance Co. v. Penn. & C. R. Co.*, 11 Hun (N. Y.) 182; *McHugh v. Chicago & C. R. Co.*, 41 Wis. 78; *Woodson v. Milwaukee & C. R. Co.*, 21 Minn. 60; *Leavenworth &*

*R. Co. v. Cook*, 18 Kan. 261; *Read v. Pennsylvania R. Co.*, 44 N. J. L. 280; *Newton v. New York & C. R. Co.*, 56 Conn. 21; s. c. 12 Atl. Rep. 644; *Atchison & C. R. Co. v. Riggs*, 31 Kan. 622; *Henderson v. Philadelphia & C. R. Co.*, 144 Pa. St. 461; s. c. 28 W. N. C. 179; 48 Am. & Eng. Rail. Cas. 16; 41 Alb. L. J. 479; 22 Atl. Rep. 851; *Babcock v. Fitchburg & C. R. Co.*, 67 Hun (N. Y.) 469; s. c. 22 N. Y. Supp. 449; *Campbell v. Goodwin* (Tex. Civ. App.), 26 S. W. Rep. 864; *St. Louis & C. R. Co. v. Lindley* (Tex. Civ. App.), 29 S. W. Rep. 1101 (no off. rep.); *Mattoon v. Fremont & C. R. Co.*, 6 S. D. 301; s. c. 60 N. W. Rep. 69; 61 Am. & Eng. Rail. Cas. 468; rehearing denied in s. c. 6 S. D. 196; s. c. 60 N. W. Rep. 740. Compare *Louisville & C. R. Co. v. Nitsche*, 126 Ind. 229; s. c. 26 N. E. Rep. 51; 9 L. R. A. 760; 43 Alb. L. J. 191; 45 Am. & Eng. Rail. Cas. 532,—where the fire was set by order of the section foreman; *post*, § 2337, *et seq.*

<sup>8</sup> See the principle in other relations, *ante*, §§ 1908, 1945.

<sup>9</sup> *Bernard v. Richmond & C. R. Co.* (Va.), 13 Va. L. J. 184; s. c. 8 S. E. Rep. 785 (no off. rep.).



§ 2231. **In What this Negligence may Consist.**<sup>10</sup>—The negligence of the railway company whereby fire is communicated to adjacent premises may consist: 1. In not being provided with the best appliances to prevent the unnecessary escape of fire from its locomotives.<sup>11</sup> 2. In not keeping such appliances in repair.<sup>12</sup> 3. In not keeping its right of way free from combustible materials.<sup>13</sup> 4. In operating its locomotives so as unnecessarily to scatter fire.<sup>14</sup> 5. In not arresting the spread of fire which has been set by its negligence, or, without its negligence, upon its right of way.<sup>15</sup>

§ 2232. **Liable only for the Want of Reasonable or Ordinary Care in its Use.**—The modern law has so far departed from ancient conceptions that, instead of the railroad company being liable as an insurer against damages arising from its use, it is liable only for what the books describe as reasonable or ordinary care, which may be said to mean, in this connection, the care which will under given circumstances be exercised by a competent specialist having a due regard for the rights of others.<sup>16</sup> But for the lack of this measure of care it is liable.<sup>17</sup> In the absence of a statute making it such, it is not an insurer against loss by fire of all the combustible property situated along the line of its road, but is required to exercise only such care and caution in providing machinery, in the employment of agents in operating its road, and in caring for its right of way, as an ordinarily prudent person would exercise under all the circumstances if all the property to be affected belonged to himself.<sup>18</sup> This obligation to use reasonable or ordinary care includes the obligation to use reasonable care and skill in the *construction of its locomotives*, by the adoption of improved appliances to prevent the escape of fire or sparks therefrom;<sup>19</sup> to use reasonable care in keeping them in repair;<sup>20</sup> to use reasonable care and skill in operating and managing such locomotives

<sup>10</sup> This section is cited in § 2345.

<sup>11</sup> *Post*, § 2252, *et seq.*; *Gulf & C. R. Co. v. Reagan* (Tex. Civ. App.), 32 S. W. Rep. 846 (no off. rep.).

<sup>12</sup> *Post*, § 2259, *et seq.*; *Gulf & C. R. Co. v. Reagan* (Tex. Civ. App.), 32 S. W. Rep. 846 (no off. rep.).

<sup>13</sup> *Post*, § 2270, *et seq.*; *Gulf & C. R. Co. v. Reagan* (Tex. Civ. App.), 32 S. W. Rep. 846 (no off. rep.).

<sup>14</sup> *Post*, § 2263, *et seq.*

<sup>15</sup> *Post*, §§ 2242, 2243, 2247.

<sup>16</sup> *St. Louis & C. R. Co. v. Hoover*, 3 Kan. App. 577; s. c. 43 Pac. Rep. 854. Compare Vol. I, § 23.

<sup>17</sup> *Fort Worth & C. R. Co. v. Hogsett*, 67 Tex. 685; s. c. 4 South. Rep. 365.

<sup>18</sup> *St. Louis & C. R. Co. v. Hoover*, 3 Kan. App. 577; s. c. 43 Pac. Rep. 854. It follows that it is not liable, in the absence of a statute changing the rule, for the unavoidable escape of fire from its locomotive, operated in the usual and ordinary manner: *St. Louis & C. R. Co. v. Hoover*, 3 Kan. App. 577; s. c. 43 Pac. Rep. 854.

<sup>19</sup> *Post*, § 2252, *et seq.*; *East Tennessee & C. R. Co. v. Hesters*, 90 Ga. 11; s. c. 15 S. E. Rep. 828; *East Tennessee & C. R. Co. v. Hall*, 90 Ga. 17; s. c. 16 S. E. Rep. 91.

<sup>20</sup> *Post*, § 2259, *et seq.*



while running;<sup>21</sup> to use reasonable care in preventing the accumulation of combustible materials along its right of way;<sup>22</sup> to use reasonable care in arresting the spread of fires which have been communicated from its locomotives or which have been otherwise set by its servants on its right of way,<sup>23</sup> or by strangers;<sup>24</sup> and to use reasonable efforts to extinguish fires set by its locomotives, by its employés, or spreading from its right of way, no matter by whom set, after such fires have reached the premises of others.<sup>25</sup>

**§ 2233. Which is a Care Proportioned to the Danger to Others.—**

The degree of care which it is required to exercise in all these cases is, as in other cases, *proportioned to the danger* accruing to third persons from the failure to exercise care.<sup>26</sup> In other words, here, as in other cases,<sup>27</sup> what the law regards as reasonable care is a care proportioned to the risk; and it may, in some cases, require a high degree of skill and the most exact and unremitting attention and diligence, while in other cases, where the danger is remote, it will be satisfied with less skill and with a less exact and sustained degree of attention.<sup>28</sup>

**§ 2234. When this Measure of Care Deemed to have been Fulfilled.<sup>29</sup>**—In the absence of statutes creating a different rule, it is a proposition upon which all the decisions will probably unite, that a railway company whose engine is equipped with the most approved and best known spark arrester, in good repair, and properly operated by a skilled engineer, is not rendered liable for property burned near its

<sup>21</sup> *Post*, § 2263, *et seq.*; *East Tennessee &c. R. Co. v. Hesters*, 90 Ga. 11; s. c. 15 S. E. Rep. 828; *East Tennessee &c. R. Co. v. Hall*, 90 Ga. 17; s. c. 16 S. E. Rep. 91.

<sup>22</sup> *Post*, § 2270, *et seq.*

<sup>23</sup> *Post*, §§ 2242, 2243.

<sup>24</sup> *Post*, §§ 2238, 2278.

<sup>25</sup> *Post*, §§ 2242, 2243, 2278.

<sup>26</sup> *Vol. I*, § 25; *Martin v. Texas &c. R. Co.*, 87 Tex. 117; s. c. 26 S. W. Rep. 1052.

<sup>27</sup> *Vol. I*, § 25; *ante*, § 1812.

<sup>28</sup> There is, however, a holding to the effect that it is proper to refuse to instruct the jury that the degree of care which the defendant is required to exercise should be determined by the situation and condition of the plaintiff's property and the method of conducting his business thereon. The court reason that the duty of the railroad company

extends no further than to run its trains with reference to property on its land, which is providently used by its owners; and that it is not bound to shut off steam or otherwise to increase its precautions while running, because the adjacent property owner may have carelessly exposed his property to fire. The same court reason that the failure of the engineer of the railway company to manage his engine with reference to the inflammable condition of neighboring mills and their surroundings, is not negligence, unless such condition was or should have been known to him: *Mississippi Home Ins. Co. v. Louisville &c. R. Co.*, 70 Miss. 119; s. c. 54 Am. & Eng. Rail. Cas. 512; 12 South. Rep. 156.

<sup>29</sup> This section is cited in §§ 2339, 2350.



right of way by the mere fact that it was caused by sparks emitted from the engine, in the absence of any proof of carelessness or negligence on its part, or in any other respect,<sup>30</sup>—such, for example, as allowing combustible materials to accumulate on its right of way.<sup>31</sup> But there is no juridical sense in the proposition that where the evidence shows that the locomotive from which the fire proceeded was equipped with effective appliances to prevent the escape of fire, the testimony must be very positive, strong and convincing to establish the fact of negligence on the part of the company;<sup>32</sup> since whether it is so will, under every proper system of remedial justice, be a question for the jury; and since the railroad company may be negligent in some other respect directly producing the injury, such as allowing combustible materials to accumulate on its right of way.<sup>33</sup> Nor is the proposition tenable that the uncontradicted testimony of persons holding positions of trust and responsibility under the railroad company, that, shortly before and shortly after the burning of a building by fire communicated from a locomotive, the spark arrester of the engine was found, upon actual inspection, to be in perfect repair, where the evidence tending to show the contrary is circumstantial, and consists of testimony of a witness that he saw some glowing sparks flying in the darkness from the smoke-stack of the engine, and that the fire appeared shortly afterwards, overcomes the presumption of negligence as matter of law;<sup>34</sup> since nothing is more common than for persons holding positions of trust under railroad companies to lie on the witness stand, and since the question of the weight and sufficiency of the countervailing testimony is, under every proper judicial system, a question exclusively for the jury. Judges who render such decisions seem to be better qualified for the office of jurors which they habitually perform, than for the office of judges. It has been held in another decision, which is grossly untenable, that the mere fact that a fire set out by an engine was started one hundred

<sup>30</sup> New York &c. R. Co. v. Boltz, 141 Ind. 661; s. c. 36 N. E. Rep. 414; White v. Chicago &c. R. Co., 1 S. D. 326; s. c. 47 N. W. Rep. 146; 9 L. R. A. 824; 45 Am. & Eng. Rail. Cas. 565; Pennsylvania R. Co. v. Page (Pa.), 12 Atl. Rep. 662; 11 Cent. Rep. 424; 21 W. N. C. 52; Missouri &c. R. Co. v. Stafford, 13 Tex. Civ. App. 192; s. c. 18 S. W. Rep. 319; St. Louis &c. R. Co. v. Knight (Tex. Civ. App.), 41 S. W. Rep. 416 (no off. rep.) (fires originating outside right of way). Com-

pare Paris &c. R. Co. v. Nesbitt, 11 Tex. Civ. App. 608; s. c. 33 S. W. Rep. 280.

<sup>31</sup> Post, § 2270; Moore v. Wilmington &c. R. Co., 124 N. C. 338; s. c. 32 S. E. Rep. 710.

<sup>32</sup> Meyer v. Vicksburg &c. R. Co., 41 La. An. 639; s. c. 6 South. Rep. 218.

<sup>33</sup> Post, § 2270, *et seq.*

<sup>34</sup> Van Nostrand v. New York &c. R. Co., 78 Hun (N. Y.) 549; s. c. 61 N. Y. St. Rep. 167; 29 N. Y. Supp. 625.



and eighteen feet from the track, is not sufficient in itself to warrant the submission of the question of negligence to the jury.<sup>35</sup> Exactly the contrary should have been held, since the fact that a locomotive will throw fire such a distance is of itself strong circumstantial evidence of its being improperly equipped or managed at the time; and this necessarily takes the question to the jury.<sup>36</sup>

**§ 2235. Illustrative Circumstances Demanding More than Usual Care.**—When the season is unusually dry, and there is consequently greater danger to agricultural proprietors from fire communicated from its locomotives, it seems to be a just conclusion that this obligation of reasonable care carries with it the duty of taking extra precautions to prevent the communication of fires.<sup>37</sup> So, a higher degree of care is required when trains are passing through or standing in the streets of a thickly built city, than when running in the open country; when the wind is high, than when it is calm. In a case in one of the Federal courts, the jury found the defendant guilty of negligence for having landed its steamer near a high elevator while a gale of wind was blowing in that direction.<sup>38</sup> The principles just stated are announced in a number of cases, among which those given below may be profitably consulted.<sup>39</sup>

**§ 2236. Liability for Fires Set Out by its Section-Men.**—A railroad company is liable in damages to an adjacent owner for the de-

<sup>35</sup> *Smith v. Northern & C. R. Co.*, 3 N. D. 17; s. c. 53 N. W. Rep. 153.

<sup>36</sup> See to the contrary, *Greenfield v. Chicago & C. R. Co.*, 83 Iowa 270; s. c. 49 N. W. Rep. 95.

<sup>37</sup> *Pittsburgh & C. R. Co. v. Noel*, 77 Ind. 110. Much to the same effect, see *Hayes v. Chicago & C. R. Co.*, 45 Minn. 17; s. c. 47 N. W. Rep. 260.

<sup>38</sup> *Kellog v. Milwaukee & C. R. Co.*, 1 Cent. L. J. 778 (affirmed in U. S. Sup. Ct., 94 U. S. 469; 5 Cent. L. J. 305).

<sup>39</sup> *Frankford & C. Turnpike Co. v. Philadelphia & C. R. Co.*, 54 Pa. St. 345; *Smith v. Old Colony R. Co.*, 10 R. I. 22; *Fero v. Buffalo & C. R. Co.*, 22 N. Y. 209; *Chicago & C. R. Co. v. Quaintance*, 58 Ill. 389; *Pierce v. Worcester & C. R. Co.*, 105 Mass. 199; *Gagg v. Vetter*, 41 Ind. 228; *Read v. Morse*, 34 Wis. 315; *Webb v. Rome & C. R. Co.*, 49 N. Y. 420; *Michigan & C. R. Co. v. Anderson*, 20 Mich. 244. "Now, the definition of negligence is the absence of care, according to circumstances." *Willes, J.*, in

the leading case of *Vaughan v. Taff Vale R. Co.*, 5 Hurl. & N. 679. It is said, in the syllabus of a Missouri case, that railroad companies must use reasonable precautions to prevent fire from being carried from their locomotives by such winds as are usual and ordinary at the season and place, and are only relieved from making provision against extraordinary and unusual winds: *Palmer v. Missouri & C. R. Co.*, 76 Mo. 217. It is justly reasoned, in conformity with the above text, that the care and caution required of the owner of a private logging-railroad in running trains propelled by a steam engine is commensurate with, and in proportion to, the risks assumed; and that anything less than this must be regarded as negligence, and renders the owner liable for any injury from fire that ensues therefrom: *Kendrick v. Towle*, 60 Mich. 363; s. c. 27 N. W. Rep. 567; 1 Am. St. Rep. 526.



struction of his property by fire negligently started by its section-men on its right of way, while in the discharge of their ordinary duties.<sup>40</sup> In a case where the fire is not scattered from a locomotive, but is set out by an employé of the company,—in the particular case a section boss,—the test by which to determine whether this measure of care has been applied is the conduct of *ordinarily prudent men*, and not merely the conduct of *prudent railroad men*.<sup>41</sup>

§ 2237. **Railway Companies may Contract against Liability for Fires Communicated by their Locomotives.**<sup>42</sup>—There is no principle of public policy which prevents a railway company from entering into a contract with a property owner, by an instrument under seal, or by an instrument founded on a good consideration, whereby it shall be exonerated from liability to the property owner for damages caused by fire communicated from its locomotives, even though caused by the negligence of its servants,—provided the agreement contains no provision which in any way involves the relation of the railroad company as a common carrier to the other contracting party, or to the public.<sup>43</sup> For example, a stipulation in an instrument whereby a railway company *leased* to another a strip of land upon its right of way to be used for a storage warehouse, by which the railroad company is exempted from any liability for damages caused by fire emitted from its locomotive engines, even though caused by the negligence of the company or its servants, has been held valid.<sup>44</sup> So where, in such an instrument of lease, the lessee assumes “all risks of fire from any cause whatever,” the risk of fire due to the negligence of the lessor or its servants is assumed by and cast upon the lessee.<sup>45</sup> The rule is the same where there is a statute making railroad companies absolutely liable for all damages caused by negligent fires set out by their locomotives.<sup>46</sup> It has been well said that the public has no interest in the question whether the railroad company or a lessee who erects buildings on the right of way shall bear the loss resulting from

<sup>40</sup> Gould v. Northern &c. R. Co., 50 Minn. 516; s. c. 52 N. W. Rep. 924.

<sup>41</sup> Cole v. Lake Shore &c. R. Co., 105 Mich. 549; s. c. 2 Det. L. N. 184; 63 N. W. Rep. 647.

<sup>42</sup> This section is cited in § 2230.

<sup>43</sup> Hartford Fire Ins. Co. v. Chicago &c. R. Co., 175 U. S. 91; s. c. 20 Sup. Ct. Rep. 33; Ordelheide v. Wabash R. Co., 80 Mo. App. 357; s. c. 2 Mo. App. Rep. 659; Hahn v. Missouri &c. R. Co., 80 Mo. App. 411; Griswold v. Illinois &c. R. Co., 90 Iowa 265; s. c. 24 L. R. A. 647, 651;

57 Am. & Eng. Rail. Cas. 59; 57 N. W. Rep. 843; Savannah &c. Ins. Co. v. Pelzer Man. Co., 60 Fed. Rep. 39.

<sup>44</sup> Hartford Fire Ins. Co. v. Chicago &c. R. Co., 175 U. S. 91; s. c. 20 Sup. Ct. Rep. 33.

<sup>45</sup> Ordelheide v. Wabash R. Co., 80 Mo. App. 357; s. c. 2 Mo. App. Rep. 659.

<sup>46</sup> Griswold v. Illinois &c. R. Co., 90 Iowa 265; s. c. 24 L. R. A. 647; 57 Am. & Eng. Rail. Cas. 59; 57 N. W. Rep. 843.



negligence of the railroad company's servants, so as to raise any question of public policy in respect to a contract exempting the company from such liability.<sup>47</sup> But such a clause in a lease of ground for the purpose of erecting a building for the storage of grain, does not extend so far as to exempt the railroad company from liability for the destruction, by fire communicated from its locomotives, of grain stored in the building owned by persons who are *not parties to the lease*.<sup>48</sup> Where the owner of cotton stored in a warehouse erected by him on the land of a railroad company has entered into a contract with the company, releasing it from liability for damages from fire, an insurance company which has insured the cotton for the benefit of the owner, and which has paid the loss, can not, on the theory of subrogation, have an action against the railroad company to recover the amount so paid.<sup>49</sup> So, where a railroad company occupied under a statute the position of an insurer against loss by fire communicated by its engines, it was not liable for loss occasioned thereby to *partnership property* contained in a grain building owned by *one of the partners*, who had, by contract with the company, assumed all risk of loss by fire.<sup>50</sup>

**§ 2238. When Liable for the Negligence of Others Permitted to Use Fire about its Cars.**<sup>51</sup>—Since the heating of freight cars, when necessary for the safe transportation of freight, is a part of the operation of a railroad which can not be delegated by it to others, a railroad company intrusting the heating of a freight car to a *shipper* is responsible for the loss to a neighboring building from a fire caused by the shipper's negligence.<sup>52</sup>

**§ 2239. Who Liable—Lessor, Lessee, Mortgage Trustees in Possession.**—The person or corporation which sets out the fire—which does the mischief—is certainly liable.<sup>53</sup> If the railroad is operated by a lessee, the lessee corporation will be liable for damages done by fire scattered in operating the road, whatever its relations with the lessor corporation may be,—a matter with which third persons are not con-

<sup>47</sup> *Griswold v. Illinois & C. R. Co.*, 90 Iowa 265; s. c. 24 L. R. A. 647; 57 Am. & Eng. Rail. Cas. 59; 57 N. W. Rep. 843.

<sup>48</sup> *Ordelheide v. Wabash R. Co.*, 80 Mo. App. 357; s. c. 2 Mo. App. Rep. 659; *Walker v. Missouri & C. R. Co.*, 68 Mo. App. 465.

<sup>49</sup> *Savannah & C. Ins. Co. v. Pelzer Man. Co.*, 60 Fed. Rep. 39. There was a statute (S. C. Gen. Stat.,

§ 1511), making railroad companies liable for fires, as *insurers*.

<sup>50</sup> *Ordelheide v. Wabash R. Co.*, 80 Mo. App. 357; s. c. 2 Mo. App. Rep. 659.

<sup>51</sup> This section is cited in § 2232.

<sup>52</sup> *Rolfe v. Boston & C. R. Co.*, 69 N. H. 476; s. c. 45 Atl. Rep. 251.

<sup>53</sup> *Genung v. New York & C. R. Co.*, 66 Hun (N. Y.) 632; s. c. 50 N. Y. St. Rep. 511; 21 N. Y. Supp. 97.



cerned.<sup>54</sup> This is especially true where the lease has been made without legislative sanction, in which case the lessor corporation has been unable to clothe the lessee corporation with any privileges or immunities which the lessor may possess. This leaves the lessee corporation liable, under the common or statute law, for any mischief which it may commit in scattering fire.<sup>55</sup> Whether the lessor remains liable, is governed by a different principle, already considered in another relation.<sup>56</sup> That principle is that, the franchises of a railway corporation having been conferred upon it by the State for public objects, it can not devolve them upon another person or corporation, by leasing its properties or otherwise, without the consent of the State, so as to cast off the liabilities under which it rests to third persons for injuries inflicted upon them through negligence in the exercise of those franchises. Hence, if the lease is unauthorized by the charter of the lessor corporation, or by the statute law of the State, it will remain liable to owners of property situated along the right of way, destroyed by fire communicated in the operation of its road by the lessee. If, however, the lease is authorized by the State, there is no propriety in holding the lessor company liable for the negligence committed by the lessee company, where the lessor company has no right of entry and no power of control over the lessee company, any more than there would be in the case of an ordinary farm lease.<sup>57</sup> Where the trustees for the bondholders in a railway mortgage, upon a default in the payment of the principal or interest of such bonds, take possession of the road under the terms of the mort-

<sup>54</sup> Texas &c. R. Co. v. Ross, 7 Tex. Civ. App. 653; s. c. 27 S. W. Rep. 728; Cantlon v. Eastern R. Co., 45 Minn. 481; s. c. 48 N. W. Rep. 22; Jacksonville &c. R. Co. v. Peninsular Land &c. Co., 27 Fla. 1; s. c. 9 South. Rep. 661.

<sup>55</sup> Thus, it was reasoned in a Canadian case that a railway company incorporated under the laws of Ontario can not, without legislative sanction, confer upon a foreign company the immunities and privileges which it possesses; and the foreign company, in running engines over the road of the former, is subject to the common law liability imposed upon one using a dangerous and fire-emitting machine, and is liable for fire set by its engine, without proof of negligence: *Wealleans v. Canada &c. R. Co.*, 21 Ont. App. 297.

<sup>56</sup> *Ante*, § 1955.

<sup>57</sup> A statute making a railroad company absolutely liable for damages

to property by fire communicated by its locomotives, irrespective of negligence on its part, does not make the lessor company liable, where the road is operated by another corporation as lessee: *Hunter v. Columbia &c. R. Co.*, 41 S. C. 86; s. c. 19 S. E. Rep. 197; *Lipfeld v. Charlotte &c. R. Co.*, 41 S. C. 285; s. c. 19 S. E. Rep. 497. The Supreme Court of Illinois hold that the lessor company remains liable for such injuries, although the Legislature has authorized the lease and conferred upon the lessee company all the powers possessed by the lessor, where the statute has not provided that the lessor shall be exempted from responsibilities for such injuries: *Balsley v. St. Louis &c. R. Co.*, 119 Ill. 68; s. c. 6 West. Rep. 469. This decision seems to be indefensible. A decision which makes B. liable for a tort committed by A., invades the constitutional rights of B. It is a mere judicial confiscation.



gage and operate it for the benefit of the bondholders, public policy requires that they should be held liable to the owners of property situated along the line of the road, which has been negligently destroyed by fire by their agents and servants in so operating it; and this is believed to be the general view, supported at least by analogy,<sup>58</sup> although there may be holdings to the contrary.<sup>59</sup> The purchasers of a railroad property at a foreclosure sale do not become liable for the torts previously committed by the railway company, including injuries from fires, unless the statuté law, existing at the time of their purchase, imposed such liability upon them, or unless such liability is imposed by the judicial decree under which the sale takes place. Unless the liability of the corporation committing such torts is thus continued, the case becomes the simple case of one person not being liable for a wrong done by another, with which he was in no way concerned.<sup>60</sup>

**§ 2240. To Whom Liable—to Landlord or Tenant—Owner—Naked Possessor.**—The person to whom the railway company will be liable, if at all, will manifestly be the person who has been damnified by the fire. Manifestly, he proves that he is the owner of the property destroyed,—consisting, let us say, of grass, crops, timber, buildings, and the like,—when he shows, not only that he has a paper title to the premises, but that he has been for some time in actual possession and exercising acts of ownership under a contract of purchase.<sup>61</sup> And the railroad company will not be allowed to set up, that the plaintiff was occupying the land upon which the grass was burned under a *verbal contract* for a term of more than one year.<sup>62</sup> It can not thus plead the statute of frauds, which the land-owner has waived, against the occupier, to escape liability for an injury to the property of the latter.<sup>63</sup> On the contrary, one who enters lands under a *parol license*, and who expends labor in making hay thereon, is entitled to recover from a railroad company damages for the destruction of the hay by

<sup>58</sup> Lockhart v. Little Rock & C. R. Co., 40 Fed. Rep. 631 (liable for damages for *personal injuries*). A case similar to the above is Ballou v. Farnum, 91 Mass. 47, where trustees for bondholders, who have leased the road, but remain in possession and operate it under a contract with the lessees, were held liable for personal injuries to an employé.

<sup>59</sup> Stratton v. European & C. R. Co., 74 Me. 422. In this case the trustees were held not liable, because a statute of Maine expressly limits their liability as such to moneys received,

and their personal liability, to *malfeasance* or *fraud*.

<sup>60</sup> Hammond v. Port Royal & C. R. Co., 15 S. C. 10; Stratton v. European & C. R. Co., 74 Me. 422. See 1 Thomp. Corp., §§ 263, 374; 5 Thomp. Corp., §§ 6237, 6239.

<sup>61</sup> Van Inwegen v. Port Jervis & C. R. Co., 41 App. Div. (N. Y.) 628; s. c. 58 N. Y. Supp. 405.

<sup>62</sup> International & C. R. Co. v. Seairight, 8 Tex. Civ. App. 593; s. c. 28 S. W. Rep. 39.

<sup>63</sup> International & C. R. Co. v. Seairight, 8 Tex. Civ. App. 593; s. c. 28 S. W. Rep. 39.



fire.<sup>64</sup> There are many cases where a person may have a *qualified ownership* in personal property, such as will enable him to maintain *trover* or *trespass* against a mere wrong-doer for its conversion,—as, for example, a *sheriff* or *constable* who has made a *levy* and taken personal property into his possession. Whether this principle would apply in a case where property, held by a levying officer, is destroyed by fire negligently communicated by a railway company need not be considered. The general rule is that ownership, and not mere possession, is required to entitle one to recover damages for the destruction of property by fire communicated from a railroad.<sup>65</sup> Under this rule, if the injury is to the freehold, in a case where the land has been demised to a tenant, the action must obviously be brought by the landlord; but if the injury is to the property of the tenant,—as, for example, to his crops, or to grass on the demised premises which he is entitled to gather under the terms of the lease,—the right of action will be in him.<sup>66</sup> If, under the terms of the lease, or if, in the state of the law, the duty is cast upon the tenant of rebuilding structures which have been destroyed by fire, then plainly the injury will be to the tenant, and the right of action will be in him.<sup>67</sup> But this must be determined by the facts as they existed at the time of the fire, and the liability of the railroad company can not be changed by anything which is afterwards done as between the lessor and the lessee,<sup>68</sup> subject to the principle that such a right of action may be assigned.<sup>69</sup>

<sup>64</sup> Bulliss v. Chicago & C. R. Co., 76 Iowa 680; s. c. 39 N. W. Rep. 245.

<sup>65</sup> Mathews v. Great Northern R. Co., 7 N. D. 81; s. c. 72 N. W. Rep. 1085; Northern & C. R. Co. v. Lewis, 162 U. S. 366; s. c. 40 L. ed. 1002; criticising Northern & C. R. Co. v. Lewis, 7 U. S. App. 254; s. c. 51 Fed. Rep. 658; 2 C. C. A. 446.

<sup>66</sup> Townley v. Oregon & C. R. Co., 33 Ore. 323; s. c. 54 Pac. Rep. 150 (injury was to crops and personal property).

<sup>67</sup> Thus, where the lease required the lessee to rebuild the buildings if they should be destroyed by fire, unless he should be excused therefrom by the lessor,—it was held he might recover their value from the railroad company which had negligently set the fire which caused the destruction of the buildings: Anthony v. New York & C. R. Co., 162 Mass. 60; s. c. 37 N. E. Rep. 780.

<sup>68</sup> Anthony v. New York & C. R. Co.,

162 Mass. 60; s. c. 37 N. E. Rep. 780.

<sup>69</sup> Baltimore & C. R. Co. v. Countryman, 16 Ind. App. 139; s. c. 44 N. E. Rep. 265. A Manitoba decision is to the effect that a person who, without lease, permission, or authority, cuts hay on Crown lands and then stacks it without remaining in actual or *de facto* possession, has no property in it which will give him a right of action for its destruction by fire through negligence of another: Gaudry v. Canadian & C. R. Co., 11 Manitoba 69. The view of the court is that there is no possession actual or constructive, and, there being neither possession nor right of possession, there are no rights even against a wrong-doer. A railway company was held liable for injury to a baby who, lying in a cradle in her father's home, was burned by fire set in her clothing by sparks from a passing locomotive of the railway company, when the sparks were



§ 2241. **Effect upon the Right of Recovery of the Assessment of Damages in Condemnation Proceedings.**—The general rule is that the damages which are assessed for the taking of the land of a land-owner for the right of way of the railroad, and which are paid to him by the railroad company, are deemed to include any damages which may subsequently accrue to him through the necessary, proper and lawful use of fire by the railroad company in propelling its trains. In other words, the rule is that the risk of injury from fire, although properly used and guarded, is an element which is deemed to have been taken into consideration by the commissioners or the jury in assessing the damages to be paid to the land-owner. From this premise, the conclusion follows that the land-owner can not recover damages under any circumstances for a fire communicated by the railroad company to his property, unless he proves that it was unlawfully or negligently done; since for such damages he has already been paid; but the presumption of law is that future damages, happening through the negligence or other wrongful or unlawful act of the railroad company, were not in the contemplation of the commissioners or of the jury in assessing the damages of the land-owner in the condemnation proceeding; that the commissioners or the jury were not at liberty to presume, and did not presume, that such damages would accrue, and had no scales by which to measure the extent of such damages, since they might never accrue, and would not if the law were obeyed and due care exercised. The rule, therefore, is that the assessment and payment of damages for taking the land does not preclude the land-owner from maintaining an action against the railroad company to recover any damages which may accrue from a fire communicated to his property through the negligence or other wrongful act of the company.<sup>70</sup> Another mode of reasoning, by which the same result is reached, is that the risk of possible damage from fires is deemed to be taken into consideration by the commissioners, or by the jury, only so far as it *depreciates the value* of the property, and that it is not deemed to include the conjectural losses by fire which may or may not occur.<sup>71</sup>

caused by the negligent manner of operating the locomotive, which was defectively constructed: *Gulf & C. R. Co. v. Johnson* (Tex. Civ. App.), 51 S. W. Rep. 531; s. c. 6 Am. Neg. Rep. 719; s. c. rev'd on another point in 92 Tex. 591; s. c. 15 Am. & Eng. Rail. Cas. (N. S.) 664; 53 S. W. Rep. 374.  
<sup>70</sup> *Mississippi Home Ins. Co. v. Louisville & C. R. Co.*, 70 Miss. 119;

s. c. 54 Am. & Eng. Rail. Cas. 512; 12 South. Rep. 156.

<sup>71</sup> *Mathews v. St. Louis & C. R. Co.*, 121 Mo. 298; s. c. 25 L. R. A. 161; 24 S. W. Rep. 591. Compare *Chicago & C. R. Co. v. McGrew*, 104 Mo. 282, 294; *Bangor & C. R. Co. v. McComb*, 60 Me. 290; *Pierce v. Worcester & C. R. Co.*, 105 Mass. 199; *Pittsburgh & C. R. Co. v. McCloskey*, 110 Pa. St. 436.



§ 2242. **Duty of the Company to Extinguish the Fire.**<sup>72</sup>—The railroad company is under the same obligation which rests upon any other land-owner to exercise reasonable care and make reasonable exertions to the end of extinguishing any fire which may break out upon its right of way, so as to prevent its *spreading* upon adjacent lands; and this is so, although the railroad company has been guilty of no negligence in setting the fire.<sup>73</sup> This rule does not mean that those in charge of a railway train are bound to keep a constant watch to see that fires do not break out behind the train in its progress, since this would interfere with their duty of looking forward to observe obstructions upon the track; nor does it require them to stop the train to put out a fire which may have been set by the engine without negligence; since this might, by throwing the train out of its schedule time, greatly incommode and even endanger the passengers thereon.<sup>74</sup> Hence, an instruction to a jury which makes a railroad company liable for the failure of its employes on a passing train to use proper care to extinguish such a fire, without regard to the duty which the company owes to the public which would preclude the stoppage of the train, has been held erroneous.<sup>75</sup> But it has been well reasoned that this duty is not discharged where the station agent, although his attention was

<sup>72</sup> This section is cited in §§ 2231, 2232, 2355, 2365.

<sup>73</sup> *Missouri &c. R. Co. v. Platzer*, 73 Tex. 117; s. c. 3 L. R. A. 639; 11 S. W. Rep. 160; *Missouri &c. R. Co. v. Donaldson*, 73 Tex. 124; s. c. 11 S. W. Rep. 163. A railroad company is, therefore, chargeable with negligence for a fire which is started by its servants in a very dry time where there is no water in the vicinity, and which *spreads* to the damage of abutting owners, where its servants, with knowledge of the facts, make no effort to prevent its spreading: *Tien v. Louisville &c. R. Co.*, 15 Ind. App. 304; s. c. 44 N. E. Rep. 45. Further, on the general subject of liability for the spread of fires from the premises of railroad companies or other land-owners where the fires were originally set, to the premises of other owners, causing damages thereon,—see *Louisville &c. R. Co. v. Nitsche*, 126 Ind. 229; s. c. 9 L. R. A. 750; *Brummit v. Furness*, 1 Ind. App. 401; *Needham v. King*, 95 Mich. 303; *Day v. Akeley Lumber Co.*, 54 Minn. 522; s. c. 23 L. R. A. 513; *Dunleavy v. Stockwell*, 45 Ill. App. 230; *McClellan v. St. Paul &c. R. Co.*, 58

Minn. 104; *Jespersion v. Phillips*, 46 Minn. 147. Cases where there was no liability: *McGibbon v. Baxter*, 51 Hun (N. Y.) 587; *Russell v. Reagan*, 34 Mo. App. 242; *Kahle v. Hobein*, 30 Mo. App. 472; *Garnier v. Porter*, 90 Cal. 105; *Brown v. Brooks*, 85 Wis. 290; s. c. 21 L. R. A. 255; *Bolton v. Calkins*, 102 Mich. 69.

<sup>74</sup> *Mississippi Home Ins. Co. v. Louisville &c. R. Co.*, 70 Miss. 119; s. c. 54 Am. & Eng. Rail. Cas. 512; 12 South. Rep. 156. What was really ruled in this case was that a railroad company is under no duty to contiguous property owners to stop its train to extinguish a fire which has been set by its locomotive *without its fault or negligence*. The proposition may well be challenged; as the fire proceeds from its own premises, it should seem that if it is under a duty under the circumstances to stop its train to put it out, the duty can not be discharged by the circumstance that the communication of the fire from its locomotive may have been, in theory of the law, merely accidental.

<sup>75</sup> *Missouri &c. R. Co. v. Donaldson*, 73 Tex. 124.



called to the fire, made no effort to put it out, observing that boys were engaged in an apparently successful effort to extinguish it.<sup>76</sup>

**§ 2243. When Liable, Notwithstanding Subsequent Attempts to Extinguish.**<sup>77</sup>—If the railroad company was originally negligent in setting the fire, it will remain liable to the injured property-owner, notwithstanding the fact that, after its commencement, it made reasonable efforts to prevent the spread of it.<sup>78</sup>

**§ 2244. Company not Bound to Employ Track-Walkers to Guard against Fires.**—Yet it is ruled that a railroad company is not bound to keep men stationed along the line of its road, either to guard against or to extinguish fires.<sup>79</sup> Therefore, where the owner of cordwood had deposited it near a railroad track, in accordance with the directions of an agent of the company, and under an agreement that it was to become the property of the company when measured and paid for by the company, it was held that the latter was under no obligation to provide a watchman to protect it from fire accidentally escaping from its engines.<sup>80</sup>

**§ 2245. Liability for Damages from Escape of Fire Resulting in Death.**<sup>81</sup>—If the conflagration created by the negligent escape of fire from a locomotive engine results in the death of a human being, and that result is a proximate result of the negligence, an action may be maintained for damages for such death, under a statute giving a right of action for damages for injuries resulting in death.<sup>82</sup> Where, in

<sup>76</sup> *Eighme v. Rome R. Co.*, 32 N. Y. St. Rep. 757; s. c. 10 N. Y. Supp. 600. Where a railroad company switched burning cars on a side-track to save the rest of the train, and negligently allowed them to run to the end of the side-track, and so destroyed the plaintiff's property, when, by stopping them in the middle of the siding, no property would have been burned, it was held that the company was liable for the injury done: *St. Louis & C. R. Co. v. Hecht*, 38 Ark. 357. Where certain bales of cotton, which had been stored on a railway platform preparatory to shipment, took fire without the fault of the railway company, and the fire extended to adjoining buildings, by reason of the fact that the company had placed in front of the platform certain box cars into which the cotton was to be loaded, the presence of which cars rendered it impossible to roll

the burning bales from the platform so as to prevent the fire from extending to the adjoining buildings,—the railway company did not become liable to the owner of the buildings by reason of the fact of the presence of the box cars: *Tribette v. Illinois & C. R. Co.*, 71 Miss. 212; s. c. 13 South. Rep. 899.

<sup>77</sup> This section is cited in §§ 2231, 2232, 2355, 2365.

<sup>78</sup> *Austin v. Chicago & C. R. Co.*, 93 Wis. 496; s. c. 67 N. W. Rep. 1129; *Chicago & C. R. Co. v. Luddington*, 10 Ind. App. 636; s. c. 38 N. E. Rep. 342.

<sup>79</sup> *Baltimore & C. R. Co. v. Shipley*, 39 Md. 251.

<sup>80</sup> *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143.

<sup>81</sup> This section is cited in § 2307.

<sup>82</sup> *Rajnowski v. Detroit & C. R. Co.*, 74 Mich. 20; s. c. on second appeal 78 Mich. 681; 44 N. W. Rep. 335.



consequence of the negligence of the railroad company in not keeping its engine in proper repair, a dwelling-house near its track was set on fire and a child sleeping therein was burned to death, it was held that the death was not too remote a consequence of the negligence to enable the company to escape liability.<sup>83</sup> The question of contributory negligence on the part of the plaintiff, and of those in charge of the child, was held a question of fact for the jury.<sup>84</sup>

§ 2246. **Evidence to Determine what Corporation was Operating the Road when the Fire was Scattered.**—It was held that, under a statute making *the corporation* using a locomotive engine responsible for injuries resulting from fires, *trustees* operating the road for bondholders can not be made liable for a fire occurring during their possession; nor can the corporation afterwards organized in the stead of a former corporation be held responsible for such fires set by the employés of the trustees.<sup>85</sup>

§ 2247. **Liability for Permitting Fire to Escape from its Right of Way.**<sup>86</sup>—The railway company is liable for damages caused by a fire set out on its right of way, and negligently allowed to spread to the lands of adjacent proprietors,<sup>87</sup> in the absence of contributory negligence on the part of the property-owner, regardless of the question whether the original setting of the fire was negligent or not,<sup>88</sup> and although it may not have been responsible for the acts of the persons who started the fire.<sup>89</sup>

§ 2248. **Liability for Burning Cotton.**—The liability of a railway company for the burning, by sparks emitted from its locomotives, of cotton which has been brought to the immediate vicinity of its track for shipment, may depend upon principles somewhat different from those which govern its liability to an adjacent owner of property

<sup>83</sup> *Rajnowski v. Detroit & C. R. Co.*, 74 Mich. 20.

<sup>84</sup> *Rajnowski v. Detroit & C. R. Co.*, 74 Mich. 20. Compare *Gulf & C. R. Co. v. Johnson* (Tex. Civ. App.), 51 S. W. Rep. 531.

<sup>85</sup> *Stratton v. European & C. R. Co.*, 74 Me. 422. The statute made the trustees liable only for *fraud* and *malfeasance*.

<sup>86</sup> This section is cited in §§ 2231, 2355, 2365.

<sup>87</sup> *Chicago & C. R. Co. v. Long*, 16 Ind. App. 401; s. c. 45 N. E. Rep. 484; *Tien v. Louisville & C. R. Co.*,

15 Ind. App. 304; s. c. 44 N. E. Rep. 45; *Thompson v. Richmond & C. R. Co.*, 24 S. C. 366 (absolutely liable under a statute without reference to negligence in setting the fire, or to the question of proximate and remote cause, provided it was set out by its authorized agent).

<sup>88</sup> *Baltimore & C. R. Co. v. Countryman*, 16 Ind. App. 139; s. c. 44 N. E. Rep. 265; *International & C. R. Co. v. McIver* (Tex. Civ. App.), 40 S. W. Rep. 438 (no off. rep.).

<sup>89</sup> *St. Louis & C. R. Co. v. Ford*, 65 Ark. 96; s. c. 45 S. W. Rep. 55.



which is burned on his own land. 1. The owner of the cotton brings it voluntarily to the place of danger, and consequently accepts all risks which do not proceed from the negligence of the railway company; and this fact may require a different solution of the question of his *contributory negligence*, from that which arises in the case where the injury is to the property of an adjacent land-owner.<sup>90</sup> 2. Cotton is a highly inflammable material, more so, in fact, than the dry grass, leaves, and other rubbish which ordinarily accumulate upon the right of way of a railroad company: a fact which calls for extra care, both on the part of its owner and of the railroad company, to avoid setting it on fire. 3. After the cotton has been delivered to the railroad company as a carrier for transportation, a bill of lading is usually issued therefor, which may contain stipulations varying somewhat the liability of the carrier with reference to it; and while the law does not permit a common carrier to stipulate with the shipper against being held liable for its own negligence or that of its agents or servants,—yet a bill of lading containing such a stipulation may, and in the opinion of many courts does, change the burden of proof as to negligence, so as to prevent a presumption of negligence from arising from the mere fact of the ignition of the cotton while in the hands of the carrier.<sup>91</sup> The old doctrine turns up in this connection that, in an action against a railroad company for the value of cotton placed upon a platform of the defendant and destroyed by fire from its engines, in which the pleadings raise no issue of delivery to the company for shipment, the plaintiff can not recover if the defendant proves that the engines were equipped with the best mechanical appliances to secure safety from fire, and that they were in good repair and carefully and skillfully operated by a competent engineer.<sup>92</sup> Then, we have a holding to the effect that a railroad company is not, as matter of law, guilty of negligence in failing to procure and keep appliances for the extinguishment of fires at its station, while engaged in the transportation of cotton, so as to render it liable for injuries to an adjoining owner from fire communicated by such cotton, which is set on fire without negligence on its part, although the season is unprecedentedly dry.<sup>93</sup> But it may well be doubted whether a jury ought not to be allowed to say that a railroad company which ships a great deal of cotton from a given station ought to keep, on a movable car, some such simple and inexpensive device as a hand fire engine, for the purpose of extinguishing the fire in cotton which may become ignited

<sup>90</sup> See *post*, § 2318, *et seq.*

<sup>91</sup> *Post*, § 2398.

<sup>92</sup> *Gulf &c. R. Co. v. Courtney* (Tex.

Civ. App.), 23 S. W. Rep. 226 (no off. rep.).

<sup>93</sup> *Tribette v. Illinois &c. R. Co.*, 71 Miss. 212; s. c. 13 South. Rep. 899.



while on its platform by its passing engines. Then we have a holding to the effect that a railroad company, engaged in transporting cotton, is not, as matter of law, guilty of negligence in failing to procure *tarpaulins* to cover the cotton, so as to avoid the danger of its being set on fire from its passing engines, although the season is unprecedently dry, where it has never before been thought necessary to use such tarpaulins.<sup>94</sup> But, considering the great danger of cotton so exposed being ignited by the sparks of passing locomotives, the use of tarpaulins would seem to be the most obvious suggestion of prudence. Nor—at least in the opinion of the same court—does there seem to be any limit to the amount of cotton which a railway company may be allowed to accumulate on its platform in a dry season, without being covered with tarpaulins or otherwise protected from its locomotives, which are passing back and forth scattering fire.<sup>95</sup>

§ 2249. **Additional Note on the Subject of Liability for Ordinary Fires.**—It will be perceived from the foregoing statements of doctrine that, except so far as changed by statute, the modern law places the railway company on substantially the same footing, with respect to its liability for fires communicated from its locomotives, as that of a private land-owner,—a subject considered in the preceding volume.<sup>96</sup>

<sup>94</sup> *Tribette v. Illinois & C. R. Co.*, 71 Miss. 212; s. c. 13 South. Rep. 899.

<sup>95</sup> It was held that a railroad company whose chief business at certain periods of the year was transportation of *cotton* in bales, was not guilty of negligence in allowing 168 bales to accumulate on the platform of a station, where eighty-five of such bales were delivered to it late the evening before the fire was communicated to adjoining property by such cotton burning: *Tribette v. Illinois & C. R. Co.*, 71 Miss. 212; s. c. 13 South. Rep. 899. A railroad company, which issued bills of lading for *cotton* in exchange for receipts of a compress company whose sheds caught fire, was not liable to one whose warehouse was destroyed by the fire, on the ground of negligence in the keeping and storing of the cotton in the sheds, where it appears it never assumed control or possession of any cotton until it was placed on the cars: *Martin v. St. Louis & C. R. Co.*, 55 Ark. 510; s. c. 19 S. W. Rep. 314. Railway company not liable for the destruction

of cotton by fire, delivered to a compress company to be compressed preparatory to final shipment, from the fact that when the cotton is delivered to the compress company, it is placed on a platform seventy-four feet from the railroad track, which platform has been located where it was by an agreement between the railway company and the compress company for their mutual convenience, and connected with the platform of the railway company: *Martin v. Texas & C. R. Co.*, 87 Tex. 117; s. c. 26 S. W. Rep. 1052. On the other hand, the running of an engine on a track so close to a platform as to endanger cotton deposited thereon, from escaping sparks in the shifting of cars, is not excused by the fact that the shifting of the cars in any other way would involve shifting them over a public crossing without an engine being attached to them,—for reasons given by the court: *Edwards v. Campbell*, 2 Tex. Civ. App. 237; s. c. 33 S. W. Rep. 761.

<sup>96</sup> Vol. I, § 726, *et seq.*



Restating the doctrine of the liability of the private land-owner for the escape of fire, in the light of some further decisions that have come to the attention of the author, it may be said that one who uses fire in his field in a customary way, for agricultural or other industrial purposes, is not liable for damage for its escape to other lands, not due to his negligence;<sup>97</sup> but, though not bound at all hazards to prevent its spread to his neighbor's property, he must exercise caution and care proportionate to the risk, and take every precaution that is reasonably possible under the circumstances, to prevent such spread.<sup>98</sup> Such care should be exercised in the use of a *steam threshing engine*, to avoid setting fire to property, as a prudent and reasonable man would take under the existing circumstances; and where the known risks from the use of it are increased, the degree of care and diligence should increase correspondingly.<sup>99</sup> In like manner, a *cotton compress company* is engaged in a lawful business, and is consequently not liable for a fire originating from a spark escaping from its smokestack, unless such company, or its employes who operate the compress, were guilty of negligence in allowing the spark to escape, even though it was impossible absolutely to prevent the emission of sparks.<sup>100</sup> This seems to be a very hard and unjust conclusion. They are operating the instrument of danger for their own profit; and if it is of such a nature that they can not prevent fire from escaping from it to the damage of adjacent land-owners, then it is a *nuisance*, and they ought to be held liable on that ground. One man ought not to be allowed to destroy his neighbor's property for his own profit without paying for it.<sup>101</sup> Another court has held that the owner of a *saw-mill* having a natural draft is guilty of negligence in failing to use a *spark-ar-*

<sup>97</sup> *Owens v. Burgess*, 11 Manitoba 75.

<sup>98</sup> *Booth v. Moffatt*, 11 Manitoba 25. A statute of North Carolina (N. C. Code, §§ 52, 53), gives a right of action against one who sets fire to his woods without giving his neighbors two days' notice. It was held that a failure to give the notice, and damage done, confer the right of action, and it is no defense that defendant used reasonable care to prevent the spread of the fire: *Lamb v. Sloan*, 94 N. C. 534.

<sup>99</sup> *McClelland v. Scroggin*, 48 Neb. 141; s. c. 66 N. W. Rep. 1123. See also *Dennis v. Harris*, 46 N. Y. St. Rep. 535; *Grisson v. Graybill*, 52 Mo. App. 580; *Holman v. Boston Land & Co.*, 20 Colo. 7; s. c. on second appeal, 8 Colo. App. 282; *Gillingham v. Christen*, 55 Ill. App. 17.

A fire set out on one's own land is not within Neb. Crim. Code, § 62, making it a misdemeanor to set fire "to any woods, prairies, or other grounds whatsoever," except that a person may set on fire any woods or prairies adjoining his own land for their necessary preservation from accident by fire between specified periods: *Kansas City & C. R. Co. v. Rogers*, 48 Neb. 653; s. c. 4 Am. & Eng. Rail. Cas. (N. S.) 617.

<sup>100</sup> *Planters' Warehouse & Co. v. Taylor*, 64 Ark. 307; s. c. 42 S. W. Rep. 279.

<sup>101</sup> *Hoyt v. Jeffers*, 30 Mich. 187; *Gagg v. Vetter*, 41 Ind. 228; s. c. 13 Am. Rep. 332; *Philadelphia & C. R. Co. v. Schultz*, 93 Pa. St. 341; *Montgomery v. Muskegon Boom Co.*, 88 Mich. 633.



rester, where such use would lessen the danger of communicating fire from a mill with such draft, and it is located near structures liable to take fire from sparks emitted, although it is not customary to use spark-arresters where no artificial draft is used.<sup>102</sup> Another court has held that, in order to recover for the burning of property caused by the use of an *unlicensed steam-engine on neighboring premises*, the plaintiff must show that the engine, by reason of location, construction, or want of repair, was a *nuisance*, or that the defendant was guilty of *negligence* in its use; and if it was under the exclusive control of a *contractor* with the defendant, the latter is not liable unless it was a nuisance when the contractor assumed control.<sup>103</sup> The disposition to condone negligence in the owner of a machine liable to communicate fire to the property of others, extends to the benefit of such property-owner; so that the owner of grain is not guilty of *contributory negligence* precluding recovery for its destruction from fire escaping from a *threshing engine*, in failing to have water enough on hand to put out the fire.<sup>104</sup>

<sup>102</sup> Webster v. Symes, 109 Mich. 1; 75 Me. 373; s. c. 46 Am. Rep. 400.  
s. c. 2 Det. L. N. 982; 66 N. W. Rep. 580. <sup>104</sup> Holman v. Boston Land &c. Co.,  
8 Colo. App. 282; s. c. 45 Pac. Rep.

<sup>103</sup> Burbank v. Bethel &c. Mill Co., 519.



## CHAPTER LXXII.

## CONSTRUCTION AND REPAIR OF CONTRIVANCES TO PREVENT THE ESCAPE OF FIRE FROM LOCOMOTIVES.

| SECTION  | SECTION  |
|--|--|
| 2252. Duty in the construction of locomotives so as to prevent the escape of fire therefrom.             | 2257. Doctrine that failure to use spark-arresters is negligence <i>per se</i> .         |
| 2253. Bound to adopt the best practicable improvements in general use.                                   | 2258. Doctrine that such failure is evidence of negligence to be considered by the jury. |
| 2254. Sufficient that it has adopted the best improved spark-arrester and exercised due care in its use. | 2259. Duty to keep spark-arresters in repair.  |
| 2255. Other judicial expressions on this subject.  | 2260. Evidence to show that the spark-arrester was out of repair.                        |
| 2256. Not negligence to fail to adopt some particular device.  | 2261. Statutory requirements.  |

§ 2252. **Duty in the Construction of Locomotives so as to Prevent the Escape of Fire Therefrom.**<sup>1</sup>—If it were, as matter of fact, possible, by the exercise of reasonable care and skill, effectually to prevent the escape of sparks from a locomotive or other steam-engine, the escape of fire would then raise an irrebuttable presumption of negligence, and the rules governing the liability of railroad companies in this respect would be few. Expert evidence, it may be remarked, is to be found in the reports, to the effect that by the use of proper appliances the escape of sparks from a locomotive may be rendered impossible.<sup>2</sup> So, too, several judges have expressed themselves to a similar effect. “The evidence, I think, shows,” says Maule, J., in an English case,<sup>3</sup> “that it is perfectly practicable to adopt precautions that will render such accidents next to impossible, by travelling at a rate of speed, or with a load, proportioned to the power of the engine.” “Experience

<sup>1</sup> This section is cited in §§ 2231, 2232.

<sup>2</sup> *Anderson v. Cape Fear S. Co.*, 64 N. C. 399; *Steinweg v. Erie Ry.*, 43 N. Y. 123; *Case v. Northern Central R. Co.*, 59 Barb. (N. Y.) 644; *Dimmock v. North Staffordshire R. Co.*, 4 Fost. & Fin. 1058; *Longabaugh v.*

*Virginia City &c. R. Co.*, 9 Nev. 271; *Longman v. Grand Junction &c. R. Co.*, 3 Fost. & Fin. 736; *Crist v. Erie &c. R. Co.*, 1 N. Y. S. C. (T. & C.) 435.

<sup>3</sup> *Piggot v. Eastern &c. R. Co.*, 3 C. B. 230.



has demonstrated," says Scott, J.,<sup>4</sup> "that railway companies, by the use of certain mechanical inventions and contrivances, can prevent the emission of fire-sparks from locomotive engines, in such quantities, at least, as would not be at all dangerous to property in the immediate vicinity." In a case in Iowa, Beck, J., says: "We are of opinion that contrivances may be applied to engines that would prove just as effectual in preventing the escape of fire as a fence is in preventing cattle going upon a railroad track. Whether such contrivances are in use, we know not, and it is not important to inquire; that they may be applied, can not be doubted, when we contemplate the resources which science brings to the aid of machinists. At all events, the law, in holding railroad companies liable for damage resulting from fires set out by their engines, presumes they may prevent injuries resulting in that way."<sup>5</sup> But these expressions are misleading. The duty imposed upon persons using steam-engines, and railroad companies using locomotives, is only that they shall take all the precautions which are within their means, and which science and invention have offered. By this is meant only the most improved machinery which is practicable, and not any thing which mechanical skill and ingenuity can devise, whether known or not, or able to be obtained or not.

**§ 2253. Bound to Adopt the Best Practicable Improvements in General Use.**—It may be collected from many recent holdings that the measure of diligence which the law puts upon a railroad company in this respect is to apply to its engines the best improvements in general use, the use of which is consistent with the practicable operation of its engines, and to use reasonable care and skill in keeping the same in good order.<sup>6</sup> While it has been inadvertently said that they are bound to adopt the latest improvements in general use,<sup>7</sup>—yet the better view is that they are not to be charged with negligence in not

<sup>4</sup> Chicago &c. R. Co. v. Quaintance, 58 Ill. 389.

<sup>5</sup> Small v. Chicago &c. R. Co., 50 Iowa 338; s. c. 6 Cent. L. J. 310.

<sup>6</sup> Henderson v. Philadelphia &c. R. Co., 144 Pa. St. 461; s. c. 22 Atl. Rep. 851; 48 Am. & Eng. Rail. Cas. 16; 44 Alb. L. J. 479; 28 W. N. C. (Pa.) 479; Frankford &c. Turnp. Co. v. Philadelphia &c. R. Co., 54 Pa. St. 345; Rost v. Missouri &c. R. Co., 76 Tex. 168; s. c. 12 S. W. Rep. 1131. Substantially to the same effect, see Dillingham v. Whitaker (Tex. Civ. App.), 25 S. W. Rep. 723 (no off. rep.); Babcock v. Fitchburg R. Co.,

46 N. Y. St. Rep. 796; Louisville &c. R. Co. v. Spencer, 47 Ill. App. 503; Ryan v. Gross, 68 Md. 377. But compare Paris &c. R. Co. v. Nesbitt, 11 Tex. Civ. App. 608; Watt v. Nevada &c. R. Co., 23 Nev. 154; s. c. 44 Pac. Rep. 423; 3 Am. & Eng. Rail. Cas. (N. S.) 659; modified on rehearing, 46 Pac. Rep. 52, but not on this point; rehearing denied, 46 Pac. Rep. 726.

<sup>7</sup> Frankford &c. Turnp. Co. v. Philadelphia &c. R. Co., 54 Pa. St. 345; repeated in Henderson v. Philadelphia &c. R. Co., 144 Pa. St. 461, 476.



adopting such an appliance until it has become well known and until its efficiency has been demonstrated by actual use.<sup>8</sup> The doctrine on which many of the decisions unite can not be better formulated than by saying that railroad companies, while not bound to use every possible precaution to prevent the escape of fire from their locomotives that the highest scientific skill may have suggested, are required, in the exercise of reasonable care, to avail themselves of the most approved practicable appliances for the purpose.<sup>9</sup> Under a statute requiring the railroad company to use all practicable means to obviate the danger of a conflagration, it was held a question for a jury whether it had adopted such means in using a Smith's screen or a Diamond top-stack, the same being in good order.<sup>10</sup>

§ 2254. **Sufficient that it has Adopted the Best Improved Spark-Arrester and Exercised Due Care in its Use.**—On the other hand, where it is established or admitted that the railroad company has used the best improved spark-arrester, and has exercised due care in the use of it and in the operation of its locomotives, and has not been otherwise guilty of negligence under the principles of this article, it can not be held liable for damages caused by a fire proceeding from one of its locomotives,—otherwise the law would make it an insurer against such damages.<sup>11</sup> It seems sufficient that the efficiency and

<sup>8</sup> Hagan v. Chicago & C. R. Co., 86 Mich. 615; s. c. 49 Am. & Eng. Rail. Cas. 670; 49 N. W. Rep. 509.

<sup>9</sup> Hoyer v. Chicago & C. R. Co., 46 Minn. 269; s. c. 43 N. W. Rep. 1117; Forest Glen Brick & C. Co. v. Chicago & C. R. Co., 33 Ill. App. 565; Jacksonville & C. R. Co. v. Peninsular Land & C. Co., 27 Fla. 1-157; s. c. 9 South. Rep. 661; Lackawanna & C. R. Co. v. Doak, 52 Pa. St. 379; Steinweg v. Erie R. Co., 43 N. Y. 123; Flinn v. New York & C. R. Co., 142 N. Y. 11; s. c. 58 N. Y. St. Rep. 431; 50 Alb. L. J. 197; 36 N. E. Rep. 1046; reversing s. c. 67 Hun (N. Y.) 631. Compare Chicago & C. R. Co. v. Hunt, 24 Ill. App. 644, where it was held that an instruction that it was the duty of the railroad company to use "all the best and most approved mechanical inventions," etc., did not state its liability strongly enough, since it was its duty to use every possible precaution to prevent the escape of fire, etc.,—a decision which seems untenable.

<sup>10</sup> Wiley v. West Jersey & C. R. Co., 44 N. J. L. 247.

<sup>11</sup> Missouri & C. R. Co. v. Cullers, 81

Tex. 382; s. c. 17 S. W. Rep. 19; 13 L. R. A. 542; Chicago & C. R. Co. v. Smith, 11 Ill. App. 348; Hoff v. West Jersey R. Co., 45 N. J. L. 201; Edrington v. Louisville & C. R. Co., 41 La. An. 96; s. c. 6 South. Rep. 19; Gulf & C. R. Co. v. Benson, 69 Tex. 407; s. c. 5 Am. St. Rep. 74; 5 S. W. Rep. 772; West Jersey R. Co. v. Abbott, 60 N. J. L. 150; First Nat. Bank & C. Ins. Co. v. Lake Erie & C. R. Co., 65 Ill. App. 21; Missouri & C. R. Co. v. Stafford (Tex. Civ. App.), 31 S. W. Rep. 319 (no off. rep.); New York & C. R. Co. v. Baltz, 141 Ind. 661; Union & C. R. Co. v. Motzner, 2 Kan. App. 342; s. c. 43 Pac. Rep. 785; White v. Chicago & C. R. Co., 1 S. D. 326; s. c. 9 L. R. A. 824; Frankford & C. Turnp. Co. v. Philadelphia & C. R. Co., 54 Pa. St. 345; Philadelphia & C. R. Co. v. Hendrickson, 80 Pa. St. 182; s. c. 21 Am. Rep. 97; Smyth v. Stockton & C. R. Co. (Cal.), 4 Pac. Rep. 505 (no off. rep.); Houston & C. R. Co. v. McDonough, 1 Tex. App. Cas. 354; Rood v. New York & C. R. Co., 18 Barb. (N. Y.) 80; Gowen v. Glaser (Pa.), 3 Cent. Rep. 109 (no off. rep.); Kentucky & C. R.



practicability of the improvement should have been demonstrated by use, and it does not seem reasonable to impose the additional requirement that it should have come into general use; since if this were so every railroad company might, when an improved and most efficient spark-arrester should be presented for its adoption, refuse to adopt it on the ground that it had not come into general use, and thus escape the imputation of negligence.<sup>12</sup> It is not necessary, in order to clear the railway company from the imputation of negligence, that the device which it has adopted should have been approved by a majority of railway managers.<sup>13</sup> On the other hand, it is a sound conclusion that a railroad company is not bound at once to adopt a new appliance which it is claimed will have the effect to make its engines safer in this respect, but that it is entitled to a reasonable time for trial and experiment and to make the necessary changes.<sup>14</sup> An instruction which told the jury that the defendant was guilty of negligence "unless provided with all the means and appliances which science has discovered to prevent the escape of fire," was therefore held erroneous.<sup>15</sup> On the other hand, if a particular safeguard has been sufficiently tested and found to meet the requirement without impeding the practicable operation of the locomotive, it may be left to a jury to say whether the railroad company is not negligent in not adopting it.<sup>16</sup>

§ 2255. Other Judicial Expressions on this Subject.—"If," it is said in a New York case,<sup>17</sup> "there was known and in use any apparatus which, applied to an engine, would enable it to consume its own sparks,

Co. v. Barrow, 89 Ky. 638; Texas &c. R. Co. v. Medaris, 64 Tex. 92; Louisville &c. R. Co. v. Mitchell (Ky.), 29 S. W. Rep. 860 (no off. rep.); Chicago &c. R. Co. v. Madison, 81 Ill. App. 393.

<sup>12</sup> To this effect, see Chicago &c. R. Co. v. Hunt, 24 Ill. App. 644.

<sup>13</sup> Blue v. Aberdeen &c. R. Co., 117 N. C. 644; s. c. 23 S. E. Rep. 275.

<sup>14</sup> Flinn v. New York &c. R. Co., 142 N. Y. 11; s. c. 58 N. Y. St. Rep. 431; 36 N. E. Rep. 1046. Substantially to the same effect, see Spaulding v. Chicago &c. R. Co., 30 Wis. 110; Toledo &c. R. Co. v. Pindar, 53 Ill. 447; Frankford &c. Turnpike Co. v. Philadelphia &c. R. Co., 54 Pa. St. 345; Anderson v. Cape Fear S. Co., 64 N. C. 399; St. Louis &c. R. Co. v. Gilham, 39 Ill. 455; Longabaugh v. Virginia City &c. R. Co., 9 Nev. 271; Bevier v. Delaware &c. R. Co., 13

Hun (N. Y.) 254; Hoyt v. Jeffers, 30 Mich. 181.

<sup>15</sup> Read v. Morse, 34 Wis. 315.

<sup>16</sup> Toledo &c. R. Co. v. Corn, 71 Ill. 493. The majority of a divided court have refused to find evidence of negligence in the fact that a railway company continued to use what is known as the Diamond smoke-stack, instead of adopting the later invention called the "extension front," the only evidence of the superiority of the latter over the former being that the latter threw out fewer sparks, but they were of a larger size than those thrown out by the former: Babcock v. Fitchburg R. Co., 140 N. Y. 308; s. c. 35 N. E. Rep. 596; 55 N. Y. St. Rep. 640; reversing s. c. 67 Hun (N. Y.) 469.

<sup>17</sup> Steinweg v. Erie Ry., 43 N. Y. 123.



and thus prevent the emission of them, to the consequent ignition of combustible property, it was negligent if it did not avail itself of such apparatus. But it was not bound to use every possible precaution which the highest scientific skill might have suggested, nor to adopt an untried machine or mode of construction." The Supreme Court of Indiana state the rule thus: "If the company, by availing itself of all the discoveries which science and experience have put within its reach, could have constructed its machinery so perfect as to prevent the emission of sparks or the dropping of coal, and if the machinery used in this case was not so perfect as to accomplish this purpose, the fact that the machinery used was such as was in common and general use, and had been approved by experience, did not relieve the appellant from liability."<sup>18</sup> In *Gagg v. Vetter*,<sup>19</sup> where the fire causing the damage escaped from the defendant's brewery, the same court said on this point: "A mere difference of opinion among men of science and experience, as to the best plan to construct the chimney, furnace, and flues, did not justify the selection of any well-supported theory without further inquiry, for they were bound to use all due care and vigilance to ascertain which theory was correct and which was incorrect; and for that purpose they were bound to avail themselves of all the discoveries which science and experience had put within their reach. While the law does not require absolute scientific perfection in the construction of such works, it does require the exercise of a high degree of care and skill to ascertain, as near as may be, the best plan for the structures; and it requires not only that skillful and experienced workmen shall be employed in their construction, but that due skill was exercised in the particular instance." The duty of a railroad company in this respect is more liberally stated by an English judge; and as his charge does not conflict with the American decisions, it is here given: "The company, in the construction of their engines, are bound not only to employ all due care and skill for the prevention of mischief arising to the property of others by the emission of sparks, or any other cause, but they are bound to avail themselves of all the discoveries which science has put within their reach for that purpose, provided they are such as, under the circumstances, it is reasonable to require the company to adopt. But if the dangers to be avoided were insignificant, or not very likely to occur, and the remedy suggested was very costly and troublesome, or such as interfered materially with the efficient working of the engine, you will say whether it could reasonably be expected that the company should

<sup>18</sup> *Pittsburgh &c. R. Co. v. Nelson*,  
51 Ind. 150.

<sup>19</sup> 41 Ind. 228.



adopt it. On the other hand, if the risk was considerable, and the expense, or trouble, or inconvenience of providing the remedy was not great in proportion to the risk, then you will have to say whether the company would reasonably be excused from availing themselves of such remedy because it might to some extent be attended with expense or other disadvantage to themselves."<sup>20</sup>

**§ 2256. Not Negligence to Fail to Adopt Some Particular Device.**—A railway company will not be deemed negligent, as matter of law, for failing to adopt and use *some specified device* to prevent the escape of fire from its engine, unless it is a well established fact that it is superior to all others, even though the court or jury might be convinced that such device is the best one.<sup>21</sup> Nor is the use of locomotives of the most approved form, size and construction absolutely necessary to exonerate the railway company from the imputation of negligence. It has been held that the use, instead of an ordinary road engine, of a small motor engine which emits more and hotter sparks than the ordinary road engine, but which is in every way suitable for the service in which it is employed, and is equipped with suitable appliances and carefully operated, is not negligence on the part of the railroad company, although the danger of fire to adjacent property is thereby increased.<sup>22</sup>

**§ 2257. Doctrine that Failure to Use Spark-Arresters is Negligence Per Se.**—Chief Justice Tindal, in an early case,<sup>23</sup> compared the use of a perforated cap on the chimney of a locomotive to the muzzling of a dog known by his owner to be accustomed to bite, the absence of which precaution was, according to an old case, negligence in the latter. Failing to use a "spark-arrester" is negligence *per se*, and it is no answer that its use would have choked the smoke-stack and impeded the speed of the engine.<sup>24</sup> An engine which throws burning brands to the distance of one hundred feet has been de-

<sup>20</sup> *Fremantle v. London &c. R. Co.*, 2 Fost. & Fin. 340; affirmed on appeal, 10 C. B. (N. S.) 89. See also *Dimmock v. North Staffordshire R. Co.*, 4 Fost. & Fin. 1058; *Hoyt v. Jeffers*, 30 Mich. 181.

<sup>21</sup> *Menomonie River Sash &c. Co. v. Milwaukee &c. R. Co.*, 91 Wis. 447; s. c. 65 N. W. Rep. 176.

<sup>22</sup> *Rosen v. Chicago &c. R. Co.*, 83 Fed. Rep. 300; s. c. 49 U. S. App. 647; 27 C. C. A. 534; citing *Daly*

*v. Chicago &c. R. Co.*, 43 Minn. 319; *Frace v. New York &c. R. Co.*, 143 N. Y. 182; distinguishing *Karsen v. Milwaukee &c. R. Co.*, 29 Minn. 12; *Burud v. Great Northern R. Co.*, 62 Minn. 243; *Piggot v. Eastern Counties R. Co.*, 3 C. B. 229.

<sup>23</sup> *Piggot v. Eastern &c. R. Co.*, 3 C. B. 229.

<sup>24</sup> *Anderson v. Cape Fear S. Co.*, 64 N. C. 399; *Bedell v. Long Island R. Co.*, 44 N. Y. 367.



clared, as matter of law, not to have such safeguards as the law requires.<sup>25</sup>

**§ 2258. Doctrine that Such Failure is Evidence of Negligence to be Considered by the Jury.**—There is, however, a disposition in the courts to leave this question to be decided as one of fact by the jury.<sup>26</sup> In an important Federal case,<sup>27</sup> where the defendant was the owner of a steamboat which ran on the Mississippi River, which set fire to an elevator at one of its landings, and a preponderance of evidence given at the trial showed that the spark-arresters could not be successfully used on boats navigating the Mississippi, and for that reason were generally in disuse, Mr. Justice Miller, in charging the jury, said: "On that subject, I hesitated a good deal whether I should have to say to you that there was no negligence in that regard,—that is to say, that the owners of the boat were not bound to use their spark-extinguishers or arresters; but, upon further reflection, I do not think, on the evidence, I am authorized to declare as a matter of law that that is so. But I must leave you to say, from the testimony, whether in this respect the owners of the boat were guilty of negligence." The jury found for the plaintiff, and judgment on the verdict was affirmed by the Supreme Court of the United States.<sup>28</sup> In an English case, the judge having left it to the jury to say whether the defendants were negligent in not having adopted "the perforated grating, the Venetian blinds, or the American spark-catcher," and the issue being found for the plaintiff, the court, on appeal, refused to disturb the verdict, although the weight of evidence went to show that the use of these contrivances was impracticable.<sup>29</sup>

**§ 2259. Duty to Keep Spark-Arresters in Repair.**<sup>30</sup>—A railroad or other transportation company does not, obviously, discharge its duty by providing its locomotives or other engines with good and sufficient spark-arresters, unless it takes reasonable care and exercises reasonable skill to the end that they be kept in good repair.<sup>31</sup> Upon this subject it has been observed that "it is hard to see the difference between

<sup>25</sup> Jackson v. Chicago &c. R. Co., 31 Iowa 176; Illinois &c. R. Co. v. McClelland, 42 Ill. 355.

<sup>26</sup> Lackawanna &c. R. Co. v. Doak, 52 Pa. St. 379; Algier v. Steamer Maria, 14 Cal. 167; Henderson v. Philadelphia R. Co., 144 Pa. St. 461; s. c. 28 W. N. C. 479; 48 Am. & Eng. Rail. Cas. 16; 44 Alb. L. J. 479; 22 Atl. Rep. 851; Missouri &c. R. Co.

v. Prickryl (Tex. Civ. App.), 26 S. W. Rep. 855 (no off. rep.).

<sup>27</sup> Kellogg v. Milwaukee &c. R. Co., 5 Dill. (U. S.) 537.

<sup>28</sup> 94 U. S. 278; s. c. 5 Cent. L. J. 305.

<sup>29</sup> Fremantle v. London &c. R. Co., 10 C. B. (N. S.) 89.

<sup>30</sup> This section is cited in §§ 2231, 2232.

<sup>31</sup> Ryan v. Gross, 68 Md. 377.



having no spark-catcher at all—which is held to be negligence—and having one not sufficient to prevent the fire from communicating with the shore and endangering the property on the banks of the stream.”<sup>32</sup> It is quite clear that credible evidence to the effect that the spark-arrester was worn out and full of holes, justifies a finding that the defendant was guilty of negligence.<sup>33</sup>

§ 2260. **Evidence to Show that the Spark-Arrester was Out of Repair.**—It has been reasoned, in an opinion which discusses the facts very much as a jury might be supposed to do, that the mere proof of the escape of cinders from a locomotive engine is not evidence of the engine being out of repair, where the other evidence shows that their escape could not be avoided.<sup>34</sup> In another case, where the judges dealt with the evidence as though they were a mere jury, the same rule was applied, although there was evidence to the effect that the locomotive, for half an hour before reaching the plaintiff's premises, was emitting large sparks. On the other hand, it has been held in the same State, that where the defendant's evidence leads to the inference that proper precaution in construction would prevent the emission of sparks from an engine, the jury may infer that sparks from an engine were owing to its defective construction.<sup>35</sup> Another court has held on the clearest grounds that evidence to the effect that a locomotive emitted a stream of sparks along its way, setting fire to many things, is evidence from which a jury may infer that it has an imperfect spark-arrester, from which fact they are entitled to find that the company was negligent.<sup>36</sup> Where the railroad company gave evidence that the engine from which the fire proceeded was furnished with an improved spark-arrester, and the plaintiff in rebuttal testified that numerous fires had been ignited by sparks from the same engine,—that it had fired the country almost daily for a period of two weeks, throwing out sparks as large as a hickory-nut,—it was held that the question of negligence was one for the jury.<sup>37</sup> A learned Federal judge has held that evidence to the effect that a locomotive throws sparks to a height of fifty feet, and to a distance of one hundred feet from the road, is presumptive evidence that it is not equipped with a proper

<sup>32</sup> *Algier v. Steamer Maria*, 14 Cal. 168, 172, per Baldwin, J.

<sup>33</sup> *Ryan v. Gross*, 68 Md. 377; s. c. 12 Atl. Rep. 115; 11 Cent. Rep. 502.

<sup>34</sup> *Searles v. Manhattan R. Co.*, 101 N. Y. 661. This case was followed in *Van Nostrand v. New York & C. R. Co.*, 78 Hun (N. Y.) 549; s. c. 29 N. Y. Supp. 625; 61 N. Y. St. Rep. 167.

<sup>35</sup> *Tanner v. New York & C. R. Co.*, 108 N. Y. 623; s. c. 15 N. E. Rep. 379. In this case the sparks which were thrown out “were half the size of a walnut,” and the fire ran down the roof “like a stream of water.”

<sup>36</sup> *Pennsylvania Co. v. Watson*, 81½ Pa. St. 293.

<sup>37</sup> *Philadelphia & C. R. Co. v. Schultz*, 93 Pa. St. 341.



spark-arrester.<sup>38</sup> The conclusion from these and other cases hereafter to be considered<sup>39</sup> is that whether the locomotive or other steam-engine is equipped with the proper appliances to prevent it from scattering fire is a question which may be solved by *circumstantial evidence*; and that evidence to the effect that it does scatter fire to an extent which such an engine would not do if properly equipped, is evidence from which a jury may find that it has not been properly equipped and that the defendant has been guilty of negligence.

§ 2261. **Statutory Requirements.**—The requirements of a statute that the smoke-stacks of locomotive engines shall be provided with a screen, so as to prevent, as far as practicable, the escape of fire, does not make the railway company an insurer against the escape of fire from its locomotives; but it is under no obligation, even in periods of extreme drought, absolutely to prevent the escape of fire from the smoke-stacks of its engines.<sup>40</sup>

<sup>38</sup> Missouri &c. R. Co. v. Texas &c. R. Co., 41 Fed. Rep. 917.

<sup>40</sup> West Jersey R. Co. v. Abbott, 60 N. J. L. 150; s. c. 37 Atl. Rep. 1104.

<sup>39</sup> *Post*, § 2291.



## CHAPTER LXXIII.

NEGLIGENCE IN THE OPERATION AND SPEED OF ENGINES AND TRAINS,  
WHEREBY FIRE IS SCATTERED.

| SECTION  | SECTION   |
|--|---|
| 2263. Negligence in running the engine, whereby fire is scattered.                       | 2263. Acts held not to be negligent of running trains at an unlawful rate of speed. |
| 2264. Obligation to use greater care where there is combustible material near the track. | 2266. Burning wood in coal engines.   |
|  | 2267. Other acts from which negligence in scattering fire has been inferred.        |
|  | 2268. Acts held not to be negligent.  |

§ 2263. **Negligence in Running the Engine, whereby Fire is Scattered.**<sup>1</sup>—A locomotive or other steam-engine may, of course, be properly constructed and equipped, and yet may cause fires through negligence in its management; in which case, the liability is the same as stated in the preceding chapter.<sup>2</sup> Overloading the locomotive may amount to such negligence.<sup>3</sup> The engine may have the means of retaining the sparks, and yet there may be negligence in not properly managing the safeguards.<sup>4</sup> Therefore, not only is it required that the locomotives of a railroad company should be originally constructed with the best and most approved appliances to prevent the escape of fire, but, if one of them has caused damage, it will devolve upon the defendant to show that its engine was, at the time of the accident, both in good order and in the care of competent persons.<sup>5</sup> Nor is it enough that the engine was well constructed and in the care of competent persons, but it must further appear that it was operated with ordinary care to the end of avoiding the scattering of fire.<sup>6</sup> In

<sup>1</sup> This section is cited in §§ 2231, 2232, 2365.

<sup>2</sup> *Hinds v. Barton*, 25 N. Y. 544; *Toledo &c. R. Co. v. Wand*, 48 Ind. 476; *Baltimore &c. R. Co. v. Dorsey*, 37 Md. 19; *Louisville &c. R. Co. v. Taylor*, 92 Ky. 55; *Wilson v. Atlanta &c. R. Co.*, 16 S. C. 587; *Jackson v. Chicago &c. R. Co.*, 31 Iowa 176; s. c. 7 Am. Rep. 120; *St. Louis &c. R. Co. v. Fire Ass'n of Philadelphia*, 55 Ark. 163; *Longabaugh v. Virginia City &c. R. Co.*, 9 Nev. 271; *Spauld-*

*ing v. Chicago &c. R. Co.*, 30 Wis. 110; s. c. 11 Am. Rep. 550; *Central Vermont R. Co. v. Stanstead &c. Ins. Co.*, Rap. Jud. Quebec 5 B. R. 224.

<sup>3</sup> *Toledo &c. R. Co. v. Pindar*, 53 Ill. 447.

<sup>4</sup> *Dimmock v. North Staffordshire &c. R. Co.*, 4 Fost. & Fin. 1058.

<sup>5</sup> *Chicago &c. R. Co. v. Quaintance*, 58 Ill. 389; *Chicago &c. R. Co. v. Clamptit*, 63 Ill. 95.

<sup>6</sup> *Missouri &c. R. Co. v. Texas &c. R. Co.*, 41 Fed. Rep. 917.



a district where, from the dryness of the vegetation, fires are likely to be set out, this ordinary care requires the employ  s to take into consideration the conditions prevailing, the speed and direction of the wind, and the risk to adjoining property, while giving due consideration to the interests of the railway service and the duty of the company to its patrons and the public.<sup>7</sup> Proof that its engines were properly constructed and equipped, and were carefully inspected by a competent person every other day, and found to be in good order, was held to rebut the presumption of negligence, even though the inspection was not shown to have continued down to the moment when the fire escaped.<sup>8</sup> But this must be proved by direct evidence; a usage to this effect will not do.<sup>9</sup> Negligence may be inferred from carrying more steam than necessary, whereby an undue quantity of sparks is emitted. But a railroad company has a right to use the fuel in ordinary use; and it is not liable for using an inferior quality, unless its use was known to be hazardous.<sup>10</sup>

**  2264. Obligation to Use Greater Care where there is Combustible Material near the Track.**—No doubt, there is an obligation upon the railroad company to use greater care in running its engines where combustible material is accumulated near the track either on its own right of way or on the land of adjacent proprietors.<sup>11</sup>

**  2265. Scattering Fire in Consequence of Running Trains at an Unlawful Rate of Speed.**—The danger to buildings and other property caused by the emission of sparks from locomotive engines while in rapid motion, is one of the mischiefs which statutes and municipal ordinances limiting the speed of railway trains through cities and towns, are intended to prevent.<sup>12</sup> It follows, on a principle elsewhere considered,<sup>13</sup> that, for a fire communicated by a locomotive in consequence of running it at a rate of speed so prohibited, the company

<sup>7</sup> *Riley v. Chicago & c. R. Co.*, 71 Minn. 425; s. c. 74 N. W. Rep. 171.

<sup>8</sup> *Spaulding v. Chicago & c. R. Co.*, 30 Wis. 110; *Baltimore & c. R. Co. v. Shipley*, 39 Md. 251.

<sup>9</sup> *Baltimore & c. R. Co. v. Shipley*, 39 Md. 251. But see *Chicago & c. R. Co. v. Quaintance*, 58 Ill. 389.

<sup>10</sup> *Collins v. New York & c. R. Co.*, 5 Hun (N. Y.) 499.

<sup>11</sup> *Chicago & c. R. Co. v. Smith*, 6 Ind. App. 262; s. c. 33 N. E. Rep. 241. That a railroad company owes no greater degree of care in furnishing safeguards against the escape of fire to the injury of its

patrons than towards the public whose lives and property are equally exposed to such injury, was reasoned in *Babcock v. Fitchburg R. Co.*, 67 Hun (N. Y.) 469; s. c. 22 N. Y. Supp. 449; affirming s. c. 46 N. Y. St. Rep. 796; 19 N. Y. Supp. 774. The rule of the text was applied in the following *threshing machine cases*: *Collins v. Groseclose*, 40 Ind. 414; *Gagg v. Vetter*, 41 Ind. 228; *Brummit v. Furness*, 1 Ind. App. 401.

<sup>12</sup> *Martin v. Western & c. R. Co.*, 23 Wis. 437.

<sup>13</sup> Vol. I,   10.



will be liable;<sup>14</sup> and there are statutes expressly so providing. As we have elsewhere seen,<sup>15</sup> negligence is implied in law from the violation of a statutory duty intended for the protection of other persons, provided the violation of the statute was the proximate cause of the damage.<sup>16</sup> Upon this ground it is plain that a railroad company will be liable for damages caused by fire scattered from its locomotive, when running at a prohibited rate of speed, where it reasonably appears that the fire would probably not have been communicated if it had been running at a lawful rate of speed. Thus, where the complaint alleged negligence in running the train within the city limits, where the fire occurred, at an unlawful rate of speed, and in carelessly opening the grates and flues of the boiler, whereby burning cinders escaped, it was held that the plaintiff was entitled to recover, although no proof of the latter allegation was offered. "We have no doubt," said the court, "that the danger of buildings and other adjacent property liable to injury and destruction by fire, caused by the emission of coals and sparks from the engine when in rapid motion, was one of the mischiefs which the statute limiting the rate of speed through cities and villages was designed to prevent, and are consequently of opinion that for losses so occasioned by trains moving at a greater rate of speed than the statute prescribes, the company is responsible."<sup>17</sup> But where a fire was communicated by a locomotive while being driven through a town at an unlawful rate of speed, it was held, attempting to distinguish the case just cited, that there was no evidence of negligence for a jury, because there was no evidence tending to prove that the rate of speed at which the train was driven increased the danger of fire.<sup>18</sup> Under such a statute, a railway company is liable for property burned by a fire set out by its engine, if it would not have been burned except for the company's violation of the law limiting the rate of speed within city limits.<sup>19</sup> On the other hand, it is to be observed, that here, as in other cases, no *rate of speed* at which a railway train is run is negligence as matter of law, but whether a high rate of speed is evidence of negligence is a question

<sup>14</sup> *Martin v. Western & C. R. Co.*, 23 Wis. 437. As, for example, in running a heavy freight train, consisting in part of several cars of oil, over a defective and unsafe track, through a city in the night, at a high and dangerous rate of speed, in violation of a city ordinance, burning the property of an adjacent land-owner by the wrecking of the train and the consequent burning and flowing of the oil: *Lake*

*Erie & C. R. Co. v. Lowder*, 7 Ind. App. 547; s. c. 34 N. E. Rep. 747.

<sup>15</sup> Vol. I, § 10.

<sup>16</sup> *Briggs v. New York & C. R. Co.*, 72 N. Y. 26.

<sup>17</sup> *Martin v. Western & C. R. Co.*, 23 Wis. 437.

<sup>18</sup> *Brusberg v. Milwaukee & C. R. Co.*, 50 Wis. 231.

<sup>19</sup> *Mississippi Home Ins. Co. v. Louisville & C. R. Co.*, 70 Miss. 119; s. c. 54 Am. & Eng. Rail. Cas. 512; 12 South. Rep. 156.



for the jury under all the circumstances of the case.<sup>20</sup> Therefore it has been held, in an action for damages by fire set by a locomotive, that evidence that it was *laboring hard* to maintain a speed of forty miles an hour in order to make the schedule time of the freight train which it was drawing, is not conclusive proof of negligence in its management.<sup>21</sup> But evidence of negligence was discovered in driving an engine at an unusual rate of speed through a city, so that it emitted large quantities of sparks of the size of one's little finger.<sup>22</sup>

§ 2266. **Burning Wood in Coal Engines.**—Where it is shown, as a matter of fact, that the burning of wood in engines devised and constructed for the burning of coal, increases the danger of scattering fire, this practice will be deemed evidence of negligence fit to be submitted to the jury.<sup>23</sup> It has even been held that where it is indisputably established in a case that the use of wood in a coal-burning engine very materially increases the danger of setting fire to adjacent property, the court may instruct the jury that the use of wood in such an engine, engaged in propelling a train of cars, constitutes negligence as matter of law,<sup>24</sup> which means that the court is at liberty to instruct the jury that the use of wood under such circumstances constitutes negligence.

§ 2267. **Other Acts from which Negligence in Scattering Fire has been Inferred.**—Where a burning brand was thrown from a passing locomotive by a servant of the company, the latter was held liable for the damage which it caused.<sup>25</sup> Where a fire started by sparks from a locomotive on the defendant's right of way was seen by employes of the company in time to have extinguished it before it had gone very far, and they, notwithstanding this, permitted it to burn, whereby it spread to and consumed the plaintiff's premises, the company was held liable, although the escape of the fire from the locomotive was accidental and without negligence.<sup>26</sup> So, also, where sparks from a *construction train* set fire to combustibles on the track, which, spreading, burned the plaintiff's property; and the defendant's servants on the train, though having notice of the fire, did not stop and attempt

<sup>20</sup> *Ante*, § 1874, *et seq.*

<sup>21</sup> *Hagan v. Chicago & C. R. Co.*, 86 Mich. 615; s. c. 49 N. W. Rep. 509; 49 Am. & Eng. Rail. Cas. 670.

<sup>22</sup> *Hygienic & C. Man. Co. v. Raleigh & C. R. Co.*, 122 N. C. 881; s. c. 29 S. E. Rep. 575.

<sup>23</sup> *St. Joseph & C. R. Co. v. Chase*, 11 Kan. 47; *Chicago & C. R. Co. v. Quaintance*, 58 Ill. 387.

<sup>24</sup> *Chicago & C. R. Co. v. Ostrander*, 116 Ind. 259, 266; s. c. 19 N. E. Rep. 110.

<sup>25</sup> *McCoun v. New York & C. R. Co.*, 66 Barb. (N. Y.) 338.

<sup>26</sup> *Kenney v. Hannibal & C. R. Co.*, 63 Mo. 99; 3 Cent. L. J. 399; *Bass v. Chicago & C. R. Co.*, 28 Ill. 9.



to extinguish it. Had the train been a passenger train, the duty might not have been the same.<sup>27</sup> Evidence of negligence sufficient to take a case to a jury and support a verdict for the plaintiff has been discovered in the act of running a railway train, too heavily loaded, upon an up-grade, while a strong wind was blowing, causing an unusual quantity of sparks to escape from the locomotive, setting fire to the plaintiff's barn, which stood in close proximity to the track;<sup>28</sup> in running a train at the speed of thirty-five miles an hour, the wind being strong, the ground being very dry, and the danger of setting fires being very great at the particular season of the year, and there being evidence that the locomotive, as it passed along, scattered fire from underneath;<sup>29</sup> in running a train so heavy as to tax the engine to its full capacity, while a strong wind was blowing, the evidence being that an engine so taxed is liable to set fires, and the fire in question having been set at the distance of seventy-five feet from the railroad track and outside of the company's right of way;<sup>30</sup> in "working an engine too hard and running it fifteen miles an hour," within the limits of a village, in connection with a finding that the spark-arrester was defective;<sup>31</sup> in using a locomotive, in exceptionally dry weather, in shunting cars on a heavy grade, with a strong wind blowing, in the immediate vicinity of inflammable buildings, so that sparks escaped in great volumes, setting fire to the buildings,—and this although the locomotive is supplied with the most approved spark-arrester.<sup>32</sup>

§ 2268. **Acts Held not to be Negligent.**—The following acts in the management of locomotive engines have been held not to show negligence, on the evidence:—Putting an undue amount of coal in the fire-box, and running backwards and forwards while at a water-station;<sup>33</sup> shutting off steam;<sup>34</sup> and emitting steam through the smoke-stack.<sup>35</sup>

<sup>27</sup> Rolke v. Chicago &c. R. Co., 26 Wis. 537.

<sup>28</sup> North Shore Co. v. McWillie, 17 Can. S. C. 511.

<sup>29</sup> Wilson v. Northern &c. R. Co., 43 Minn. 519; s. c. 45 N. W. Rep. 1132.

<sup>30</sup> Hockstedler v. Dubuque &c. R. Co., 88 Iowa 236; s. c. 55 N. W. Rep. 74.

<sup>31</sup> Kansas City &c. R. Co. v. Chamberlin, 61 Kan. 859; s. c. 60 Pac. Rep. 15.

<sup>32</sup> Central Vermont R. Co. v. Stanstead &c. Ins. Co., Rap. Jud. Quebec 5 B. R. 224.

<sup>33</sup> Philadelphia &c. R. Co. v. Yerger, 73 Pa. St. 121.

<sup>34</sup> Burke v. Louisville &c. R. Co., 7 Heisk. (Tenn.) 451.

<sup>35</sup> Kellogg v. Milwaukee &c. R. Co., 5 Dill. (U. S.) 537; s. c. 1 Cent. L. J. 279; s. c. aff'd 94 U. S. 469. It has been held that a railroad company is not liable for fire communicated by its engine because of a long and steep grade and the number of the cars the engine was required to haul, where the evidence shows that such grades are common on well built roads, and that it would be impracticable to maintain the road without it, and that the engine could easily haul over such a grade a heavier train: First Nat. Bank v. Lake Erie &c. R. Co., 65 Ill. App. 21.



## CHAPTER LXXIV.

### ALLOWING COMBUSTIBLE MATERIAL TO ACCUMULATE UPON RIGHT OF WAY.

| SECTION   | SECTION  |
|---|--|
| 2270. Duty of railway company to prevent the accumulation of combustible materials upon its right of way. | 2277. Circumstances under which the mere setting of the fire will be negligence. |
| 2271. Theory upon which this duty is supported.   | 2278. Railway company liable although fire set by a third person.                |
| 2272. Company not an insurer, but liable for want of reasonable care.                                     | 2279. Circumstances under which the company may not be liable.                   |
| 2273. The true rule stated and illustrated.   | 2280. Questions of evidence connected with this subject.                         |
| 2274. Further illustrations of the rule.  | 2281. Instructions in actions of this kind.                                      |
| 2275. Statutes affirming this duty.   | 2282. Special verdicts in these cases.   |
| 2276. Communicating fires in burning off its right of way.  |  |

§ 2270. **Duty of Railway Company to Prevent the Accumulation of Combustible Materials upon its Right of Way.**<sup>1</sup>—A railroad company is bound to keep its track and contiguous land clear of materials likely to be ignited from sparks issuing from its locomotives. A neglect of these precautions will render it liable, even though its appliances were proper, and though it were guilty of no negligence in allowing the fire to escape. This is a duty which is implied in the grant of power to use locomotive engines. A franchise of this nature must be strictly construed; and it would be unreasonable to presume that, in granting the privilege to use this dangerous agent, the Legislature intended to give them the privilege of running their engines on premises surrounded and covered with combustible material.<sup>2</sup> The removal of such combustible substances is quite as much a means of

<sup>1</sup> This section is cited in §§ 2231, 2232, 2234, 2280, 2294, 2365.

<sup>2</sup> *Salmon v. Delaware &c. R. Co.*, 38 N. J. L. 5; *Delaware &c. R. Co. v. Salmon*, 39 N. J. L. 299; *Kellogg v. Chicago &c. R. Co.*, 26 Wis. 223; *Toledo &c. R. Co. v. Wand*, 48 Ind.

476; *Burlington &c. R. Co. v. Westover*, 4 Neb. 268; *Henry v. Southern &c. R. Co.*, 50 Cal. 176; *Pittsburg &c. R. Co. v. Nelson*, 51 Ind. 150. But see *Kansas &c. R. Co. v. Butts*, 7 Kan. 308.



preventing the communication of fire from their locomotives, as is the use of inventions for preventing the escape of fire from the locomotives themselves. Decisions are numerous which affirm the liability of railroad companies for negligence in failing to perform this duty, where adjacent property is burned by reason of the neglect of it, notwithstanding it may have used due care in providing proper appliances to arrest the scattering of fire by its engines, and due care in the running of its engines so as to avoid setting fire to adjacent property.<sup>3</sup> A round statement of this doctrine is that where a railroad company sets fire to the dry grass and other combustible material, which it has negligently suffered to accumulate on its right of way, and, without fault of the adjacent owner, permits such fire to escape to his lands and burn and destroy his property, it will be liable to him for the damages, whether the escape of such fire was due to its negligence or not.<sup>4</sup> Nor is its liability, in such cases, confined to adjoining owners; but if a fire is communicated from its locomotive to dry grass and weeds

<sup>3</sup> *Brighthope R. Co. v. Rogers*, 76 Va. 443; *Aycock v. Raleigh & C. R. Co.*, 89 N. C. 321; *Atchison & C. R. Co. v. Dennis*, 38 Kan. 424; s. c. 17 Pac. Rep. 153; *O'Neil v. New York & C. R. Co.*, 115 N. Y. 579; s. c. 5 L. R. A. 591; 40 Am. & Eng. Rail. Cas. 240; 6 Rail. & Corp. L. J. 408; 26 N. Y. St. Rep. 269; 22 N. E. Rep. 217; *Kelsey v. Chicago & C. R. Co.*, 1 S. D. 80; s. c. 45 N. W. Rep. 204; 43 Am. & Eng. Rail. Cas. 43; *Gram v. Northern & C. R. Co.*, 1 N. D. 252; s. c. 45 Am. & Eng. Rail. Cas. 544; 46 N. W. Rep. 972; *Hayes v. Chicago & C. R. Co.*, 45 Minn. 17; s. c. 47 N. W. Rep. 260; *Billings v. Fitchburg R. Co.*, 58 Hun (N. Y.) 605, *mem.*; s. c. 34 N. Y. St. Rep. 382; 11 N. Y. Supp. 837; *Kurz & Ice Co. v. Milwaukee & C. R. Co.*, 84 Wis. 171; s. c. 53 N. W. Rep. 850; *Dillingham v. Whitaker* (Tex. Civ. App.), 25 S. W. Rep. 723 (no off. rep.); *Texas & C. R. Co. v. Gains* (Tex. Civ. App.), 26 S. W. Rep. 433 (no off. rep.); *Chicago & C. R. Co. v. Burger*, 124 Ind. 275; s. c. 24 N. E. Rep. 981; *St. Johns & C. R. Co. v. Ransom*, 33 Fla. 406; s. c. 14 South. Rep. 892; *Louisville & C. R. Co. v. Hart*, 119 Ind. 273; s. c. 4 L. R. A. 549; 21 N. E. Rep. 753; *Bass v. Chicago & C. R. Co.*, 28 Ill. 9; *Illinois & C. R. Co. v. Mills*, 42 Ill. 407; *Ohio & C. R. Co. v. Shanefelt*, 47 Ill. 497; *Illinois & C. R. Co. v. Frazier*, 47 Ill. 505; *Rockford & C. R. Co. v. Rogers*,

62 Ill. 346; *Brown v. Buffalo & C. R. Co.*, 4 App. Div. (N. Y.) 465; s. c. 38 N. Y. Supp. 655; *Patton v. St. Louis & C. R. Co.*, 87 Mo. 117; s. c. 1 West. Rep. 757; *Indiana & C. R. Co. v. Overman*, 110 Ind. 538; s. c. 8 West. Rep. 385; *Chicago & C. R. Co. v. Bailey*, 19 Ind. App. 163; s. c. 46 N. E. Rep. 688; *Clark v. Chicago & C. R. Co.*, 33 Minn. 359; *Tutwiler v. Chesapeake & C. R. Co.*, 95 Va. 443; s. c. 28 S. E. Rep. 597; *Lake Erie & C. R. Co. v. Clark*, 7 Ind. App. 155; s. c. 34 N. E. Rep. 587; *Lake Erie & C. R. Co. v. Cruzen*, 29 Ill. App. 212; *Chicago & C. R. Co. v. Glenny*, 70 Ill. App. 510; *Black v. Aberdeen & C. R. Co.*, 115 N. C. 667; s. c. 20 S. E. Rep. 713, 909; *Chicago & C. R. Co. v. McBride*, 54 Kan. 172; s. c. 37 Pac. Rep. 978; *Louisville & C. R. Co. v. Miller*, 109 Ala. 500; s. c. 19 South. Rep. 989; *Rabbermann v. Callaway*, 63 Ill. App. 154; *Galveston & C. R. Co. v. Polk* (Tex. Civ. App.), 28 S. W. Rep. 353 (no off. rep.); *Richmond & C. R. Co. v. Medley*, 75 Va. 499; s. c. 40 Am. Rep. 734; *Toledo & C. R. Co. v. Wand*, 48 Ind. 476; *International & C. R. Co. v. Newman* (Tex. Civ. App.), 40 S. W. Rep. 854 (no off. rep.).

<sup>4</sup> *Indiana & C. R. Co. v. Overman*, 110 Ind. 538; s. c. 8 West. Rep. 385; *Chicago & C. R. Co. v. Bailey*, 19 Ind. App. 163; s. c. 46 N. E. Rep. 688.



suffered to grow on its right of way, on a day when the wind is high, it may become liable for damages caused thereby to premises situated at a distance, where the damage would probably not have occurred but for the wind,<sup>5</sup>—a subject considered hereafter.<sup>6</sup> It is merely changing the form of statement of the doctrine of all the preceding cases, to say that a railroad company is not relieved from liability for damages caused by fire set upon its right of way, and communicated to the premises of another, by reason of its negligence in permitting its right of way to become covered with materials, by the fact that the engine which set the fire was properly equipped with devices to prevent the scattering of fire.<sup>7</sup> Therefore, in an action against a railroad company for damages from fire caused by sparks from its locomotive, *allegations* that defendant carelessly and negligently permitted grass and other combustible matter to accumulate on its right of way, and that sparks from a passing locomotive set fire to such matter, and that the fire spread to plaintiff's building, are sufficient, without allegation that the locomotive was kept in an improper condition, or carelessly operated.<sup>8</sup>

§ 2271. **Theory upon which this Duty is Supported.**—The theory of these decisions, based upon experience and common knowledge, is that, however carefully a railway locomotive may be constructed and equipped so as to prevent the scattering of fire, and however skillfully it may be operated, there is always danger that some fire will be scattered either from its ash-pan or its chimney; that railroad companies are bound, in the exercise of that duty which every man owes to his neighbor, of so using his own property as not to injure that of another, to *exercise reasonable care* to the end of minimizing this danger. But the judicial holdings are generally to the effect that the failure to perform this duty is not negligence *per se*, or negligence as matter of law, to be declared by the judge, but that whether it was negligence in any given instance is a *question of fact to be determined by a jury*, in view of all the evidence which speaks upon the question.<sup>9</sup>

<sup>5</sup> Chicago &c. R. Co. v. McBride, 54 Kan. 172; s. c. 37 Pac. Rep. 978.

<sup>6</sup> *Post*, § 2298, *et seq.*

<sup>7</sup> Toledo &c. R. Co. v. Endres, 57 Ill. App. 69.

<sup>8</sup> Pittsburgh &c. R. Co. v. Indiana Horseshoe Co., 154 Ind. 322; s. c. 56 N. E. Rep. 766.

<sup>9</sup> Richmond &c. R. Co. v. Medley, 75 Va. 499; s. c. 40 Am. Rep. 734; Texas &c. R. Co. v. Medaris, 64 Tex. 92 (not negligence as matter of

law); Missouri &c. R. Co. v. Sparks (Tex. Civ. App.), 35 S. W. Rep. 745 (no off. rep.) (not negligence as matter of law); Chicago &c. R. Co. v. Bailey, 19 Ind. App. 163; s. c. 46 N. E. Rep. 688 (whether the railroad company has exercised proper care to remove combustible materials from its right of way is a question of fact for a jury in each case); Eddy v. Lafayette, 163 U. S. 456; s. c. 41 L. ed. 225; 16 Sup. Ct. Rep.



§ 2272. **Company not an Insurer, but Liable for Want of Reasonable Care.**—All that is required is that the railway company should exercise ordinary or reasonable care in this particular,<sup>10</sup> and what is such reasonable or ordinary care will, as in other cases, be generally a question for a jury under all the circumstances of the case.<sup>11</sup> This measure of care has been well defined by saying in substance that a railroad company is bound only to use the same diligence in removing combustibles from its right of way that a prudent and cautious husbandman would use in reference to combustible materials on his own premises, *if exposed to the same hazard from fire*.<sup>12</sup>

§ 2273. **The True Rule Stated and Illustrated.**—The true rule is that, although it is not negligence *per se* for a railroad company to allow combustible materials to accumulate upon its right of way, yet to allow such accumulation may become actionable negligence where it is reasonably probable that damage will result to adjoining property therefrom, in case of such material being fired by passing locomotives.<sup>13</sup> A railroad company which has constructed a track and is using it for its own gain and profit, is bound to use reasonable care to keep it free from inflammable material, although it merely has a

1082 (negligence in allowing combustible materials to accumulate on the track and right of way is a question for the jury); Taylor v. Pennsylvania &c. R. Co., 174 Pa. St. 171; s. c. 34 Atl. Rep. 457 (mere fact of allowing weeds and grass cut on its right of way to remain thereon during the winter, not of itself negligence).

<sup>10</sup> Eddy v. Lafayette No. 2, 4 U. S. App. 247; s. c. 1 C. C. A. 441; 49 Fed. Rep. 807. An instruction is therefore erroneous which has the effect of informing the jury that the railroad company is under an absolute duty to keep its tracks free from combustible materials; but they should be told that it is under the duty of exercising reasonable care to guard against the escape of fire by reason of the accumulation of such materials: Pitney v. Atlantic City R. Co. (N. J.), 43 Atl. Rep. 1099. That a railroad company is bound to exercise due care and caution to prevent exposure of *petroleum* to great heat or contact with fire while standing on a side-track in its yards, and to exercise such care as is reasonably necessary to protect the public from the danger in this respect,—see Henry v.

Cleveland &c. R. Co., 67 Fed. Rep. 426.

<sup>11</sup> Atchison &c. R. Co. v. Dennis, 38 Kan. 424; s. c. 17 Pac. Rep. 153; Fort Worth &c. R. Co. v. Hogsett, 67 Tex. 685; s. c. 4 S. W. Rep. 365; White v. Missouri &c. R. Co., 31 Kan. 280; Gibbons v. Wisconsin &c. R. Co., 58 Wis. 335; Van Ostrand v. Walkill Valley R. Co., 46 N. Y. St. Rep. 456; s. c. 19 N. Y. Supp. 621; St. Louis &c. R. Co. v. Richardson, 47 Kan. 517; s. c. 27 Pac. Rep. 183; Union &c. R. Co. v. Gilland, 4 Wyo. 395; s. c. 34 Pac. Rep. 953; Gulf &c. R. Co. v. Benson, 69 Tex. 407; s. c. 5 S. W. Rep. 822; 5 Am. St. Rep. 74; Jones v. Michigan &c. R. Co., 59 Mich. 437; s. c. 26 N. W. Rep. 662; San Antonio &c. R. Co. v. Long, 4 Tex. Civ. App. 497; s. c. 23 S. W. Rep. 499.

<sup>12</sup> Chicago &c. R. Co. v. Bailey, 19 Ind. App. 163; s. c. 46 N. E. Rep. 638.

<sup>13</sup> St. Johns &c. R. Co. v. Ransom, 33 Fla. 406; s. c. 14 South. Rep. 892. The question of the negligence of the railroad company in this regard was submitted to a jury in O'Neil v. New York &c. R. Co., 45 Hun (N. Y.) 458; s. c. 10 N. Y. St. Rep. 147.



*license* to lay the track and has no interest in the land over which it is laid.<sup>14</sup>

§ 2274. **Further Illustrations of the Rule.**—In *Smith v. London and South-Western Railway*,<sup>15</sup> it appeared that certain workmen employed by the company in cutting the grass and trimming the hedges bordering its line placed the trimmings in heaps near the track, where they remained for fourteen days in the month of August. One of the heaps was ignited by a passing engine, and the fire spread to a house two hundred yards distant from the track. It was held by the Court of Common Pleas (Brett, J., dissenting), that there was evidence to go to the jury of negligence on the part of the company, although there was no suggestion that the engine was improperly constructed or driven. On appeal, this ruling was unanimously approved by the six judges of the Court of Exchequer Chamber.<sup>16</sup> In a North Carolina case, where the company had allowed a pile of dry, combustible sills to remain near its track, which, being ignited by one of the company's engines, communicated the fire to the plaintiff's fence, this fact was held by the court to be evidence of negligence.<sup>17</sup> And in *Flynn v. San Francisco and San Jose Railroad Company*,<sup>18</sup> it was said: "Nor is the ignition of combustible matter lying on the track of a railroad, by sparks dropped by a passing engine, unavoidable accident. The removal of the combustible matter from the road is an obvious and sure protection." Where a railroad company suffered Bermuda grass to remain on its right of way for three or four months after the close of the season in which such grass was in a green or growing state, in sufficient quantities to be ignited from sparks from passing locomotives, and to communicate the fire so started to adjoining lands, this was held evidence of negligence.<sup>19</sup>

§ 2275. **Statutes Affirming this Duty.**—Many statutes have been enacted affirming this duty. Where such a statute is directly violated the violation of it is negligence *per se*,<sup>20</sup> or *prima facie* evidence of neg-

<sup>14</sup> *Kurz &c. Ice Co. v. Milwaukee &c. R. Co.*, 84 Wis. 171; s. c. 53 N. W. Rep. 850.

<sup>15</sup> L. R. 5 C. P. 98.

<sup>16</sup> L. R. 6 C. P. 14.

<sup>17</sup> *Troxler v. Richmond &c. R. Co.*, 74 N. C. 377.

<sup>18</sup> 40 Cal. 14.

<sup>19</sup> *Louisville &c. R. Co. v. Miller*, 109 Ala. 500; s. c. 19 South. Rep. 989. For a railroad company to allow combustible material to accumulate on its right of way which is

ignited by sparks from a passing locomotive, resulting in the burning of the limbs of a tree, which stands on the ground of an adjacent landowner, but the limbs of which extend over the company's right of way, has been held evidence of negligence: *Rabbermann v. Callaway*, 63 Ill. App. 154.

<sup>20</sup> *Chicago &c. R. Co. v. Goyette*, 133 Ill. 21; s. c. 24 N. E. Rep. 549; 43 Am. & Eng. Rail. Cas. 36; Vol. I, § 10.



ligence, according to the rule of the jurisdiction.<sup>21</sup> But where the statute prescribes the *kind* of combustible material of which the company shall keep its right of way clear, it is not negligence *per se* for it to allow the accumulation of *other* such material.<sup>22</sup> A statute of Wyoming, requiring every railroad company to burn, as a fire guard, all vegetation growing on its right of way for a stated distance, between September 1st and November 1st in each year, is complied with by such burning at any time between those dates, and does not make the company liable for a fire spreading to adjoining property from its right of way on October 20, although it had not burned the vegetation at that time.<sup>23</sup> A statute of Ohio, requiring railroad companies to keep their rights of way free from weeds, high grass, decayed timber, and other combustible material, has been construed as not requiring removal of a grain elevator standing upon the right of way, although it is composed of combustible material, because the elevator is not the kind of material referred to in the statute.<sup>24</sup>

### § 2276. Communicating Fires in Burning Off its Right of Way.—

Cases have arisen where railroad companies have set fire to adjacent property in burning off the grass and other combustible material from their right of way; and we have already had occasion to notice a statute requiring railroad companies to *burn* such material from their right of way. Such a statute is no doubt satisfied with a *removal* of the combustible material from the right of way by whatever means adopted by the railroad company. The necessity of removing combustible materials from its right of way being imposed upon the railroad company either by the common or the statute law, or by both, and the use of fire in effecting such removal being an obvious and generally proper use, in case the fire escapes control and spreads to adjoining property the liability of the railroad company will depend upon the question whether in setting the fire at the particular time, having regard to the dryness of the combustible matter, the direction and force of the wind, and other circumstances, or in allowing it to escape control after being set, the railroad company acted with reasonable care: it can not be held liable in damages unless it has been guilty of negligence in either of these particulars.<sup>25</sup> In exercising the duty

<sup>21</sup> Vol. I, § 11. Compare *post*, § 2337, *et seq.*

<sup>22</sup> *Chicago &c. R. Co. v. Goyette*, 133 Ill. 21; s. c. 24 N. E. Rep. 549; 43 Am. & Eng. Rail. Cas. 36.

<sup>23</sup> *Union &c. R. Co. v. Gilland*, 4 Wyo. 395; s. c. 34 Pac. Rep. 953.

<sup>24</sup> *Martz v. Cincinnati &c. R. Co.*, 12

Ohio C. C. 144; s. c. 1 Ohio C. D. 451.

<sup>25</sup> *Atchison &c. R. Co. v. Dennis*, 38 Kan. 424; s. c. 17 Pac. Rep. 153. To a similar effect see *Townley v. Fall Brooke Coal Co.*, 35 N. Y. St. Rep. 975; s. c. 12 N. Y. Supp. 649.



of burning off its right of way so as to clear it of combustible material liable to communicate fire to adjacent premises, the railroad company is held substantially to the same degree of care as that which the law imposes upon a private owner or occupier of land, provided the risk is the same.<sup>26</sup> The fact that a railroad company may have been negligent in allowing grass and weeds to accumulate upon its right of way,—in other words, may have been negligent in creating the condition which rendered it necessary for it to set out the fire in order to clear its right of way of combustible materials,—will not render it liable for damages proceeding from fire communicated from its right of way to adjacent premises, while its section foreman was burning off the right of way, provided the foreman acted in a careful and prudent manner in starting the fire, and in preventing its spread to the other premises.<sup>27</sup>

§ 2277. **Circumstances under which the Mere Setting of the Fire will be Negligence.**—But the circumstances may be such that the mere act of setting the fire will involve such obvious danger to adjoining property as to afford of itself evidence of negligence. It was so held where the fire was set on a bed of *turf* or *peat* in a season of great drought when the ground was parched and dry, so that the fire would inevitably run through the bed of peat and escape upon adjoining land to which the peat bed extended.<sup>28</sup> So, the fact that the employes of a railroad company, in order to burn off combustible materials on its

<sup>26</sup> See on this subject, *Lake Erie &c. R. Co. v. Naron*, 18 Ind. App. 193; s. c. 47 N. E. Rep. 691.

<sup>27</sup> *Gulf &c. R. Co. v. Cusenberry*, 86 Tex. 525; s. c. 26 S. W. Rep. 43; rev'g 5 Tex. Civ. App. 114; s. c. 23 S. W. Rep. 851. As to negligence in setting fire to burn off right of way, see further and compare the following cases: *Atchison &c. R. Co. v. Scrafford*, 2 Kan. App. 73; *Cole v. Lake Shore &c. R. Co.*, 105 Mich. 549. Care required—see *Townley v. Fall Brooke Coal Co.*, 35 N. Y. St. Rep. 975; *Missouri &c. R. Co. v. Cady*, 44 Kan. 633; *Missouri &c. R. Co. v. Lamar*, 44 Kan. 636; *Atchison &c. R. Co. v. Dennis*, 38 Kan. 424.

<sup>28</sup> *Louisville &c. R. Co. v. Nitsche*, 126 Ind. 229; s. c. 26 N. E. Rep. 51; 9 L. R. A. 750; 45 Am. & Eng. Rail. Cas. 532; 43 Alb. L. J. 191. In this case there is a very learned opinion by Elliott, J., asserting the proposition that where a railroad company,

under the circumstances named in the text, sets out a fire, it is guilty of a *positive wrong*, and not of mere *passive negligence*. It seems that, under the theory of the ancient common law, the act would be in the nature of a *trespass* upon the property to which the fire escaped. It has been held that, although a railroad company has only an *easement* in its right of way, the *fee* being in the land-owner whose land has been condemned, it may burn the grass thereon as a precaution against the spread of fires from its engines, and may even exclude the owner of the right of way therefrom, when necessary to the proper exercise of its franchises; but, nevertheless, it can not *give away the hay* growing thereon, and if it assumes to do so, the owner of the field may maintain *trover* therefor: *Bailey v. Sweeney*, 64 N. H. 296; s. c. 4 N. Eng. Rep. 287; 9 Atl. Rep. 543.



right of way, set fire to such materials on a dry day, when a high wind is blowing, where the right of way is adjacent to an orchard, and there is combustible stubble near the rows of trees;<sup>29</sup> and the fact that, for the same purpose, they set out a fire on a very windy day, but fifty feet from a plowed fire guard, which is but three or four feet wide, and which is in the direction toward which the wind is blowing, over which fire guard the fire is carried by the wind upon adjacent premises,<sup>30</sup>—will afford evidence of negligence.<sup>31</sup>

**§ 2278. Railway Company Liable although Fire Set by a Third Person.**<sup>32</sup>—Where a railway company has negligently allowed combustible materials to accumulate upon its right of way, it may become liable for a fire started thereon which escapes to the premises of an adjacent owner, although it had no knowledge of the fire,<sup>33</sup> or although the fire was not set by itself,<sup>34</sup> but by another company, to whom it has granted the license of running its train over the road.<sup>35</sup>

**§ 2279. Circumstances under which the Company may not be Liable.**—It has been reasoned that a railroad company is not chargeable with negligence in failing to keep its right of way, at a point where it exceeds the width to which the right of way is limited by law, clear of combustible material for a width exceeding the ordinary legal width of the right of way;<sup>36</sup> but, while the case seems to have been rightly decided, this view does not seem to be sound, because adjacent land-owners, whose property may be injured by accumulations of combustible material on so much of the company's right of way as lies outside of the ordinary legal limit, have no right to climb over the

<sup>29</sup> *Missouri &c. R. Co. v. Steinberger*, 6 Kan. App. 585; s. c. 51 Pac. Rep. 623.

<sup>30</sup> *Padgett v. Atchison &c. R. Co.*, 7 Kan. App. 736; s. c. 52 Pac. Rep. 578.

<sup>31</sup> That it may be negligence for a railroad company, for the purpose of burning off its right of way, to set a fire thereon on a very windy day,—see also *Atchison &c. R. Co. v. Scrafford*, 2 Kan. App. 73; s. c. 43 Pac. Rep. 308.

<sup>32</sup> This section is cited in § 2232.

<sup>33</sup> *Pittsburgh &c. R. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322; s. c. 56 N. E. Rep. 766.

<sup>34</sup> *Terre Haute &c. R. Co. v. Walsh*, 11 Ind. App. 13; s. c. 38 N. E. Rep. 534.

<sup>35</sup> *Heron v. St. Paul &c. R. Co.*, 68

*Minn.* 542; s. c. 71 N. W. Rep. 706. Where a railroad company has possession and control of its own road, and allows another company to run its trains over the same, and negligently suffers combustible material to accumulate upon its right of way, to which the other negligently sets fire, doing damage to an adjacent owner,—the former company is concurrently liable with the latter company, for the damages inflicted upon the adjacent owner,—the one because of negligently allowing the combustible materials to accumulate, the other because of negligently setting fire to them: *Heron v. St. Paul &c. R. Co.*, 68 *Minn.* 542; s. c. 71 N. W. Rep. 706.

<sup>36</sup> *Union &c. R. Co. v. Buck*, 3 Kan. App. 671; s. c. 44 Pac. Rep. 904.



fence and clear off such materials. Such materials are therefore a menace to their safety and a continuing nuisance.<sup>37</sup>

§ 2280. **Questions of Evidence Connected with this Subject.**—It has been well reasoned that, where the railroad company negligently permitted combustible material to accumulate on its right of way, from which a fire, communicated by one of its locomotives, spread to the property of an adjoining land-owner, the question whether the fire was started through negligence in supplying the locomotive with proper appliances to prevent the spread of fire, or in keeping it in proper repair, or in operating it on the particular occasion, became immaterial.<sup>38</sup> In such a case it has been held no error to exclude evidence as to what kind of a smoke-stack, fire-box, and ash-pan were in use on the defendant's locomotives.<sup>39</sup> Aside from the question of the negligence of the company in allowing combustible materials to accumulate upon its right of way, it is to be observed that *evidence* of the existence of such materials is *relevant* as bearing upon the question of the degree of care necessary in operating its locomotives to prevent the scattering of fire;<sup>40</sup> since, as already seen,<sup>41</sup> greater care is demanded in operating locomotives to the end of avoiding the scattering of fire, where the track and right of way are strewn with combustible materials, than in other cases.

§ 2281. **Instructions in Actions of this Kind.**—Where the only allegation of negligence was to the effect that the railway company permitted sparks to escape from its locomotive, which came in contact with the property of the plaintiff, destroying it,—it was held erroneous to submit to the jury the question of negligence in allowing the accumulation of combustible material on the right of way.<sup>42</sup>

§ 2282. **Special Verdicts in these Cases.**—In a jurisdiction where special interrogatories are submitted to juries, it has been held in an

<sup>37</sup> Other decisions where, on various grounds, the railroad company was exonerated are: *Hemmi v. Chicago & C. R. Co.*, 102 Iowa 25; *Central Vermont R. Co. v. Stanstead & C. Ins. Co.*, Rap. Jud. Quebec 5 B. R. 224; *Toledo & C. R. Co. v. Wickenden*, 11 Ohio Ind. C. C. 378.

<sup>38</sup> *Indiana & C. R. Co. v. Overman*, 110 Ind. 538; *ante*, §§ 2247, 2270.

<sup>39</sup> *Indiana & C. R. Co. v. Overman*, 110 Ind. 538.

<sup>40</sup> *Cantlon v. Eastern R. Co.*, 45 Minn. 481; s. c. 48 N. W. Rep. 22. To the same effect, see *Carter v. Kansas City & C. R. Co.*, 65 Iowa 287.

It is scarcely necessary to add that where the plaintiff's action is predicated upon the negligence of the railway company in allowing dead grass, dry weeds, and other combustible material to accumulate upon its right of way, the burden of showing the existence of such combustible material on a right of way is on the plaintiff: *Indiana & C. R. Co. v. Hawkins*, 84 Ill. App. 39.

<sup>41</sup> *Ante*, § 2233.

<sup>42</sup> *Savannah & C. R. Co. v. Tiedeman*, 39 Fla. 196; s. c. 22 South. Rep. 658.



action of the kind under consideration, that a finding that defendant's right of way was covered with dry, combustible material, consisting in part of weeds and grass cut two weeks before the fire, and that the fire was started by defendant's engine, and spread continuously through such combustible material till it reached plaintiff's building, is sufficient to support a judgment for the plaintiff without a finding as to the amount of combustible material, or that permitting the grass and weeds to remain for two weeks after being cut was unnecessary, or increased the danger.<sup>43</sup> In another case it was held that a special finding that the company had allowed large quantities of dry and combustible material to accumulate on the right of way for more than two months previous to the fire, when the said material was in a highly inflammable condition, and in sufficient quantities to cover the right of way from within eight feet of the track continuously up to and adjoining the owner's premises; and that the company failed to employ any means to prevent the fire from communicating with the owner's land, and other findings showing the location and condition of the property, sufficiently show negligence on the part of the railroad company.<sup>44</sup>

<sup>43</sup> *Pittsburgh &c. R. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322; s. c. 56 N. E. Rep. 766.

<sup>44</sup> *Cleveland &c. R. Co. v. Hadley*, 12 Ind. App. 516; s. c. 40 N. E. Rep. 760.



## CHAPTER LXXV.

### EVIDENCE OF NEGLIGENCE IN COMMUNICATING RAILWAY FIRES.

#### SECTION

- 2284. As to the burden of proof in these cases.
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#### SECTION

- 2291. Negligence in communicating the fire provable wholly by circumstantial evidence.
- 2292. View that the fact of fires breaking out along the right of way not evidence of their having been communicated from defendant's locomotives.
- 2293. Emission of sparks or coals of extraordinary size or in extraordinary quantities deemed evidence of negligence.
- 2294. Other evidence of negligence.
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§ 2284. **As to the Burden of Proof in these Cases.**—Unquestionably, the general burden of proof is upon the plaintiff to prove that species of negligence which he alleges in his declaration, complaint or petition.<sup>1</sup> Whether he sustains this burden by proving that the fire which destroyed his property was communicated from a locomotive of the defendant, is a question on which, as we shall presently see, the courts are divided, with a strong preponderance of judicial opinion in favor of the proposition that he does. We gain very little by stating the proposition of another court that in such an action, where the allegation is that the property of the plaintiff was destroyed by fire set by sparks emitted from a locomotive of the defendant, the burden is upon the plaintiff to prove not only that the fire was caused by sparks from the defendant's engine, but that the emission of such sparks was due to the defendant's negligence.<sup>2</sup> The case which so holds belongs to the minority side of judicial opinion upon this question, the side which upholds the doctrine that the land-owner must find out what engine scattered the fire, and how that engine was constructed, and

<sup>1</sup> *Albert v. Northern &c. R. Co.*, 98 Pa. St. 316.

<sup>2</sup> *Garret v. Southern R. Co.*, 101 Fed. Rep. 102.



how it was operated at the time,—evidence which in most cases it would be impossible for him to produce. In another jurisdiction, judicial opinion ranges itself upon the minority side of this question, by holding that the burden is on the plaintiff, in an action for damages for the destruction of property by sparks escaping from a locomotive, to show that the appliance for the arrest of sparks used by the company was defective or improperly and negligently used, where such appliance has been in common use for a long time and found sufficient to protect property from danger,<sup>3</sup>—a burden which in most cases he can not sustain, because all the means of proof are in the possession of the defendant and its agents and servants.

§ 2285. **Presumption of Negligence from the Fact of the Fire being Communicated from a Locomotive.**<sup>4</sup>—The rule which obtains in cases of ordinary fires, that the destruction of property by a fire communicated from the premises of another, does not of itself raise a presumption of negligence,<sup>5</sup> finds an exception in the case of a fire communicated by a locomotive engine. The reason for this exception is that where a fire is communicated from a locomotive engine, the engine is generally out of sight before the fact of the fire is discovered by the owner or occupier of the premises; that all knowledge of the construction and working of the locomotives of the railway company is in its possession; that it is practically impossible for the land-owner to prove specifically how the fire originated, while all evidence on this subject is in the possession of the railway company and its agents and servants, so that the railway company is in a position to prove, and generally does prove, to the satisfaction of judges, if not of juries, that all its engines were of the most approved construction; that all the men employed to operate them were skillful and careful; that there were no combustibles negligently accumulated upon its right of way,—in short, it is generally able to prove a state of facts which, if true, would have rendered it impossible for the fire to take place. These, and like considerations, have induced the courts with great, though not with entire unanimity, to hold that the simple fact that a fire was communicated from a locomotive in the use of a railway company, to the premises of an adjacent owner or occupier, is *prima facie* evidence of negligence, such as casts upon the company, in an action against it for the damages, the burden of proving that it had not been guilty of negligence, either in the construction or in the management of its lo-

<sup>3</sup> *Gumbel v. Illinois &c. R. Co.*, 48 La. An. 1180; s. c. 4 Am. & Eng. Rail. Cas. (N. S.) 452; 20 South. Rep. 703.

<sup>4</sup> This section is cited in §§ 2293, 2339.

<sup>5</sup> Vol. I, § 729.



comotive, or in failing to prevent the accumulation of combustible material upon its right of way. This is a very apt illustration of the rule of *res ipsa loquitur*.<sup>6</sup> The meaning is that, whereas the communication of fires by railway locomotives does not generally occur where due skill and diligence are used in their construction, in their reparation, in their management, and in the prevention of the accumulation of combustible materials upon the right of way of the railway company,—it is a reasonable conclusion, in the absence of contravening circumstances, that the mere communication of the fire was the result of negligence. If the facts were such as to exclude the conclusion of negligence, the means of producing the evidence of those facts are generally in the possession of the railroad company, and not in the possession of the injured land-owner. The rule, therefore, proceeds upon the just ground that the land-owner can not, from the very nature of things, know the condition of the particular engine which did the damage, or in many cases what engine it was, or by whom or in what manner it was propelled, or how it had been constructed or repaired; and consequently, that the burden of producing evidence upon these points ought to rest upon the railroad company in whose possession such evidence is.<sup>7</sup>

<sup>6</sup> Vol. I, § 15.

<sup>7</sup> Cases affirming the doctrine that the mere fact of the communication of a fire from a railway locomotive is presumptive or *prima facie* evidence of negligence, and that the burden of rebutting this presumption is on the railroad company, are: Aldridge v. Great Western R. Co., 3 Man. & G. 515; Piggot v. Eastern & C. R. Co., 3 C. B. 229; Smith v. London & C. R. Co., L. R. 6 C. P. 14; Gibson v. South Eastern R. Co., 1 Fost. & Fin. 23; Eddy v. Lafayette, 4 U. S. App. 247; s. c. 49 Fed. Rep. 807; Louisville & C. R. Co. v. Reese, 85 Ala. 497; s. c. 5 South. Rep. 283; 7 Am. St. Rep. 66; St. Louis & C. R. Co. v. Jones, 59 Ark. 105; Tilley v. St. Louis & C. R. Co., 49 Ark. 535; s. c. 6 S. W. Rep. 8; Jacksonville & C. R. Co. v. Peninsular Land & C. Co., 27 Fla. 1; s. c. 17 L. R. A. 33; East Tennessee & C. R. Co. v. Hesters, 90 Ga. 11; s. c. 15 S. E. Rep. 828; East Tennessee & C. R. Co. v. Hall, 90 Ga. 17; s. c. 16 S. E. Rep. 91; Bass v. Chicago & C. R. Co., 28 Ill. 9; Illinois & C. R. Co. v. Mills, 42 Ill. 407; Toledo & C. R. Co. v. Larmon, 67 Ill. 68 (since adopted by statute: Rev. Stat. Ill. 1877, ch.

114, § 89); Chicago & C. R. Co. v. McCahill, 56 Ill. 28; Pittsburgh & C. R. Co. v. Campbell, 86 Ill. 443; Toledo & C. R. Co. v. Kingman, 49 Ill. App. 43; Rose v. Chicago & C. R. Co., 72 Iowa 625; Engle v. Chicago & C. R. Co., 77 Iowa 661, 666; s. c. 37 N. W. Rep. 6; 42 N. W. Rep. 512; Seska v. Chicago & C. R. Co., 77 Iowa 137; s. c. 41 N. W. Rep. 596; Fort Scott & C. R. Co. v. Karracker, 46 Kan. 511; s. c. 26 Pac. Rep. 1027; Atchison & C. R. Co. v. Gibson, 42 Kan. 34; s. c. 21 Pac. Rep. 788; Daly v. Chicago & C. R. Co., 43 Minn. 319; s. c. 45 N. W. Rep. 611; Woodson v. Milwaukee & C. R. Co., 21 Minn. 60; Fitch v. Pacific R. Co., 45 Mo. 325; Bedford v. Hannibal & C. R. Co., 46 Mo. 456; Clemens v. Hannibal & C. R. Co., 53 Mo. 366; Coale v. Hannibal & C. R. Co., 60 Mo. 227; Coates v. Missouri & C. R. Co., 61 Mo. 38 (overruling Smith v. Hannibal & C. R. Co., 37 Mo. 287); Miller v. St. Louis & C. R. Co., 90 Mo. 389; Polhans v. Atchison & C. R. Co., 45 Mo. App. 153; Logan v. Wabash & C. R. Co., 43 Mo. App. 71; Union & C. R. Co. v. Keller, 36 Neb. 189; s. c. 54 N. W. Rep. 420; Burlington & C. R. Co. v. Westover, 4 Neb. 268; Longabaugh v. Virginia



§ 2286. **Cases Denying this Presumption.**—On the other hand, decisions are found in several jurisdictions denying this presumption, and requiring that the plaintiff produce some additional evidence of negligence on the part of the railway company.<sup>8</sup>

City &c. R. Co., 9 Nev. 271; Sugarman v. Manhattan Elev. R. Co., 42 N. Y. St. Rep. 30; Koontz v. Oregon R. &c. Co., 20 Ore. 3; s. c. 43 Am. & Eng. Rail. Cas. 11; 23 Pac. Rep. 820; Kelsey v. Chicago &c. R. Co., 1 S. D. 80; s. c. 43 Am. & Eng. Rail. Cas. 43; 45 N. W. Rep. 204; White v. Chicago &c. R. Co., 1 S. D. 326; s. c. 47 N. W. Rep. 146; 9 L. R. A. 324; 45 Am. & Eng. Rail. Cas. 565; Cronk v. Chicago &c. R. Co., 3 S. D. 93; s. c. 52 N. W. Rep. 420; Burke v. Louisville &c. R. Co., 7 Heisk. (Tenn.) 451; Simpson v. East Tennessee &c. R. Co., 5 Lea (Tenn.) 456; International &c. R. Co. v. Timmermann, 61 Tex. 660; Galveston &c. R. Co. v. Horne, 69 Tex. 643; s. c. 9 S. W. Rep. 440; Gulf &c. R. Co. v. Benson, 69 Tex. 407; s. c. 5 S. W. Rep. 822; 5 Am. St. Rep. 74; Missouri &c. R. Co. v. Bartlett, 69 Tex. 79; s. c. 6 S. W. Rep. 549; Bierling v. Gulf &c. R. Co., 79 Tex. 584; s. c. 15 S. W. Rep. 576; Missouri &c. R. Co. v. Goode, 7 Tex. Civ. App. 245; s. c. 26 S. W. Rep. 441; Galveston &c. R. Co. v. Rheiner (Tex. Civ. App.), 25 S. W. Rep. 971; Galveston &c. R. Co. v. Dolores Land &c. Co. (Tex. Civ. App.), 26 S. W. Rep. 79; Campbell v. Goodwin, 87 Tex. 273; Spaulding v. Chicago &c. R. Co., 30 Wis. 110. But see Chicago &c. R. Co. v. Ostrander, 116 Ind. 259; Flinn v. New York &c. R. Co., 142 N. Y. 11; Lake Erie &c. R. Co. v. Murray, 86 Ill. App. 461 (evidence that the fire started on defendant's right of way and spread to the plaintiff's farm, sufficient to sustain a verdict for the plaintiff); Diamond v. Northern &c. R. Co., 6 Mont. 580 (the rule which raises this presumption applies to chartered as well as to other railroads); Crews v. Kansas City &c. R. Co., 19 Mo. App. 302; s. c. 1 West. Rep. 443 (escape of fire and ignition of grass upon the track spreading to the plaintiff's property making out a *prima facie* case); Miller v. St. Louis &c. R. Co., 90 Mo. 389; s. c. 7 West. Rep. 122 (same doctrine, throwing the burden upon the railroad company of proving

that it maintained the best mechanical contrivances, etc.); Georgia R. Co. v. Lawrence, 74 Ga. 534 (such evidence tends to show negligence); Wise v. Joplin R. Co., 85 Mo. 178; Gainesville &c. R. Co. v. Edmondson, 101 Ga. 747; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 154; 29 S. E. Rep. 213; Edwards v. Campbell, 12 Tex. Civ. App. 237; s. c. 33 S. W. Rep. 761 (such evidence throws the burden on the defendant of proving that the engine was equipped with approved appliances and operated with care); Mobile &c. R. Co. v. Stinson, 74 Miss. 453; s. c. 21 South. Rep. 14; rehearing denied in 21 South. Rep. 522; Campbell v. Goodwin, 87 Tex. 273; s. c. 28 S. W. Rep. 266, 273 (such evidence casts the burden on the company of proving that it maintained the best approved appliances to prevent the escape of fire, and kept them in good repair, or used ordinary care to that end, and that the engine was skillfully and carefully operated); Texas &c. R. Co. v. Levine, 87 Tex. 437; s. c. 29 S. W. Rep. 466; denying writ of error in 29 S. W. Rep. 514 (same holding as in preceding case); International &c. R. Co. v. Searight, 8 Tex. Civ. App. 593; s. c. 28 S. W. Rep. 39; McCullen v. Chicago &c. R. Co., 101 Fed. Rep. 66 (creates a presumption of negligence either in the construction, the reparation, or handling of the locomotive). *Contra*, Fort Worth &c. R. Co. v. Tomlinson, 4 Tex. App. Cas. 175; s. c. 16 S. W. Rep. 866.

<sup>8</sup>Hull v. Sacramento &c. R. Co., 14 Cal. 387; Henry v. Southern &c. R. Co., 50 Cal. 176; Burroughs v. Housatonic &c. R. Co., 15 Conn. 124; Jefferis v. Philadelphia &c. R. Co., 3 Houst. (Del.) 447; Indiana &c. R. Co. v. Paramore, 31 Ind. 143; Lake Erie &c. R. Co. v. Gossard, 14 Ind. App. 244; s. c. 42 N. E. Rep. 818; Pittsburgh &c. R. Co. v. Hixon, 11, Ind. 225 (overruling the decision of the same court on a prior appeal); Pittsburgh &c. R. Co. v. Hixon, 79 Ind. 111. See also Lake Erie &c. R. Co. v. Lowder, 7 Ind. App. 537; s. c.



§ 2287. This Presumption Carries the Question to the Jury.<sup>9</sup>—The true meaning of the rule is that the injured land-owner may prove that the fire proceeded from the locomotive of the defendant, and there rest his case, without proving affirmatively that the engine was in a defective condition or was negligently managed, or that the defendant had been negligent in allowing combustible material to accumulate upon its right of way; but that it will be a *question for the jury* in every such case whether the defendant has succeeded in rebutting the presumption of negligence; which question the court can not take from the jury under proper conceptions relating to the province of court and jury.<sup>10</sup> The principles which should have been applied by the judges at the outset, the failure to comply with which has been productive of a long train of injustice against the agricultural communities, which the legislatures have been obliged to step in and remedy, is that the mere fact of ignition, when it is shown to have proceeded from the locomotive, is *prima facie* evidence of negligence under the principle *res ipsa loquitur*.<sup>11</sup> There was every reason, founded in a sound public

34 N. E. Rep. 447; Chicago &c. R. Co. v. Ostrander, 116 Ind. 259; s. c. 12 West. Rep. 718; 15 N. E. Rep. 227; Gandy v. Chicago &c. R. Co., 30 Iowa 420; McCummons v. Chicago &c. R. Co., 33 Iowa 187; Garrett v. Chicago &c. R. Co., 36 Iowa 121 (but this rule has since been altered by statute); Kansas &c. R. Co. v. Butts, 7 Kan. 308; Atchison &c. R. Co. v. Stanford, 12 Kan. 354; Railroad Co. v. Yeiser, 8 Pa. St. 366; Huyett v. Philadelphia &c. R. Co., 23 Pa. St. 373; Lowney v. New Brunswick &c. R. Co., 73 Me. 479; s. c. 3 N. E. Rep. 268; Ruffner v. Cincinnati &c. R. Co., 34 Ohio St. 96; s. c. 7 Cent. L. J. 316; Sheldon v. Hudson R. Co., 14 N. Y. 218; McCaig v. Erie R. Co., 8 Hun (N. Y.) 599; Rood v. New York &c. R. Co., 18 Barb. (N. Y.) 80; Collins v. New York &c. R. Co., 5 Hun (N. Y.) 503. But see Case v. Northern &c. R. Co., 59 Barb. 644; Weidner v. New York &c. R. Co., 114 N. Y. 462; Field v. New York Cent. R. Co., 32 N. Y. 339, 349, per Davis, J. The case of Sheldon v. Hudson &c. R. Co., 14 N. Y. 218, which has been quoted to this doctrine, does not so decide. See further, Philadelphia &c. R. Co. v. Yerger, 73 Pa. St. 121. This case is rendered almost valueless from the fact that the court, forgetting that it is merely an appellate court, assumes the office of the jury and decides the whole

question upon the evidence adduced by the defendant,—thus usurping the province of the jury by passing upon the credibility of the witnesses. The same court, in subsequent cases, held that the mere fact that after the passage of a train, dry matter and other combustible materials are discovered on fire along the line of the railroad is not evidence that the appliances upon the engine were not of the best construction to prevent such a catastrophe, or that they were out of repair, since the judges are so expert in railroad fires that they judicially know that all engines scatter fire more or less; and therefore they hold the land-owner who is destroyed bound to prove—what he can seldom prove, and what he must prove, if at all, by the mouths of the employes of the defendant—the negative proposition that the particular engine, which he can seldom identify, was not properly constructed in this respect, or was not kept in proper repair: Jennings v. Pennsylvania &c. R. Co., 93 Pa. St. 337; Reading &c. R. Co. v. Latshaw, 93 Pa. St. 449.

<sup>9</sup> This section is cited in § 2295.

<sup>10</sup> Atchison &c. R. Co. v. Bales, 16 Kan. 252. Compare Atchison &c. R. Co. v. Campbell, 16 Kan. 200.

<sup>11</sup> As to this principle, see Vol. I, § 15.



policy, in applying this principle to this subject. The principal reason was the difficulty which the land-owner must have in establishing specific negligence. Before he discovers his meadow, his hay-stack, or his barn, on fire, the locomotive which has communicated the fire is out of sight. The means of proof are, therefore, wholly in the custody of the defendant. In nearly every such case the railway company will come forward with its creatures and prove that the engine was a good one, that it was suitably equipped with appliances to prevent scattering fire; and many courts have held such evidence to constitute a defense, and, assuming its truthfulness, have taken the question from the jury, thus performing their office in passing upon the truthfulness of the evidence in the case. The meadow, the stack, or the barn of the miserable farmer has been burned up by the railroad company for its own profit, and the farmer, in his misery and wretchedness, finds himself without any other remedy than to rail at the lawyers and judges, or to put dynamite on the railroad track. A better understanding of the office of the juries in passing upon the credibility of witnesses has resulted in the conclusion that, where a fire is started by sparks from a locomotive, the railroad company is not exonerated from the imputation of negligence, as matter of law, although no fault was shown in the locomotive or in its management, but that the question is *for the jury*.<sup>12</sup> Another court has held that where it is proved that a hay-stack was ignited by sparks thrown through the spark-arrester of a locomotive, a *prima facie* case of negligence is shown, which is not rebutted, as matter of law, by proof of the use of competent men and the most approved appliances, but that the question is *for the jury*.<sup>13</sup>

§ 2288. **When this Presumption Deemed Rebutted.**—There is a holding on this subject to the effect that the presumption of negligence arising from the fact that a fire has been communicated by a locomotive engine is a presumption of law, and that the question whether it has been fully met and overthrown is, in the first instance, a question for the court; and the court proceeded to examine evidence and held it sufficient to overthrow the presumption in the particular case.<sup>14</sup> The whole decision proceeds upon a misapprehension of the nature of the presumption and of the proper office of an appellate court. In the first place, it is not a presumption of law at all. It is merely a disputable presumption of fact. The jury are at liberty to disregard it, if no countervailing evidence is adduced. In the second place, an

<sup>12</sup> Hemmi v. Chicago & C. R. Co., 102 Iowa 25; s. c. 70 N. W. Rep. 746; 8 Am. & Eng. Rail. Cas. (N. S.) 547.

<sup>13</sup> Huff v. Missouri & C. R. Co., 17 Mo. App. 356.

<sup>14</sup> Smith v. Northern & C. R. Co., 3 N. D. 17, 23.



appellate court can not determine whether a presumption which requires evidence to overthrow it has been made and overthrown without usurping the functions of a jury. It can, in the first instance, determine whether there is any countervailing evidence to go to the jury. But this question would only be relevant in considering what instructions ought to be given to them on the subject. The true meaning of the rule is that when the plaintiff proves that a fire has been communicated from a passing locomotive, causing him damages, proof of that fact alone takes the question of his right of recovery to the jury, and that whether the evidence which he has thus adduced in favor of his right of recovery has been overturned by the defendant's evidence, or stands overturned by the surrounding circumstances of the case where the defendant has offered no evidence, is entirely a question for a jury.<sup>15</sup> The question is correctly considered in the same court in an earlier case.<sup>16</sup> There, it is reasoned that the fact that the fire was communicated from the locomotive creates a disputable presumption of negligence, and that this presumption is not rebutted merely by showing that the machinery and appliances of the railroad company were in good order, without showing further that they were handled with due care at the time when the fire was thrown out.<sup>17</sup> The true theory is that it is for the jury to say, in every case, whether the presumption has been rebutted, no matter how positive and clear the rebutting evidence may be.<sup>18</sup> For example, where there was evidence from which the jury might properly conclude that the fire was started by cinders escaping from the ash-pan of the defendant's locomotive, and that the cinders could not have escaped if it had been properly constructed and kept in proper repair, it was held that positive testimony of the employes of the defendant to the effect that it was properly constructed and was in proper repair, left the question for the decision of the jury.<sup>19</sup> The unexplained fact that an unusual number of sparks were thrown from an engine, whereby fire was set to adjoining property, has been held to be evidence of negligence, not rebutted by

<sup>15</sup> The North Dakota Court, imagining itself a sort of legislature, concludes its observations on this question in this language: "We therefore establish it as a rule in this State that the court must, in the first instance, determine the question whether the inference of negligence arising from the mere setting out of a single fire has been fully overthrown:" *Smith v. Northern &*

*R. Co.*, 3 N. D. 17, 23; s. c. 53 N. W. Rep. 173.

<sup>16</sup> *Johnson v. Northern & C. R. Co.*, 1 N. D. 354.

<sup>17</sup> To this effect, see *Brusberg v. Milwaukee & C. R. Co.*, 55 Wis. 106.

<sup>18</sup> *Atchison & C. R. Co. v. Bales*, 16 Kan. 252.

<sup>19</sup> *Kurz & C. Ice Co. v. Milwaukee & C. R. Co.*, 84 Wis. 171; s. c. 53 N. W. Rep. 850.



the statement of the engineer that he "handled the engine very carefully,—not any differently from what he generally did."<sup>20</sup>

§ 2289. **Further of this Subject.**—The prevailing doctrine is that this presumption is deemed rebutted, and that the court ought so to instruct the jury, when the defendant adduces evidence which satisfies the jury that the engine was properly equipped and that those in charge of it were competent and skillful.<sup>21</sup> But this does not go far enough, for those in charge of the engine may be competent and skillful, and yet they may be negligent in the particular instance. The true view is that the presumption is rebutted by showing that, at the time of the accident, the locomotive was properly equipped to prevent such accidents and was in good order; that the engineer in charge of it was experienced and competent; and that he properly performed his duty,—in other words that he was not guilty of negligence.<sup>22</sup> It is manifest that this presumption is not rebutted by merely showing that the locomotive and machinery were properly equipped and in good order, and that the men in charge of it were skillful, without showing that it was properly and carefully managed.<sup>23</sup> The conception of the South Dakota court that where the evidence in rebuttal shows careful management and the exercise of "ordinary care and prudence" in the

<sup>20</sup> Johnson v. Chicago &c. R. Co., 31 Minn. 57. Evidence under which the finding of a jury that there was negligence would not be disturbed: Dean v. Chicago &c. R. Co., 39 Minn. 413; s. c. 40 N. W. Rep. 270. Evidence from which the presumption of negligence deemed to be rebutted: Tribette v. Illinois &c. R. Co., 71 Miss. 212; s. c. 13 South. Rep. 899. Collection of facts making out a *prima facie* case of negligence upon circumstantial evidence, with the rebutting evidence, leaving the question with the jury: Atchison &c. R. Co. v. Campbell, 16 Kan. 200. See also Atchison &c. R. Co. v. Bales, 16 Kan. 252.

<sup>21</sup> Bulliss v. Chicago &c. R. Co., 76 Iowa 680; s. c. 39 N. W. Rep. 245. This seems to have been the conception of Pardee, J., in Missouri &c. R. Co. v. Texas &c. R. Co., 31 Fed. Rep. 526; Crews v. Kansas City &c. R. Co., 19 Mo. App. 302; s. c. 1 West. Rep. 443; Brown v. Atlanta &c. R. Co., 19 S. C. 39; Indiana &c. R. Co. v. Hawkins, 84 Ill. App. 39 (in the absence of evidence showing that there were combustible materials on the right of way).

<sup>22</sup> Indiana &c. R. Co. v. Craig, 14 Ill. App. 407; Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; Simpson v. East Tennessee &c. R. Co., 5 Lea (Tenn.) 456.

<sup>23</sup> Palmer v. Missouri &c. R. Co., 76 Mo. 217; Johnson v. Northern &c. R. Co., 1 N. D. 354; s. c. 48 N. W. Rep. 227; 45 Am. & Eng. Rail. Cas. 554; Greenfield v. Chicago &c. R. Co., 83 Iowa 270; s. c. 49 N. W. Rep. 95. When, therefore, in an action against a railroad company for damages caused by fire from its locomotives, the only evidence offered to rebut the charge of negligence consisted of affidavits of the master mechanic of the road as to the condition of certain locomotives as to stack-nets, ash-pans, etc., and the evidence did not disclose whether the fire complained of was caused by either or all of such engines, it was held that the plaintiff was entitled to damages: Missouri &c. R. Co. v. Texas &c. R. Co., 33 Fed. Rep. 360; Johnson v. Northern &c. R. Co., 1 N. D. 354; Gulf &c. R. Co. v. Witte, 68 Tex. 295; s. c. 4 S. W. Rep. 490.



fitting up and handling of the locomotive, the presumption is overcome,<sup>24</sup> is wholly untenable. Upon this subject it has been well observed by an able judge that "the jury is not bound to believe, contrary to their own experience, that sparks from an engine in perfect order, of the most improved pattern, will escape from a passing engine, without any negligence or incompetence on the part of the fireman or engineer, so as to set fire to neighboring property, merely because the fireman and engineer swear that they were careful and competent, and because officers of defendant testify that the machinery was of the best kind, and in good order. Where sparks have escaped and a fire commencing with plaintiff's property has ensued in consequence, the matter is for the jury."<sup>25</sup> In such a case, it was also observed by the same learned judge that the jury are entitled to take into consideration the physical facts of the case.<sup>26</sup> These decisions embody the true theory, which is that where there is, in any case, evidence of negligence to go to a jury and countervailing evidence is offered by the defendant, it is for the jury to say whether the inference of negligence has been rebutted.<sup>27</sup> When the presumption, created by proof of the fact of the escape of fire from the locomotive, has been thus rebutted by proof of its proper construction, of its being in proper repair, of its being properly and carefully managed, the plaintiff can not sustain his action without making other proof of negligence.<sup>28</sup>

**§ 2290. Further Judicial Expressions on this Subject.**—In a case where the plaintiff proved that certain cotton belonging to him, which had been deposited fifty feet from the defendant's railway track, was destroyed by fire, originating from sparks emitted by an engine of the defendant,—it was held that when the defendant showed that the en-

<sup>24</sup> *Cronk v. Chicago & C. R. Co.*, 3 S. D. 93; s. c. 52 N. W. Rep. 420.

<sup>25</sup> *Sappington v. Missouri & C. R. Co.*, 14 Mo. App. 86, 90, opinion by Bakewell, J.

<sup>26</sup> *Brown v. Missouri & C. R. Co.*, 13 Mo. App. 462.

<sup>27</sup> *Greenfield v. Chicago & C. R. Co.*, 83 Iowa 270, 276; *Babcock v. Chicago & C. R. Co.*, 62 Iowa 593; s. c. on second appeal 72 Iowa 197.

<sup>28</sup> *Koontz v. Oregon R. & C. Co.*, 20 Ore. 3; s. c. 43 Am. & Eng. Rail. Cas. 11; 23 Pac. Rep. 820; *Daly v. Chicago & C. R. Co.*, 43 Minn. 319; s. c. 45 N. W. Rep. 611. Where the evidence was to the effect that sparks from the engine of an elevated railway which set fire to the plaintiff's awning were "almost as large as a

walnut" it was held that the presumption of negligence arising from the fire set by a coal from an engine is not overcome by proof that the apparatus of the engine for preventing the escape of fire was of the most approved pattern, and that orders issued for its frequent examination and prompt repair were habitually carried out, where there is no evidence as to the actual condition of the particular engine from which the sparks issued, and there is proof that it would be impossible for so large a coal to escape from an engine in proper condition: *Sugarman v. Manhattan & C. R. Co.*, 42 N. Y. St. Rep. 30; s. c. 16 N. Y. Supp. 533.



gine was equipped with the latest devices to prevent emission of sparks, and was in good repair, and properly handled by competent workmen, then the burden shifted upon the plaintiff to show actual negligence, since the *prima facie* presumption of negligence arising from the mere communication of the fire, was rebutted.<sup>29</sup> It is perceived that the court holds that when a railroad company produces this evidence the judge is to rule, as matter of law, that the burden of proof has shifted, and that the plaintiff must produce more evidence, whether he can or not, tending to show that the railroad company was negligent, in order to take the case to the jury. This is a complete obfuscation of the line which separates the province of the court from the province of the jury. First, there is no such thing as a shifting of the burden of proof, so long as the evidence is directed to the same proposition of fact. Secondly, the judge can not decide when the burden of proof is shifted, without deciding that the evidence which shifts it is to be believed. Here is a case where evidence of a cogent nature is opposed to the testimony of the agents and employés of a railroad company who, as experience shows, will almost in every case, swear up to the necessary mark. On the one hand is the cogent fact that the engine did scatter fire, which fire did burn up the property of the plaintiff, warranting the conclusion that if the engine had been properly constructed, properly kept in repair, and properly managed, it would not have scattered the fire. On the other hand, there is the testimony of the agents and servants of the railway company that it was properly constructed, properly kept in repair, and properly managed. In all cases, this is simply a case of conflicting evidence which it is the province of the jury, and not the province of the judge to resolve. Then the Alabama doctrine, supported by a previous decision of that court,<sup>30</sup> to the effect that although the fact that the fire was communicated by the engine of the defendant, is presumptive evidence of negligence, yet it does not make out a *prima facie* case for the plaintiff, is self-contradictory; it is tantamount to saying that it does make out a *prima facie* case of negligence. The true theory is that if the plaintiff proves that fact, and no countervailing evidence is offered, he is entitled to a verdict as matter of law; and that if countervailing evidence is offered, it is for the jury and not for the judge, to say whether such evidence is to be believed. An appellate court in Illinois reasoned that, in the absence of evidence tending to show that there is dead grass, dry weeds, or other combustible material on the defendant's right of way, proof that the engine which communicated

<sup>29</sup> Louisville &c. R. Co. v. Marbury  
Lumber Co. (Ala.), 28 South. Rep.  
438.

<sup>30</sup> Louisville &c. R. Co. v. Reese,  
85 Ala. 502; s. c. 5 South. Rep. 284.



the fire was properly equipped and operated to prevent the escape of fire, is a complete defense to such an action. This involves the conclusion that it is for the plaintiff to show, if such were the fact, that there was combustible material on the right of way negligently allowed to accumulate by the defendant. This is undoubtedly sound; since, if the fire originated in that way, that was a part of the case of the plaintiff as to which the general burden of proof rested upon him. Then, whether the other facts stated make out a complete defense, it is to be observed that they make out a complete defense if the jury believe them to have been established.<sup>31</sup> The same observation applies to a case in South Carolina, where it appeared that the plaintiff left cotton upon a platform near the track of the defendant railroad company, intending to have it shipped. Before delivery to the company, the *cotton was burned* by a fire which caught from a spark from an engine. The company did not own the platform, though it constantly used it, and paid for other cotton there burned at the same time, the cotton paid for having been received by the company for carriage. It was held that the imputation of negligence, resulting from the fact that a spark from the engine fired the cotton, was rebutted by proof that the engine was carefully and skillfully managed, and was provided with improved spark-arresters, and that the company was under no obligation to provide a watchman for the cotton.<sup>32</sup> The trial court might well have charged the jury in this case, and in the preceding case, that the imputation of negligence resulting from the communication of the fire from the engine of the defendant was rebutted by evidence that the engine was carefully and skillfully managed and was provided with improved spark-arresters; but whether the testimony adduced by the defendant that such were the facts was to be believed, was for the jury, and not for the court. Such testimony is subject to suspicion, and there is no rule of law which obliges a jury to believe it, when it is opposed by a presumption based on human experience, that if such had been the fact, the fire would not have been communicated.<sup>33</sup> In an action against a railroad company for the *destruction of cotton by a fire* alleged to have been communicated from the defendant's locomotive, a verdict for the defendant was warranted by evidence that the wind was blowing strongly from the cotton and toward the track, and directly from a cotton gin toward the cotton, from which the sparks and cinders escaped.<sup>34</sup> In another such action for the destruction of cotton, evidence that the locomotives of the defendant were furnished

<sup>31</sup> Indiana &c. R. Co. v. Hawkins, 84 Ill. App. 39.

<sup>32</sup> Brown v. Atlanta &c. R. Co., 19 S. C. 39.

<sup>33</sup> Brown v. Atlanta &c. R. Co., 19 S. C. 39.

<sup>34</sup> Inman v. Elberton &c. R. Co., 90 Ga. 663; s. c. 16 S. E. Rep. 958.



with spark-arresters, and had not been within sixty feet of the cotton within an hour before the fire, and that the officers of the compress company in possession of the cotton were about it with lighted cigars, was held to show negligence on the part of the compress company, but not on the part of the railway company.<sup>35</sup> In Arkansas, under the operation of a statute, the presumption of negligence arises from the fact of the setting of the fire, and the sound view is taken that this has the effect of a presumption of law entitling the plaintiff to a judgment in the absence of evidence overcoming it, and it has been held that such evidence is not overcome by proof of the mere fact that the engine was in the hands of a competent engineer at the time when the fire was set,<sup>36</sup>—a conclusion quite obvious, since the competent engineer may have been negligent in the particular instance. Accordingly, it was well held in another jurisdiction that evidence showing that the railway company used the most approved machinery to prevent the escape of sparks, and employed competent and careful persons to run its engines, does not create a defense to an action for the destruction of property by fire communicated from its locomotive, since there may have been negligence on the part of its employes upon the occasion in question.<sup>37</sup> Nor can it escape attention that the rule of law that would allow a corporation, which can only act through the agency of individuals, to escape liability on the ground that it had employed careful and competent individuals to act for it, would abolish the rule of *respondet superior* altogether.

**§ 2291. Negligence in Communicating the Fire Provable Wholly by Circumstantial Evidence.**<sup>38</sup>—The negligence of the railroad company in communicating the fire may be proved wholly by circumstantial evidence, and there need not necessarily be direct proof of any particular act or omission upon which the law predicates negligence.<sup>39</sup> Circumstantial evidence raising an inference of negligence is as good, for the purpose of taking the question to the jury, as is direct evidence; and when it is so taken to them, the judge can not properly withdraw it from them, merely because he may suppose—usurping their functions—that the evidence of negligence has been rebutted by evidence adduced for the defendant.<sup>40</sup> It is for the jury to judge of the weight and sufficiency of the countervailing evidence. The dis-

<sup>35</sup> *Otis Co. v. Missouri &c. R. Co.*, 112 Mo. 622; s. c. 20 S. W. Rep. 676.

<sup>36</sup> *St. Louis &c. R. Co. v. Ayres*, 67 Ark. 371; s. c. 55 S. W. Rep. 159.

<sup>37</sup> *Wilson v. Atlanta &c. R. Co.*, 16 S. C. 587.

<sup>38</sup> This section is cited in § 2260.

<sup>39</sup> *Atchison &c. R. Co. v. Bales*, 16 Kan. 252. Compare *Atchison &c. R. Co. v. Campbell*, 16 Kan. 200.

<sup>40</sup> *Atchison &c. R. Co. v. Bales*, 16 Kan. 252.



covery of a fire on or near the company's right of way, shortly after a locomotive has passed, warrants the inference that it was set by sparks thrown from the engine, it being a matter of common knowledge that locomotives do emit sparks. It is true that it may have arisen from a cigar thrown from a car window by a passenger, or from a spark dropped from the pipe of a workman, or even from the act of a trespasser; but the cause first stated is so much the more probable that it warrants a jury in drawing the inference that the fire proceeded from defendant's locomotive.<sup>41</sup> Testimony that witnesses saw sparks of fire and live cinders thrown upon the roof of a building by a locomotive a short time before the fire was discovered in the building, together with testimony that before it passed persons near the building saw no indication of fire, and that within twenty or thirty minutes after the engine passed fire was discovered in that part of the building where the sparks were seen to fall,—will justify the inference that the fire originated from the sparks and live cinders.<sup>42</sup> Circumstantial evidence sufficient to support a finding that the fire was set by a locomotive of the railway company, has been presented by the following conditions of fact:—That there was an accumulation of combustible material on the right of way of the railway company, opposite the building of the plaintiff which was destroyed; that there was a steep grade at that point, so that the defendant's engines in passing put on extra steam and emitted sparks and coals which frequently ignited the rubbish on the right of way; and that, on the day of the fire, the wind was blowing over the right of way toward the plaintiff's building;<sup>43</sup> that fire was discovered on the right of way of the company burning in dry grass shortly after a train had passed, and there was no evidence accounting for the fire, or contradicting the testimony by which the fact was proved;<sup>44</sup> that the railway company negligently left combustible material upon its right of way, which was discovered to be on fire soon after a train had passed;<sup>45</sup> that the engine which passed shortly before the fire was discovered was in a defective and dangerous condition, and had set other fires,—this being sufficient to take to the jury the question whether the destruction of the property of the plaintiff was caused by fire scattered by such engine, and whether the railway company was negligent in failing to keep it in a reasonably safe condition;<sup>46</sup> that, shortly after the passage

<sup>41</sup> *Smith v. London &c. R. Co.*, L. R. 6 C. P. 14; *Burke v. Louisville &c. R. Co.*, 7 Heisk. (Tenn.) 451.

<sup>42</sup> *McDoel v. Gill*, 23 Ind. App. 95; s. c. 53 N. E. Rep. 956.

<sup>43</sup> *Pittsburgh &c. R. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322; s. c. 56 N. E. Rep. 766.

<sup>44</sup> *Clark v. Ellithorp*, 9 Kan. App. 503; s. c. 59 Pac. Rep. 286.

<sup>45</sup> *Richmond v. McNeil*, 31 Ore. 342; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 691; 49 Pac. Rep. 879.

<sup>46</sup> *Brown v. Benson*, 101 Ga. 753; s. c. 28 S. E. Rep. 215; 10 Am. & Eng. Rail. Cas. (N. S.) 161.



of a train, propelled by an engine not furnished with proper apparatus to prevent the escape of sparks, fire was discovered on the right of way of the company,—this being held evidence of negligence on the part of the company, and also evidence that the fire was caused by sparks escaping from the engine;<sup>47</sup> that the railway company used a “spark-arresting locomotive” in close proximity to a station house covered by combustible shingles, and situated so near the track that it had been frequently, to the knowledge of the company, fired by its passing trains,—this being evidence of negligence rendering the railway company liable for the burning of a private storehouse by a fire communicated from the station house.<sup>48</sup>

§ 2292. **View that the Fact of Fires Breaking Out along the Right of Way not Evidence of their having been Communicated from Defendant's Locomotives.**—On the other hand, decisions are not wanting which deny the proposition that the mere fact that a fire breaks out upon or near the right of way of a railway company after trains have passed, will furnish evidence from which a jury may infer that such fires were communicated by some locomotive of the defendant, or otherwise proceeded from its negligence, especially if the discovery of the fire did not take place for a considerable time after the passage of the train.<sup>49</sup> These decisions are believed to be untenable; while at the same time it must be conceded that the distance in point of time between the discovery of the fire and the passing of the train, and the surrounding circumstances making the conclusion of the fire having been set by some one else more or less probable, may be such as to make the evidence too remote. It has been held that the fact that a fire was set upon a railroad right of way by employes is not alone sufficient evidence that such fire was communicated to and burned a building on adjoining property, but may, when considered with other facts, be treated as evidence tending to establish the disputed fact.<sup>50</sup> Again, the mere fact that the employes of a railroad company assisted in putting out a fire can not be considered in determining its origin in an action against the company, where there is no evidence that it was, in fact, set out by the company, or that it sprung up shortly after the passage of a train.<sup>51</sup>

<sup>47</sup> Louisville &c. R. Co. v. Miller, 109 Ala. 500; s. c. 19 South. Rep. 989.

<sup>48</sup> Cincinnati &c. R. Co. v. Barker, 93 Ky. 71; s. c. 14 Ky. L. Rep. 750; 21 S. W. Rep. 347.

<sup>49</sup> See, for example, Denver &c. R. Co. v. De Graff, 2 Colo. App. 42; s. c. 29 Pac. Rep. 664; Denver &c. R. Co.

v. Morton, 3 Colo. App. 155; s. c. 32 Pac. Rep. 345; Musselwhite v. Atlantic &c. R. Co., 4 Hughes (U. S.) 166.

<sup>50</sup> Fish v. Chicago &c. R. Co., 81 Iowa 280; s. c. 46 N. W. Rep. 998.

<sup>51</sup> Denver &c. R. Co. v. Morton, 3 Colo. App. 155; s. c. 32 Pac. Rep. 345.



§ 2293. **Emission of Sparks or Coals of Extraordinary Size or in Extraordinary Quantities Deemed Evidence of Negligence.**—Some of the courts which concede the rule that the mere fact of the emission of sparks from the locomotive is not, of itself, evidence of negligence, yet hold that the rule is otherwise where the sparks are of an unusual size or where extraordinary quantities are emitted,—a thing such as does not take place where the locomotive is properly constructed, repaired and managed;<sup>52</sup> and under any theory the emission of sparks or of coals in extraordinary quantities will be deemed evidence of negligence.<sup>53</sup> This is especially true where the evidence shows that sparks of such size or in such quantities will not be emitted from engines properly equipped, kept in proper repair, and properly managed.<sup>54</sup> This principle has been applied where the evidence was to the effect that the right of way was covered with dry grass, and an engineer and fireman on one of defendant's locomotives threw a burning brand, which fell upon the right of way, communicating a fire to the plaintiff's property;<sup>55</sup> where the evidence was to the effect that an awning in front of abutting property was burned by a spark of coal nearly as large as a walnut, emitted from an elevated railway engine;<sup>56</sup> where a witness testified that the defendant's locomotive emitted a quantity of sparks so large and brilliant as specially to attract his attention;<sup>57</sup> where the evidence showed that, as the plaintiff passed under the elevated railway of the defendant, a shower of cinders struck him in the face, there being also evidence that the falling of sparks was a daily occurrence;<sup>58</sup> where sparks were seen flying from the chimney of the defendant's locomotive into the field which was set on fire, in large showers, in the day time.<sup>59</sup> On the other hand, the Court of Appeals

<sup>52</sup> *McCaig v. Erie R. Co.*, 8 Hun (N. Y.) 599; *Sugarman v. Manhattan R. Co.*, 42 N. Y. St. Rep. 30; s. c. 16 N. Y. Supp. 533 (where the sparks were "almost as large as a walnut"). See also *Missouri & C. R. Co. v. Texas & C. R. Co.*, 31 Fed. Rep. 526; *Brusberg v. Milwaukee & C. R. Co.*, 55 Wis. 106.

<sup>53</sup> *Lehigh Valley R. Co. v. McKeen*, 90 Pa. St. 122; s. c. 35 Am. Rep. 644; *Frace v. New York & C. R. Co.*, 63 Hun (N. Y.) 325; s. c. 52 N. Y. St. Rep. 102; 22 N. Y. Supp. 958; *Jacksonville & C. R. Co. v. Peninsular & C. Man. Co.*, 27 Fla. 1157; s. c. 9 South. Rep. 661.

<sup>54</sup> *Louisville & C. R. Co. v. Taylor*, 92 Ky. 55; s. c. 13 Ky. L. Rep. 373; 17 S. W. Rep. 198; *Texarkana & C. R. Co. v. O'Kelleher*, 21 Tex. Civ.

App. 96; s. c. 51 S. W. Rep. 54 (emission of a cinder larger than would be thrown out if the engine were in proper condition, rendering company liable to a person in the gallery of a neighboring house whose eye was struck and put out by the cinder).

<sup>55</sup> *Mobile & C. R. Co. v. Gray*, 62 Miss. 383.

<sup>56</sup> *Sugarman v. Manhattan & C. R. Co.*, 42 N. Y. St. Rep. 30; s. c. 16 N. Y. Supp. 533.

<sup>57</sup> *Ruppel v. Manhattan R. Co.*, 13 Daly (N. Y.) 11; *Ashley v. Manhattan R. Co.*, 13 Daly (N. Y.) 205.

<sup>58</sup> *Burke v. Manhattan R. Co.*, 13 Daly (N. Y.) 75.

<sup>59</sup> *Louisville & C. R. Co. v. Taylor*, 92 Ky. 55; s. c. 13 Ky. L. Rep. 373; 17 S. W. Rep. 198.



of New York, in opposition to nearly all the judicial authority which speaks on the question,<sup>60</sup> have held that the emission of large quantities of sparks from the engine of a railway company, while drawing heavy freight trains up a steep grade, raises no presumption of negligence on the part of the company, such as will charge it with liability unless rebutted, in case of the destruction by fire of houses near its track; but that the property owner must go further and prove—that he is generally in no position to prove—that there was negligence in the construction, the reparation, or the management of the engines of the railway company,<sup>61</sup>—a decision which is almost tantamount to a judicial license to railway companies to burn property on either side of their right of way, as far as the wind will blow the sparks and fire-brands emitted from their engines. From what has preceded,<sup>62</sup> it must be concluded that where evidence of this kind has been adduced by the plaintiff, and the defendant seeks to rebut it by evidence that the engine was supplied with the most improved spark-arrester, the jury can not be instructed that there is before them no proof of negligence, but it will be a question of fact for their determination.<sup>63</sup>

**§ 2294. Other Evidence of Negligence.**—Evidence of negligence sufficient to take the case to the jury has also been found in evidence to the effect that at the point on defendant's right of way where the fire originated, and from which a line of fire extended to plaintiff's land, there were dry grass and weeds, both standing and cut, and extending close to the rails; that passing locomotives frequently dropped coals of fire, setting fire to the ties; and that the weather was dry and the wind blowing in the direction of the destroyed property;<sup>64</sup> in evidence to the effect that a stove was left with its damper wide open so that it might become red-hot, in a room which was locked, and which contained oil cans, one of which was on the stove, and that inflammable waste matter lay scattered around the stove;<sup>65</sup> in evidence to the effect that an engine of the defendant became out of repair, in respect of appliances to prevent the scattering of fire, on a point of its line where there were no facilities for repairing it, and that it ran, with increased danger from fire, to the next repair-shop, instead of stopping at the first station after discovering the danger-

<sup>60</sup> See, in addition to the cases previously cited in this paragraph, *ante*, § 2285.

<sup>61</sup> *Flinn v. New York &c. R. Co.*, 142 N. Y. 11; s. c. 58 N. Y. St. Rep. 431; 50 Alb. L. J. 197; 36 N. E. Rep. 1046.

<sup>62</sup> *Ante*, § 2285, *et seq.*

<sup>63</sup> *Lehigh Valley R. Co. v. McKeen*, 90 Pa. St. 122; s. c. 35 Am. Rep. 644.

<sup>64</sup> *Chicago &c. R. Co. v. Williams*, 131 Ind. 30; s. c. 30 N. E. Rep. 696.

<sup>65</sup> *Read v. Pennsylvania R. Co.*, 44 N. J. L. 280.



ous defect;<sup>66</sup> in evidence to the effect that sparks could not have been emitted from the locomotive if the spark-arrester had been in a proper condition, although the evidence adduced to show that the fire was caused by escaping sparks was circumstantial merely;<sup>67</sup> in evidence that the fire was communicated by sparks from an engine to hay, in a stock car of the defendant, which had been placed unnecessarily near the engine which threw out the sparks;<sup>68</sup> in evidence to the effect that the building which was burned stood one hundred and thirty feet from the railroad track; that the wind, though slight, was blowing away from the building; that the fire originated on the inside of the building, though some of the glass in the windows of the second story was broken, through which sparks might have entered; that the locomotives of the defendant, which passed through before the time when the fire in the plaintiff's building broke out, had previously set a fire near the building; that the locomotive alleged to have set fire to the building was equipped with an improved spark-arrester, but had nevertheless emitted sparks and had set other fires.<sup>69</sup> It has been reasoned that the dryness of the season and the direction of the wind at the time of the fire, and the accumulation of combustible matter on the right of way, should be taken into consideration by the jury in determining the question of the alleged negligence of the railroad company in setting a fire.<sup>70</sup> Evidence that the defendant had permitted refuse and inflammable materials to accumulate upon its right of way and remain there for years, and that fires had been previously set thereon by its passing locomotives, has been held sufficient to warrant a jury in finding negligence in setting a fire in the particular case.<sup>71</sup> Where it was, in the opinion of the trial court, conclusively proved that the locomotive which set the fire was properly operated, but there was evidence tending to show that the bottom of the ash-pan was too short and allowed the damper to hang too nearly perpendicular, thus facilitating the dropping of live coals, and that the engine had set three other fires while running little more than a mile from the place of the fire in question, it was held that the question whether the engine was in a reasonably safe condition was properly submitted to the jury.<sup>72</sup>

<sup>66</sup> *Texas &c. R. Co. v. Tankersley*, 63 Tex. 57.

<sup>67</sup> *Southern Railway v. Hanna* (Ky.), 53 S. W. Rep. 1 (no off. rep.).

<sup>68</sup> *Wabash R. Co. v. Brown*, 51 Ill. App. 656.

<sup>69</sup> *Tyler Chair &c. Works v. St. Louis &c. R. Co.* (Tex. Civ. App.), 55 S. W. Rep. 350.

<sup>70</sup> *Jones v. Michigan &c. R. Co.*,

59 Mich. 437; s. c. 26 N. W. Rep. 662.

<sup>71</sup> *Moore v. Chicago &c. R. Co.*, 78 Wis. 120; s. c. 47 N. W. Rep. 273. As to the duty of keeping its right of way clear of combustible materials, see *ante*, § 2270, *et seq.*

<sup>72</sup> *Mills v. Chicago &c. R. Co.*, 76 Wis. 422; s. c. 45 N. W. Rep. 225.



§ 2295. **When the Question is for the Jury.**—Necessarily it will be a question for the jury, at least if the evidence admits of different conclusions of fact, to determine whether the fire emanated from the locomotive of the defendant.<sup>73</sup> It is also, where the evidence is equivocal, a question of fact for the jury whether the destruction of the property of the plaintiff was the natural and probable, that is to say the proximate, result of the scattering of the fire.<sup>74</sup> On principles already discussed,<sup>75</sup> it is also a question for the jury whether the *prima facie* case of negligence which arises upon evidence showing that the fire which destroyed the property of the plaintiff proceeded from the locomotive of the defendant, has been rebutted by evidence that the locomotive was properly constructed, properly kept in repair, properly equipped, and properly operated,<sup>76</sup> especially where the plaintiff has adduced evidence tending to show that the engine threw a shower of sparks as it passed along. In such a case, the case must be submitted to the jury, unless the evidence showing due care on the part of the company is so clear and decisive that no reasonable person could doubt its verity, or draw different conclusions from it.<sup>77</sup> But if the evidence speaking upon the question whether the fire was scattered by a locomotive of the defendant is conflicting and indecisive, then the question of the negligence of the defendant must be resolved by the jury, and it would be error to direct a verdict for the defendant.<sup>78</sup>

<sup>73</sup> For an analogous decision affirming under a somewhat different state of facts this proposition, see *Kellogg v. Milwaukee &c. R. Co.*, 5 Dill. (U. S.) 537.

<sup>74</sup> *Kellogg v. Milwaukee &c. R. Co.*, 5 Dill. (U. S.) 537; s. c. aff'd 94 U. S. 469. See also *post*, § 2298, *et seq.*

<sup>75</sup> *Ante*, § 2287.

<sup>76</sup> *Chicago &c. R. Co. v. Glenny*, 70 Ill. App. 510.

<sup>77</sup> *McCullen v. Chicago &c. R. Co.*, 101 Fed. Rep. 66.

<sup>78</sup> *McCullen v. Chicago &c. R. Co.*, 101 Fed. Rep. 66 (especially where four successive juries before whom the case has been previously tried, have failed to agree).



## CHAPTER LXXVI.

### APPLICATION OF THE DOCTRINE OF PROXIMATE AND REMOTE CAUSE.

#### SECTION

- 2298. Application of the doctrine of proximate and remote cause.
- 2299. Damages proximate notwithstanding the intervention of intermediate buildings, fields, etc., which facilitate the progress of the flames.
- 2300. Illustrations: damages not too remote.
- 2301. Remoteness of damage in point of distance.
- 2302. Duration of the fire in point of time.
- 2303. When recovery not excluded by the presence of intervening agencies.

#### SECTION

- 2304. Effect of a sudden shift of wind.
- 2305. Intervening negligence of third persons.
- 2306. Liability of the intervening responsible agent.
- 2307. Liability for ulterior, collateral or consequential damages occasioned by the burning.
- 2308. Rule of damages where the plaintiff's loss is enhanced by his own negligence.
- 2309. The question considered as a question of pleading.
- 2310. The question is a question for the jury.

§ 2298. Application of the Doctrine of Proximate and Remote Cause.<sup>1</sup>—The solution of the question whether the damage resulting from a railway fire is to be deemed the proximate result of the negligence of the defendant, for which it is responsible, or the remote result, from responsibility for which the law exonerates it, depends upon the answers to questions already considered.<sup>2</sup> The subject is involved in speculative reasoning; but its true solution is believed to be found in the consideration that what is *probable cause* is to be deemed *proximate cause*, and what is *improbable cause* is to be deemed *remote cause*.<sup>3</sup> Those who negligently set out fires ought to be held by the

<sup>1</sup> This section is cited in §§ 2270, 2295.

<sup>2</sup> Vol. I, § 43, *et seq.*

<sup>3</sup> Vol. I, § 50. "The rule of law requires that the damages chargeable to a wrong-doer must be shown to be the natural and proximate effects of his delinquency. The term 'natural' imports that they are such as might reasonably have been foreseen, such as occur in an ordinary state of things:" *Wiley v. West*

*Jersey R. Co.*, 44 N. J. L. 247, 251, opinion by Dixon, J. It has been held that, in order to make the company liable, it was not necessary to show that the burning of the hotel "might have been foreseen" by a reasonable person as the consequence of the burning of the depot, but it was sufficient to show that the consequence was so natural that a reasonable person would see that it was "liable" to result: *Chicago*



law to foresee that those fires are liable, burning continuously through combustible matter, or leaping from one building to another, to traverse great distances. It would seem to be a reasonable conclusion that responsibility for such a fire does not cease until its general progress has been arrested by some responsible intervening cause.\* This principle is vindicated with learning and vigor by the late Chief Justice Lawrence, in a case which has been very generally followed by subsequent decisions.<sup>5</sup> What was there held was that although a railway fire negligently started, setting fire to a house near the track, may subsequently, in consequence of a high wind, be communicated to the plaintiff's dwelling-house, this does not make the damage of the plaintiff remote; but he may maintain an action against the railway company. In so holding, the court repudiated the doctrine of a case in New York,<sup>6</sup> and another in Pennsylvania,<sup>7</sup> which are to the contrary. "These two cases," said Lawrence, C. J., "stand alone, and we believe they are directly in conflict with every English or American case, as yet reported, involving this question."<sup>8</sup> The Supreme Court of Pennsylvania finally concluded to submit the question whether the negligence of the railway company was the proximate or the remote cause of the damage sued for, to the jury, in cases where the fire proceeds by an ordinary succession through combustible material; and accordingly

&c. R. Co. v. Pennell, 110 Ill. 485. See also the reasoning of Dixon, C. J., in *Kellogg v. Chicago &c. R. Co.*, 26 Wis. 223, and that of Sherwood, J., in *Miller v. St. Louis &c. R. Co.*, 90 Mo. 389, 394,—vindicating the doctrine of the text; also *Smith v. London &c. R. Co.*, L. R. 6 C. P. 21; *Higgins v. Dewey*, 107 Mass. 494.

\* "The term 'proximate' indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss:" *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247, 252; citing *Delaware &c. R. Co. v. Salmon*, 39 N. J. L. 299, and *Cuff v. Newark &c. R. Co.*, 35 N. J. L. 17.

<sup>5</sup> *Fent v. Toledo &c. R. Co.*, 59 Ill. 349; s. c. 1 *Thomp. Neg.*, 1st ed., p. 136.

<sup>6</sup> *Ryan v. New York &c. R. Co.*, 35 N. Y. 210, 214. Compare *Webb v. Rome &c. R. Co.*, 49 N. Y. 420, where, distinguishing this case, the question whether the negligence was the proximate cause of the injury was held a question for the jury.

<sup>7</sup> *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353.

<sup>8</sup> *Fent v. Toledo &c. R. Co.*, 59 Ill.

349; s. c. 1 *Thomp. Neg.*, 1st ed., p. 136, 142. The Pennsylvania case above referred to was followed in principle in the same State in *Hoag v. Lake Shore &c. R. Co.*, 85 Pa. St. 293, where it was held that the intervention of a running stream, although in point of fact communicating the fire by means of burning oil spread over its surface, arrested causation. These Pennsylvania cases and also the New York case above cited are strongly disapproved in New Jersey: *Delaware &c. R. Co. v. Salmon*, 39 N. J. L. 299; *Kuhn v. Jewett*, 32 N. J. Eq. 647. In *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373, 379, Mr. Chief Justice Agnew makes a vigorous defense of *Pennsylvania R. Co. v. Kerr*, 80 Pa. St. 373, 379, against the criticism of Chief Justice Lawrence in *Fent v. Toledo &c. R. Co.*, 59 Ill. 349; s. c. 1 *Thomp. Neg.*, 1st ed., p. 136, 142. He charges that Chief Justice Lawrence "criticises with some acerbity and an imperfect understanding of the case, and with a little confusion of thought," and then he proceeds to an elaborate defense of the case which is plainly untenable.



the court held that, in an action by the owner of a building situated ninety feet from a railroad and used for storage of coal and straw, where it appeared that some straw about the building caught fire from locomotive sparks, and the fire was carried by a high wind to the storehouse, which was destroyed, the question whether the negligent escape of large sparks was the remote or proximate cause of the injury was properly left to the jury to determine.<sup>9</sup>

**§ 2299. Damages Proximate Notwithstanding the Intervention of Intermediate Buildings, Fields, etc., which Facilitate the Progress of the Flames.**—From the case referred to in the preceding section, and from numerous other cases, the general rule may be collected that the damages will not be deemed remote where fire which has been negligently permitted to escape from the engines of a railroad company does not fall upon the plaintiff's property, but falls on the property of another, setting it on fire, and then spreads by means of dry grass, stubble, and other combustible materials, and passes over the lands of one or more proprietors before it reaches the property of the plaintiff, and, finally reaching the property of the plaintiff at a greater or less distance from where the fire was first kindled, sets it on fire and consumes it. In such cases it is generally held that the negligence of the railroad company is the proximate cause of the loss visited upon the land-owner.<sup>10</sup> These decisions proceed on the ground expressed by Vice Chancellor Van Fleet, of New Jersey, that the word proximate as used in this connection means closeness of causal con-

<sup>9</sup> *Pennsylvania &c. R. Co. v. Lacey*, 89 Pa. St. 458. See also *Webb v. Rome &c. R. Co.*, 49 N. Y. 420, where a similar course was pursued, and *Ryan v. New York &c. R. Co.*, 35 N. Y. 210. The latter case was reaffirmed in *Read v. Nichols*, 118 N. Y. 224.

<sup>10</sup> *Atchison &c. R. Co. v. Bales*, 16 Kan. 252; *Atchison &c. R. Co. v. Stanford*, 12 Kan. 354; *St. Joseph &c. R. Co. v. Chase*, 11 Kan. 47; *Baltimore &c. R. Co. v. Shipley*, 39 Md. 251; *Doggett v. Richmond &c. R. Co.*, 78 N. C. 305; *Chicago &c. R. Co. v. Ross*, 24 Ind. App. 222; s. c. 56 N. E. Rep. 451; *Chicago &c. R. Co. v. Kreig*, 22 Ind. App. 393; s. c. 53 N. E. Rep. 1033; *Adams v. Young*, 44 Ohio St. 80; s. c. 3 West. Rep. 148; *Chicago &c. R. Co. v. Ludington*, 10 Ind. App. 636; s. c. 38 N. E. Rep. 342; *Missouri &c. R. Co. v. Cullers*, 81 Tex. 382; s. c. 17 S. W. Rep. 19; 13

*L. R. A.* 542; *Chicago &c. R. Co. v. Burden*, 14 Ind. App. 512; s. c. 43 N. E. Rep. 155 (the fire being a continuous one); *Central Vermont R. Co. v. Stanstead &c. Ins. Co.*, Rap. Jud. Quebec 5 B. R. 224 (although a high wind prevailed and aided in spreading the fire); *Cincinnati &c. R. Co. v. Barker*, 94 Ky. 71; s. c. 14 Ky. L. Rep. 750; 21 S. W. Rep. 347; *Johnson v. Chicago &c. R. Co.*, 31 Minn. 57; *Louisville &c. R. Co. v. Nitsche*, 126 Ind. 229; s. c. 43 Alb. L. J. 191; 45 Am. & Eng. Rail. Cas. 532; 26 N. E. Rep. 51; 9 L. R. A. 750; *Kuhn v. Jewett*, 32 N. J. Eq. 647; *Small v. Chicago &c. R. Co.*, 55 Iowa 582; *Martin v. New York &c. R. Co.*, 62 Hun (N. Y.) 181; s. c. 41 N. Y. St. Rep. 217; 16 N. Y. Supp. 499; *Chicago &c. R. Co. v. Williams*, 131 Ind. 30; s. c. 30 N. E. Rep. 696 (disapproving, in part, *Pennsylvania Co. v. Whitlock*, 99 Ind. 16).



nection, and not nearness in time or distance, and is intended to qualify the generality of the idea expressed by the word "natural."<sup>11</sup>

§ 2300. **Illustrations: Damages not Too Remote.**—A locomotive set fire to the grass near the track; the fire crossed the land of B., C., and D. before it reached the property of A.<sup>12</sup> Sparks escaped from the engine to a carpenter's shop, which was close to the track, which was consumed; the fire being carried across a street sixty feet wide, to the dwelling-house of A.<sup>13</sup> Fire from a locomotive having been communicated to the barn of B., it was carried through a shed to the barn of A.<sup>14</sup> B.'s bridge and A.'s bridge were situated fifty-eight feet apart; B.'s bridge was set on fire by sparks which came from B.'s engine, and the fire was communicated to A.'s bridge.<sup>15</sup> A fire commenced on the defendant's track in some dry grass, and spread up the adjacent bank, over its right of way, to A.'s wood, a part of which was situated within fifty feet, and a part within two hundred feet of the track, and destroyed it.<sup>16</sup> Sparks escaped from the defendant's locomotive and fell upon the ground of an adjoining proprietor, which was covered with broom sedge and dry grass; it burned across this lot about one hundred and fifty yards, to the land of A., where it consumed a fence and some dry grass; and spreading from these, destroyed a quantity of young timber and fence-rails, the property of A.<sup>17</sup> A quantity of grass on the line of a railroad was set on fire by sparks from a locomotive; the fire spread until it reached the farm of A., situated nearly a mile from the railroad track, where it destroyed some timber belonging to A.<sup>18</sup> B.'s elevator, which was situated within twenty feet of the defendant's track, was burned by sparks which escaped from one of its engines; the fire spread to the elevator of A., situated seventy feet distant, and destroyed it.<sup>19</sup> A.'s house stood one hundred feet from the railroad track, a quantity of shavings being gathered around it; sparks were blown by a high wind into the dead grass adjoining the track, from whence fire was communicated to

<sup>11</sup> Kuhn v. Jewett, 32 N. J. Eq. 647.

<sup>12</sup> Perley v. Eastern R. Co., 98 Mass. 418; Delaware & C. R. Co. v. Salmon, 39 N. J. L. 299; Henry v. Southern & C. R. Co., 50 Cal. 176.

<sup>13</sup> Hart v. Western R. Co., 13 Metc. (Mass.) 99. See Hoyt v. Jeffers, 30 Mich. 181.

<sup>14</sup> Ingersoll v. Stockbridge & C. R. Co., 8 Allen (Mass.) 438.

<sup>15</sup> Hooksett v. Concord & C. R. R., 38 N. H. 243.

<sup>16</sup> Annapolis & C. R. Co. v. Gantt, 39 Md. 115.

<sup>17</sup> Phila. & C. R. Co. v. Constable, 39 Md. 149.

<sup>18</sup> Burlington & C. R. Co. v. Westover, 4 Neb. 268.

<sup>19</sup> Small v. Chicago & C. R. Co., 50 Iowa 338; s. c. 55 Iowa 582; 8 N. W. Rep. 437; 6 Cent. L. J. 310.



the shavings and the building.<sup>20</sup> Fire escaped from a railroad locomotive and fell upon a strip of ground forty or fifty yards wide, which was covered with dry grass and other combustible matter; it spread from thence and destroyed A.'s fence.<sup>21</sup> Sparks from the defendant's locomotive set fire to the prairie along its right of way; the grass being dry and the wind high, the fire extended about three miles during the evening and night, burning slowly during the night when the wind had fallen; next morning, the wind, rising, carried the fire some five miles farther, when it reached A.'s farm and destroyed his property.<sup>22</sup> In all these cases, A. was held entitled to recover.

§ 2301. **Remoteness of Damage in Point of Distance.**—Where the progress of the fire is continuous, or where it is partly extinguished and again breaks out, a very great remoteness in point of distance will not, according to recent adjudications, relieve the railway company from liability. For example, a railway company has been held liable for an injury to property caused by negligently setting a fire in pine woods where the ground was covered with straw, grass, and other combustible material, although the fire burned continuously from the point where it was set out for a distance of *two miles* before reaching the property of the plaintiff, its progress not having been arrested by any intervening cause.<sup>23</sup> Sparks escaping from a locomotive set fire to a prairie adjoining the company's right of way, at a place where the grass was rank and dry. The wind was high, and the fire extended some *three miles* before night, but the wind having fallen, it burned through the night more slowly. On the following morning the wind again rose and blew with great violence, carrying the fire some *five miles further*, in the course of a few hours, to the plaintiff's farm, where it swept over a fire-line of sixteen feet of plowed ground and destroyed the plaintiff's property. Such violent winds were not infrequent in that country. It was held that, as the rise of the wind was a thing which a prudent man might have anticipated, it could not be regarded as the intervention of a new agency, so as to relieve the company for the consequences of its negligence in permitting the fire to escape; and that, as the fire was in fact one continuous conflagration, notwithstanding the lapse of time and the great distance over which it travelled before reaching the plaintiff's property, he was entitled to a judgment for damages.<sup>24</sup>

<sup>20</sup> Coates v. Missouri &c. R. Co., 61 Mo. 38.

<sup>21</sup> Clemens v. Hannibal &c. R. Co., 53 Mo. 366.

<sup>22</sup> Poeppers v. Missouri &c. R. Co., 67 Mo. 715; s. c. 7 Cent. L. J. 282.

<sup>23</sup> East Tennessee &c. R. Co. v. Hes-

ters, 90 Ga. 11; s. c. 15 S. E. Rep. 828; East Tennessee &c. R. Co. v. Hall, 90 Ga. 17; s. c. 16 S. E. Rep. 91.

<sup>24</sup> Poeppers v. Missouri &c. R. Co., 67 Mo. 715.



§ 2302. **Duration of the Fire in Point of Time.**—Neither will the fact that the fire burned for a *great length of time* before it finally reached the property of the plaintiff, in the absence of contributory negligence on his part or of some responsible intervening agency, under a principle already considered,<sup>25</sup> relieve the railroad company from liability. It was so held where the fire burned over other intervening lands before it reached the plaintiff's property, and continued burning for *several days*, during which time it was several times partially subdued and again broke out.<sup>26</sup> But in a case where a railway company negligently suffered combustible material to accumulate on its right of way, and it was ignited by sparks from the company's locomotive, and the fire spread to the adjoining lands, and thence over the lands of intervening proprietors, which lands were covered with inflammable material, for a distance of two miles to the plaintiff's land, and did damage to the plaintiff *two days* after it was originally started,—the damage was deemed *too remote* to support an action by the plaintiff against the railroad company.<sup>27</sup>

§ 2303. **When Recovery not Excluded by the Presence of Intervening Agencies.**—The sound doctrine, then, is that to exclude the right of recovery on the part of the person who is ultimately damaged, the intervening agency must be a *responsible agency*. The mere intervention of something that does not intercept, but which communicates the fire, is not an intervening agency such as arrests the chain of causation, unless the intervention of such agency was not reasonably to be anticipated. If, for example, the fire is set by the burning of oil cars upon a railway, the intervention of a stream of water does not, on sound principle, arrest the chain of causation provided the oil flowing upon the top of the water conducts the fire across the stream. In such a case it is, upon experience, to be anticipated that the stream will communicate, instead of arrest the fire.<sup>28</sup> So, a high wind is not to be deemed an intervening cause, such as breaks the chain of causation, unless it is a wind blowing with such extraordinary force that its presence at the particular season of the year and in the particular country, is not to be reasonably anticipated,—in other words, a wind which, with reference to the liability of a common carrier, would be ascribed to the act of God.<sup>29</sup> The same conclusion is

<sup>25</sup> Vol. I, § 51, *et seq.*

<sup>26</sup> Chicago &c. R. Co. v. Williams, 131 Ind. 30; s. c. 30 N. E. Rep. 696.

<sup>27</sup> Huffman v. King, 160 N. Y. 618; s. c. 55 N. E. Rep. 401; reversing s. c. 30 App. Div. (N. Y.) 621; 52 N. Y. Supp. 1143.

<sup>28</sup> Kuhn v. Jewett, 32 N. J. Eq. 647; *contra*, Hoag v. Lake Shore &c. R. Co., 85 Pa. St. 293.

<sup>29</sup> East Tennessee &c. R. Co. v. Hesters, 90 Ga. 11; s. c. 15 S. E. Rep. 828; East Tennessee &c. R. Co. v. Hall, 90 Ga. 17; s. c. 16 S. E. Rep. 91; Louisville &c. R. Co. v. Nitsche,



ascribed to the contributory negligence of an intervening owner; for instance, if a fire is negligently communicated from a railway locomotive to the building of A., and A., through negligence, fails to extinguish it, whereby it is communicated to the building of B., then, without reference to the question whether B. will have an action against A., it is held that he will have an action against the railway company.<sup>30</sup>

§ 2304. **Effect of a Sudden Shift of Wind.**—This subject has been considered when treating of ordinary fires, the setting out of which is not necessarily negligent, but which is customary in the ordinary operations of husbandry. But where the origin of the fire was negligent in its inception—where it was negligently scattered from a locomotive engine—the rule ought to be different. A person or corporation thus negligently scattering fire, is bound to anticipate that the wind may suddenly shift, in any American climate, and can not therefore attribute a catastrophe which follows from a shifting of the wind, and from the fact that the flames consequently take a new direction, to the act of God, upon whose shoulders so much blame is laid by human beings, nor to inevitable accident; since the accident would not have happened but for the primary negligence of the person or corporation setting the fire.<sup>31</sup> The rule, therefore, is that a railway company negligently setting a fire can derive no advantage from the fact that it was driven upon the property of the plaintiff by the ordinary shifting of the wind, such as, in the particular climate or season, is liable to take place at any time.<sup>32</sup>

§ 2305. **Intervening Negligence of Third Persons.**—On principles already considered, the intervening negligence of third persons, for which the plaintiff is not responsible, will not arrest the chain of causation so as to deprive the plaintiff of a right of recovery against the railway company for its negligence in starting the fire; since where the plaintiff is damnified by the concurring negligence of two different persons he may have an action for the damages against either.<sup>33</sup> For example, where the house of the plaintiff was destroyed by a fire negligently set out by a steamboat of the defendant, he was none the less entitled to recover damages because the fire first caught in shavings

126 Ind. 229; s. c. 26 N. E. Rep. 51;

9 L. R. A. 750; 43 Alb. L. J. 191;

45 Am. & Eng. Rail. Cas. 532.

<sup>30</sup> Small v. Chicago & C. R. Co., 55

Iowa 582; s. c. 8 N. W. Rep. 437; s.

c. on former appeal, 50 Iowa 338.

<sup>31</sup> Indiana & C. R. Co. v. Hawkins, 81 Ill. App. 570.

<sup>32</sup> Northern & C. R. Co. v. Lewis, 7

U. S. App. 254; s. c. 2 C. C. A. 446;

51 Fed. Rep. 658.

<sup>33</sup> Vol. I, § 75.



negligently left exposed by a third person, or because the city was negligent in failing to put it out after it was started and before it reached the plaintiff's house.<sup>34</sup> So, the burning of the plaintiff's woods was deemed the proximate effect of the negligence of the railway company, although the tenant of intervening land failed to use due care and diligence in extinguishing the fire.<sup>35</sup> So, where a fire was negligently started on the right of way of one railroad company, and escaped and spread to the right of way of another railroad company, where it burned a quantity of corn belonging to the plaintiff, which was stored in cars belonging to the latter railroad company,—the negligence of the latter company in failing to remove the cars out of danger did not relieve the former company, by whose negligence the fire was originally started, from liability to the plaintiff for the loss of his corn.<sup>36</sup>

**§ 2306. Liability of the Intervening Responsible Agent.**—It is necessarily a part of the foregoing doctrine that the intervening responsible agent, but for whose wrongful intervention the fire would not have reached the property of the plaintiff and destroyed it, is responsible to the plaintiff for its destruction. This, of course, assumes that his intervention was wrongful and unlawful, and not innocent or excusable. For instance, a person who prevents firemen from attaching the hose of the fire department of a city to a fire hydrant for the purpose of putting out a fire, is liable to the owner of a building to which the fire spreads, provided it would not have reached the building if the firemen had been permitted to use the hydrant.<sup>37</sup> In like manner, a railroad company whose train cut in two the fire company's hose while putting out a fire, was held liable to the owner of the burning building, sufficient notice having been given to the railroad company before its train reached the hose.<sup>38</sup>

**§ 2307. Liability for Ulterior, Collateral or Consequential Damages Occasioned by the Burning.**—The liability of the railroad company is not, under the doctrine of proximate and remote cause, restrained to the payment of damages accruing from the mere burning of fences, buildings, and the like; but it has been held that if the fire spreads over the lands of an adjacent owner, and his cattle, pasturing

<sup>34</sup> *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141; s. c. 50 Am. Rep. 352. *Ind. App.* 222; s. c. 56 N. E. Rep. 451.

<sup>35</sup> *Wiley v. West Jersey & C. R. Co.*, 44 N. J. L. 247.

<sup>36</sup> *Chicago & C. R. Co. v. Ross*, 24

<sup>37</sup> *Kiernan v. Metropolitan Constr. Co.*, 170 Mass. 378; s. c. 49 N. E. Rep. 648.

<sup>38</sup> *Metallic & C. Co. v. Fitchburg & C. R. Co.*, 109 Mass. 277.



thereon, wander into it and are injured, the fire is to be deemed the proximate cause of the injury, and the railway company must pay damages therefor.<sup>39</sup> And while, as elsewhere seen,<sup>40</sup> if a railway company negligently sets out a fire and it results in the death of a human being, it may be responsible in damages therefor under a statute giving a recovery of damages for an injury resulting in death,—yet this will not be so where the death or injury to a human being is the result of an act due to his own volition, because this is deemed to be a responsible intervening cause which breaks the chain of causation, under the principle already considered.<sup>41</sup> Thus, where, in the case of a negligent railway fire, the daughter of the plaintiff was burned to death in trying to put it out, it was held that there could be no recovery, because, irrespective of the question whether she was or was not negligent in making the attempt, her intervening act and not the negligence of the railway company was the proximate cause of her death.<sup>42</sup> So, where a woman was fatally injured in attempting to put out a fire kindled by the defendant's locomotive on property in which she had no interest, her own property being in no danger, the proximate cause of her injury was attributed to her own voluntary act, and her injury could not be made the ground of recovering damages.<sup>43</sup> So, where a fire, negligently set by a railway company, burns the fence of a pasture so that the horses confined therein escape and are lost, the railway company will become liable to the owner for their value, because it is bound to anticipate that the owner of a pasture may use it for any or all of the purposes to which it is adapted, and that he will confine animals in it which will be likely to stray off and get lost except for the fence. Nor did it make any difference, in such a case, that the horses had been driven from a remote part of the State, and therefore had a greater propensity to wander off than might have been the case with horses wonted to the place.<sup>44</sup> So, if fences are negligently burned by a railway company, it is liable for a consequent *loss of crops*, through animals getting at them, provided the landowner uses reasonable efforts to prevent such loss; since the loss of crops is a natural consequence of the burning of the fence, such as ought to be foreseen.<sup>45</sup>

<sup>39</sup> *Chicago & C. R. Co. v. Barnes*, 2 Ind. App. 213; s. c. 28 N. E. Rep. 328.

<sup>40</sup> *Ante*, § 2245.

<sup>41</sup> Vol. I, § 65.

<sup>42</sup> *Seale v. Gulf & C. R. Co.*, 65 Tex. 274; s. c. 57 Am. Rep. 602. For a *complaint* in such a case laying the damages in the burning of the plaintiff's hand in an attempt to extinguish such a fire, which was held

not to state the cause of action, see *Hinchey v. Manhattan R. Co.*, 49 N. Y. Sup. Ct. 406.

<sup>43</sup> *Pike v. Grand Trunk R. Co.*, 39 Fed. Rep. 255.

<sup>44</sup> *St. Louis & C. R. Co. v. McKinsey*, 78 Tex. 298; s. c. 14 S. W. Rep. 645.

<sup>45</sup> *Miller v. St. Louis & C. R. Co.*, 90 Mo. 389; s. c. 7 West. Rep. 122.



§ 2308. **Rule of Damages where the Plaintiff's Loss is Enhanced by his own Negligence.**—If the negligence of the railway company results in communicating a fire to the land of an owner or occupier, and the negligence of such owner or occupier enhances his loss, he may still recover for the damages done him before his own negligence began to operate.<sup>46</sup>

§ 2309. **The Question Considered as a Question of Pleading.**—Where the plaintiff alleged that a fire, started by sparks from an engine of the defendant, came to plaintiff's land,—it was held that his allegation was supported by evidence that the fire first originated on the land of another, and then spread to the land of the plaintiff.<sup>47</sup>

§ 2310. **The Question is a Question for the Jury.**—This question has been considered in its more general relation; and what is here said is designed to apply more especially to the subject of the spread of fires. It is said in a learned opinion by Chief Justice Agnew, of Pennsylvania, that in cases of this kind the question whether the negligence of the railway company was the proximate or the remote cause of the damage for which the action is brought, is peculiarly a question for the jury. The reasoning of the learned Judge upon this question is too extended to set out, but perhaps the kernel of it lies in the observations that "the province of the jury takes up the successive facts and ascertains whether they are naturally and probably related to each other by a continuous sequence, or are broken off and separated by a new and independent cause. The practical knowledge and common sense of the jury, applied to the evidence, steps in to determine whether the injury is the real proximate result of the negligence, or, by reason of intervening and independent causes, must be regarded as too remote, and the result not within the probable foresight of the party whose negligence is alleged to have produced it."<sup>48</sup> Many other cases vindicate the doctrine that in this, as in other relations, what is the proximate cause of an injury is ordinarily a question for a jury. These cases proceed upon the view that the spread of a fire is not a question of science or legal knowledge, but a question addressing

<sup>46</sup> *Stebbins v. Central Vermont R. Co.*, 54 Vt. 464; s. c. 41 Am. Rep. 855. This rule was applied to a case where the owner, on being notified that his property had been set on fire by the train, made no effort to quench it. The court held that he was entitled to such damages as had accrued up to the time of notice,

and that his non-action could go only in mitigation of damages: *Stebbins v. Central Vermont R. Co.*, 54 Vt. 464; s. c. 41 Am. Rep. 855.

<sup>47</sup> *Butcher v. Vaca Valley & C. R. Co.*, 67 Cal. 518.

<sup>48</sup> *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373, 378; reaffirmed in *Pennsylvania & C. R. Co. v. Lacey*, 89 Pa. St. 458.



itself to the every-day observation and experience of common men, and that it is better for twelve men in the jury-box, than for one man on the bench, to say what is the natural and probable result of a negligent or wrongful act in the light of any collection of circumstances, such as the wrong-doer ought to have foreseen.<sup>49</sup>

<sup>49</sup> See, to this effect, *Milwaukee &c. R. Co. v. Kellogg*, 94 U. S. 469, 474, 475; *Kellogg v. Chicago &c. R. Co.*, 26 Wis. 223; *Brown v. Chicago &c. R. Co.*, 54 Wis. 342; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141. In an illustrative case, it appeared that sparks were thrown from an engine of a railroad company to a point on land adjoining the plaintiff's, about three hundred feet from a lumber pile belonging to the plaintiff. The sparks set fire to combustible materials, consisting of leaves, briars, brush, stumps and logs, burning the same in its pathway until it reached the plaintiff's lumber.

The weather was dry and a high wind was blowing in the direction of the property destroyed. The fire reached the lumber about two hours after it started, and could not be extinguished by any effort. In a suit for the loss, there was evidence on the part of the defendant railway company tending to another theory as to the origin and extent of the fire. It was held that it was properly left to the jury to determine whether the negligence of the defendant was the proximate or the remote cause of the injury: *Lehigh Valley R. Co. v. McKeen*, 90 Pa. St. 122; s. c. 35 Am. Rep. 644.



## CHAPTER LXXVII.

## CONTRIBUTORY NEGLIGENCE OF THE PROPERTY OWNER.

| SECTION  | SECTION  |
|--|--|
| 2313. Reasonable care only is required of the land-owner.  | 2323. An impressive statement of the reasons which support this doctrine.                            |
| 2314. Not negligence to use his property in the ordinary way, as though the railway were not there.            | 2324. Care of buildings erected near railway tracks so as to prevent their taking fire.              |
| 2315. Not negligence to allow combustible materials to accumulate near the right of way of a railroad company. | 2325. Further of the care of buildings so erected.   |
| 2316. Whether such conduct on the part of the land-owner is negligence is a question for a jury.               | 2326. A limit suggested to the foregoing doctrine.   |
| 2317. No duty to surround one's premises with fire guards.   | 2327. Contributory negligence in failing to put out the fire.  |
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| 2319. When such acts not deemed contributory negligence as matter of law.                                      | 2329. Exceptions to the foregoing doctrines.   |
| 2320. Stacking hay near a railroad track.  | 2330. Miscellaneous cases illustrating the doctrines of this chapter.                                |
| 2321. Whether contributory negligence to erect buildings near railway tracks.                                  | 2331. Whether the contributory negligence of the property owner was the proximate cause of his loss. |
| 2322. Not contributory negligence to erect and maintain buildings near railway tracks.                         | 2332. Evidentiary facts bearing upon the question of contributory negligence.                        |
|  | 2333. Obsolete doctrines in this connection.   |

§ 2313. Reasonable Care only is Required of the Land-Owner.—An owner of land, near which a railroad is operated, is not bound to forbear its ordinary use, or to take unusual precautions to guard against fire communicated to it from the premises of the railroad company; but is required to take only such precautions as a person of reasonable prudence would take to protect his property, having reference to obvious hazards and to all the surrounding circum-



stances.<sup>1</sup> The New York Court of Appeals have in substance stated the doctrine as thus qualified, and have applied it by holding that the acquisition of land for the purposes of a railroad does not embarrass the right of the owner of adjoining lands not taken, in the freest use of them in any lawful business, or expose him to be charged with contributory negligence if his property, of an inflammable nature, necessarily and carefully used in the course of such business, is set afire by sparks from a defective or unskillfully managed locomotive. It was so held where the defendant maintained a *varnish factory* near a railroad station, and the fire occurred while the varnish was being thinned down with benzine, which gave off vapors.<sup>2</sup>

§ 2314. **Not Negligence to Use his Property in the Ordinary Way, as though the Railway were not There.**<sup>3</sup>—The doctrine may be regarded as settled that contributory negligence will not be imputed, as matter of law, to the owner or occupier of land, or of premises where any kind of lawful business is carried on, situated in the vicinity of a railroad,—from the mere fact that he uses his land or conducts his business in the ordinary way, and does not change the ordinary mode of using it or of conducting it because a railroad runs in its vicinity, nor take special precautions to prevent its destruction by fire which may escape through the negligence of the railway company. The principle which the decisions affirm is that the land-

<sup>1</sup> *Union &c. R. Co. v. Ray*, 46 Neb. 750; s. c. 65 N. W. Rep. 773; *Omaha Fair &c. Asso. v. Missouri &c. R. Co.*, 42 Neb. 105; s. c. 60 N. W. Rep. 330. The owner of premises near a railway is bound only to use such care and diligence in the erection of buildings and protection of property against damages by fire as an ordinarily prudent person would under all the surrounding circumstances; and the failure to exercise a greater degree of care does not render him guilty of contributory negligence precluding recovery for its destruction by fire emitted from a passing engine: *St. Louis &c. R. Co. v. Stevens*, 3 Kan. App. 176; s. c. 43 Pac. Rep. 434.

<sup>2</sup> *Kalbfleisch v. Long Island R. Co.*, 102 N. Y. 520; s. c. 3 Cent. Rep. 662. As to the precaution required by owners of property or of business against fires communicated from the locomotives of neighboring railroads, see and compare the following cases: *Patton v. St. Louis &c. R. Co.*,

87 Mo. 117; *Lake Erie &c. R. Co. v. Kirts*, 29 Ill. App. 175; *Kendrick v. Towle*, 60 Mich. 363; *Jacksonville &c. R. Co. v. Peninsular Land &c. Co.*, 27 Fla. 1, 157; s. c. 17 L. R. A. 33; *Union &c. R. Co. v. Arthur*, 2 Colo. App. 159; *Ft. Scott &c. R. Co. v. Tubbs*, 47 Kan. 630; *Cincinnati &c. R. Co. v. Smock*, 133 Ind. 411; *Cincinnati &c. R. Co. v. Baker*, 94 Ky. 71; *Chicago &c. R. Co. v. Smith*, 6 Ind. App. 262; *Northern &c. R. Co. v. Lewis*, 51 Fed. Rep. 658; s. c. 7 U. S. App. 254; *Campbell v. McGregor*, 29 N. B. 644; *Martin v. Texas &c. R. Co.*, 87 Tex. 117; *Union &c. R. Co. v. Williams*, 3 Colo. App. 526; *Chicago &c. R. Co. v. Kern*, 9 Ind. App. 505; *Omaha Fair &c. Asso. v. Missouri &c. R. Co.*, 42 Neb. 105; *Richmond &c. R. Co. v. Medley*, 75 Va. 499; *Delaware &c. R. Co. v. Salmon*, 39 N. J. L. 299; *Philadelphia &c. R. Co. v. Hendrickson*, 80 Pa. St. 182.

<sup>3</sup> This section is cited in §§ 2317, 2324, 2349.



owner is not, by reason of the fact that a railway extends along or through his land, bound to use his land in any other way than the way in which he would use it if the railway were not there; but that he is at liberty, in determining the mode in which he will use his land, to disregard the very existence of the railway,—subject, however, to the risk of having his property burned without recourse against the railway company, in the case of a fire set by the company by unavoidable accident and without negligence, under the principles elsewhere discussed.\* For example, it is not negligence, as matter of law, to suffer the roof of a barn, which stands near a railway track and which is made of shingles, to become and remain dry and decayed and peculiarly liable, on a dry and windy day, to be set on fire by sparks from passing locomotives;<sup>5</sup> nor, in general, to suffer the roof of a building which stands near a railway track to be in such condition as to make it more liable to take fire than if it were otherwise made and kept in repair.<sup>6</sup>

**§ 2315. Not Negligence to Allow Combustible Materials to Accumulate near the Right of Way of a Railroad Company.**—Applying the doctrine of the preceding paragraph, the courts, with great unanimity, hold that it is not contributory negligence, as matter of law, in the owner or occupier of land adjoining a railway, to allow combustible materials to accumulate on his land so near the railway track as to create the risk of their being set on fire by coals or sparks scattered from the locomotive and driven before the wind. On the one hand, if the railway company has been negligent in setting the fire, it can not make the failure of the land-owner to keep his land near the railway track clear of combustible materials a defense against its own liability, on the ground of its being contributory negligence; but, on the other hand, if the railway company has not been negligent in setting the fire, then it does not become liable to damages by reason of the fact that the land-owner has seen fit to ignore the existence of the railroad and the danger of fire therefrom, and to allow combustible material to exist near its line on his land, as though it were not there.<sup>7</sup> The reasoning in some of the cases is that,

\* *Patton v. St. Louis &c. R. Co.*, 87 Mo. 117; s. c. 1 West. Rep. 760; *New York &c. R. Co. v. Grossman*, 17 Ind. App. 652; s. c. 46 N. E. Rep. 546; *Mobile &c. R. Co. v. Stinson*, 74 Miss. 453; s. c. 21 South. Rep. 14; rehearing denied in 21 South. Rep. 522; *Omaha Fair &c. Asso. v. Missouri &c. R. Co.*, 42 Neb. 105; s. c. 60 N. W. Rep. 330; *Union &c. R. Co.*

*v. Ray*, 46 Neb. 750; s. c. 65 N. W. Rep. 773.

<sup>5</sup> *Jefferis v. Philadelphia &c. R. Co.*, 3 Houst. (Del.) 447.

<sup>6</sup> *Philadelphia &c. R. Co. v. Hendrickson*, 80 Pa. St. 183.

<sup>7</sup> The following cases support, more or less closely, the doctrine of the text, and affirm that, for the land-owner to allow combustible mate-



*prima facie*, there is no danger to the property of the adjacent landowner in the absence of negligence on the part of the railway company, and that he is not, under a principle elsewhere considered,<sup>8</sup> imputable with negligence because of his failure to anticipate that the railway company will be negligent, and to provide against the consequences of its possible negligence.<sup>9</sup> On the other hand, as we have

rials to accumulate upon his land near the railway track, *is not negligence as matter of law*: Louisville & C. R. Co. v. Krimming, 87 Ind. 351; Karson v. Milwaukee & C. R. Co., 29 Minn. 12; Lindsay v. Winona & C. R. Co., 29 Minn. 411; Pittsburgh & C. R. Co. v. Jones, 86 Ind. 496; s. c. 44 Am. Rep. 334; Palmer v. Missouri & C. R. Co., 76 Mo. 217; Crandall v. Goodrich Transp. Co., 16 Fed. Rep. 75; Jacksonville & C. R. Co. v. Peninsular Land & C. Co., 27 Fla. 1, 157; s. c. 9 South. Rep. 661; Philadelphia & C. R. Co. v. Schultz, 93 Pa. St. 341; Richmond & C. R. Co. v. Medley, 75 Va. 499; s. c. 40 Am. Rep. 734; Pittsburgh & C. R. Co. v. Hixon, 79 Ind. 111; Northern & C. R. Co. v. Lewis, 51 Fed. Rep. 658; s. c. 7 U. S. App. 254; 2 C. C. A. 446; Reed v. Missouri & C. R. Co., 50 Mo. App. 504; Mathews v. St. Louis & C. R. Co., 121 Mo. 298; s. c. 25 L. R. A. 161; 24 S. W. Rep. 591; Chicago & C. R. Co. v. Kern, 9 Ind. App. 505; s. c. 36 N. E. Rep. 381; Chicago & C. R. Co. v. Smith, 6 Ind. App. 262; s. c. 33 N. E. Rep. 241; Louisville & C. R. Co. v. Hart, 119 Ind. 273; s. c. 21 N. E. Rep. 753; 4 L. R. A. 549; Smith v. Hannibal & C. R. Co., 37 Mo. 287; Fitch v. Pacific R. Co., 45 Mo. 322; Salmon v. Delaware & C. R. Co., 38 N. J. L. 5; Delaware & C. R. Co. v. Salmon, 39 N. J. L. 299; Lake Erie & C. R. Co. v. Middlecoff Ins. Co. of North America, 150 Ill. 27; s. c. 37 N. E. Rep. 660; aff'g 52 Ill. App. 175; Lake Erie & C. R. Co. v. Kirts, 29 Ill. App. 175; Illinois & C. R. Co. v. Mills, 42 Ill. 407; Illinois & C. R. Co. v. Frazier, 47 Ill. 505; Illinois & C. R. Co. v. Nunn, 51 Ill. 78; Chicago & C. R. Co. v. Simonson, 54 Ill. 504; Ohio & C. R. Co. v. Shanefelt, 47 Ill. 497; Great Western R. Co. v. Haworth, 39 Ill. 347; Toledo & C. R. Co. v. Pindar, 53 Ill. 447; Bass v. Chicago & C. R. Co., 28 Ill. 9; Fitch v. Pacific R. Co., 45 Mo. 322; Ross v. Boston & C. R. Co., 6 Allen (Mass.) 87; Snyder v. Pittsburgh & C. R. Co., 11 W. Va. 15; Philadelphia & C. R. Co.

v. Hendrickson, 80 Pa. St. 182; Fero v. Buffalo & C. R. Co., 22 N. Y. 209; Cook v. Champlain Transp. Co., 1 Denio (N. Y.) 91. See Bevier v. Delaware & C. R. Co., 13 Hun (N. Y.) 254; Patton v. St. Louis & C. R. Co., 87 Mo. 117; s. c. 56 Am. Rep. 446; 1 West. Rep. 760 (not negligence not to keep down the grass in one's orchard, or the grass or stubble in one's field). The law of England in this regard is the same as the law in the United States. It was settled, in the leading case of Vaughan v. Taff Vale R. Co., 3 Hurl. & N. 742; s. c. reversed 5 Hurl. & N. 678; printed in full in 1 Thomp. Neg., 1st ed., 122, that the mere fact that a railway is laid through or contiguous to one's land does not impose upon him any duty of using his land in any different way than if a railway had not been there. On this point, Martin, B., said: "It would require a strong authority to convince me that, because a railway runs along my land, I am bound to keep it in a particular state." And Bramwell, B., also said: "The plaintiff used his land in a natural and proper way for the purposes for which it was fit. The defendants come to it, he being passive, and do it a mischief." The question had previously been considered at *Nisi Prius*: Hammon v. South Eastern R. Co., Walf. on Rys., § 239, note e; Bliss v. London & C. R. Co., 2 Fost. & Fin. 341.

<sup>8</sup> Vol. I, § 191; *ante*, §§ 1336, 1337, 1601, 1782, 1889, 1891, 1935, 1947.

<sup>9</sup> Philadelphia & C. R. Co. v. Schultz, 93 Pa. St. 341; Richmond & C. R. Co. v. Medley, 75 Va. 499; s. c. 40 Am. Rep. 374; Chicago & C. R. Co. v. Kern, 9 Ind. App. 505; s. c. 36 N. E. Rep. 381; Mississippi Home Ins. Co. v. Louisville & C. R. Co., 70 Miss. 119; s. c. 54 Am. & Eng. Rail. Cas. 512; 12 South. Rep. 156; Mobile & C. R. Co. v. Stinson, 74 Miss. 453; s. c. 21 South. Rep. 14; rehearing denied 21 South. Rep. 522.



seen, the railway company is bound to keep its right of way clear of combustible material; or at least its failure to do so raises a question for the jury whether or not it has been negligent. So that if the railroad company has been negligent in this particular, and a fire breaks out upon its right of way and is communicated to the land of the adjoining owner, the latter will have an action for damages, although he himself failed to do on his own land what the law condemns the railroad company for not doing on its land.<sup>10</sup> The rule of the text has been supposed to be stronger under a statute which makes the railroad company an *insurer* against the consequences of fires set out by it in operating its road.<sup>11</sup>

§ 2316. **Whether such Conduct on the Part of the Land-Owner is Negligence is a Question for a Jury.**—The foregoing cases hold that, for a land-owner or occupier of land contiguous to a railway, to allow combustible materials to accumulate thereon or to use it in any different way, to the end of preventing the destruction of property thereon by fire, from the way in which it would naturally and ordinarily be used if the railway were not there, *is not negligence as matter of law*. There are other cases which affirm the principle that, whether or not it is negligence is a *question for a jury*.<sup>12</sup> So, it is a question for the jury whether a farmer is guilty of contributory negligence in allowing his stacks of hay to stand in such dangerous proximity to a railway as

<sup>10</sup> Pittsburgh &c. R. Co. v. Jones, 86 Ind. 496; s. c. 44 Am. Rep. 334; Palmer v. Missouri &c. R. Co., 76 Mo. 217.

<sup>11</sup> Mathews v. St. Louis &c. R. Co., 121 Mo. 298; s. c. 24 S. W. Rep. 591; 25 L. R. A. 161.

<sup>12</sup> Kellogg v. Chicago &c. R. Co., 26 Wis. 223; Erd v. Chicago &c. R. Co., 41 Wis. 65; Ward v. Milwaukee &c. R. Co., 29 Wis. 144; McCready v. Railroad Co., 2 Strob. L. (S. C.) 356; St. Louis &c. R. Co. v. Richardson, 47 Kan. 517; s. c. 28 Pac. Rep. 183; Kansas City &c. R. Co. v. Owen, 25 Kan. 419; St. Joseph &c. R. Co. v. Chase, 11 Kan. 47; Slossen v. Burlington &c. R. Co., 60 Iowa 215; Missouri &c. R. Co. v. Cornell, 30 Kan. 35. See also Missouri &c. R. Co. v. Kincaid, 29 Kan. 654; Murphy v. Chicago &c. R. Co., 45 Wis. 222. It has been held inadmissible for the plaintiff to prove, in order to negative the conclusion of contributory negligence on his part, that other ordinarily prudent farmers who had stacks in their fields adjoining

the railroad had not, up to the time of the fire, *plowed around them*: Slossen v. Burlington &c. R. Co., 60 Iowa 215. In like manner, evidence of the *custom* of the neighborhood not to plow around hay-stacks for the purpose of preventing such fires has been held inadmissible: Ormond v. Central &c. R. Co., 58 Iowa 742. The same doctrine once prevailed in Illinois, under the rule of *comparative negligence*,—that rule being that although the plaintiff may have been guilty of some negligence in not keeping his premises free from combustible materials, yet he can recover where his negligence in comparison with that of the defendant is slight, and the negligence of the defendant gross; which question is to be left to the jury: Illinois &c. R. Co. v. Nunn, 51 Ill. 78; Chicago &c. R. Co. v. Simonson, 54 Ill. 504; Ohio &c. R. Co. v. Shanefelt, 47 Ill. 497; Great Western R. Co. v. Haworth, 39 Ill. 347; Toledo &c. R. Co. v. Pindar, 53 Ill. 447; Bass v. Chicago &c. R. Co., 28 Ill. 9.



to be unreasonably exposed to danger from fire;<sup>13</sup> but whether the owner of a frame house, situated near a railroad, in which he conducts the business of a cooper, is negligent in allowing shavings and other combustible materials to accumulate around the building, by means of which fire is communicated to the building from the railroad, is a question for a jury.<sup>14</sup>

**§ 2317. No Duty to Surround One's Premises with Fire Guards.**<sup>15</sup>—From the doctrine stated at the commencement of this chapter,<sup>16</sup> it must follow that contributory negligence will not be imputed to the property owner as matter of law, because he neglects to surround his premises with fire guards, such as, in a prairie country, are commonly regarded as sufficient to arrest the progress of a prairie fire.<sup>17</sup> Nor was it deemed contributory negligence, in such a relation, for the farmer to forbid the servants of the railway company to burn the grass around the stack as a precautionary measure.<sup>18</sup> Nor is it deemed contributory negligence in a farmer owning hay stacks, situated near a railroad, to fail to keep the grass growing upon the lands between the stacks and the right of way burned off,<sup>19</sup> nor to fail to plow a trench around a hedge and straw-ricks.<sup>20</sup> So, it is not negligence *per se* for a farmer to shock his wheat in the field where it is cut, a mile and a half from a railroad, without making a fire guard around it;<sup>21</sup> nor for a farmer to stack his grain on his premises two and a half miles from a railroad, without being so diligent as to make a fire guard around the stacks the day after they are completed.<sup>22</sup> So, it has been held that the owner of *wood* piled near a railway track is not guilty of contributory negligence by reason of his failure to *clear the brush* and other combustible matter out of an open draw through which fire is communicated to the wood.<sup>23</sup>

**§ 2318. When Contributory Negligence to Expose One's Property to Fire near Railway Tracks.**<sup>24</sup>—The foregoing cases do not negative

<sup>13</sup> Missouri & C. R. Co. v. Kincaid, 29 Kan. 654.

<sup>14</sup> Kimball v. Borden, 97 Va. 477; s. c. 34 S. E. Rep. 45.

<sup>15</sup> This section is cited in § 2321.

<sup>16</sup> *Ante*, § 2314.

<sup>17</sup> Union & C. R. Co. v. McCollum, 2 Kan. App. 319; s. c. 43 Pac. Rep. 97.

<sup>18</sup> Union & C. R. Co. v. Arthur, 2 Colo. App. 159; s. c. 29 Pac. Rep. 1031.

<sup>19</sup> Louisville & C. R. Co. v. Hart, 119 Ind. 273; s. c. 4 L. R. A. 549; 21 N. E. Rep. 753.

<sup>20</sup> Burlington & C. R. Co. v. Westover, 4 Neb. 268; West v. Chicago & C. R. Co., 77 Iowa 657; s. c. 42 N. W. Rep. 512.

<sup>21</sup> Padgett v. Atchison & C. R. Co., 7 Kan. App. 736; s. c. 52 Pac. Rep. 578.

<sup>22</sup> Padgett v. Atchison & C. R. Co., 7 Kan. App. 736; s. c. 52 Pac. Rep. 578.

<sup>23</sup> Northern & C. R. Co. v. Lewis, 51 Fed. Rep. 658; s. c. 7 U. S. App. 254; 2 C. C. A. 446.

<sup>24</sup> This section is cited in § 2248.



the conclusion that if a person brings his property into the vicinity of a railway track for shipment, or for storage, and there leaves it uncovered and fails to take the ordinary or obvious precautions for protecting it against fire, he will, in case it is burned by a negligent fire communicated in operating the railway, be precluded from recovering damages by reason of his own contributory negligence. For example, it seems that contributory negligence will be imputed in this relation to the owner of a warehouse adjoining a railway who permits the windows of a room therein to remain open and unglazed, in which room are stored cobs, corn-husks, rags, grain and other inflammable material;<sup>25</sup> or to the owner of cotton, who places or causes it to be placed upon a platform belonging jointly to a railway company and a compressing company, which is the usual and customary place for depositing cotton while waiting to be compressed, without taking the precaution of covering it or otherwise protecting it from being set on fire by sparks from passing locomotives;<sup>26</sup> or to an owner of cotton and other inflammable materials, which he intends to ship upon a railroad, who deposits them upon the station platform so near to the track as obviously to incur danger of being ignited by sparks from passing engines;<sup>27</sup> or to the owner of lumber who stores a large quantity of it by a railway side track, for convenience in loading and operating and for storing and seasoning, where the lumber is set on fire in a dry season from sparks from passing locomotives, although by the negligence of the railway company;<sup>28</sup> or to the owner of a farm adjoining a railway track who allows a canvas-covered wagon to stand in the vicinity of a railway fire while it is raging and before it is totally extinguished, whereby it takes fire and is consumed.<sup>29</sup> These holdings form an exception to the ordinary rule that the fact that a person negligently exposes his property to danger does not justify the *subsequent* negligence of another person in destroying or injuring it.<sup>31</sup> They are opposed to the leading case of *Davies v. Mann*,<sup>32</sup> and to the long train of decisions which have followed the doctrine of that case. In so far as they can be justified, their justification rests upon the view that railway locomotives, however well equipped and

<sup>25</sup> *Great Western R. Co. v. Harworth*, 39 Ill. 347.

<sup>26</sup> *Martin v. Texas &c. R. Co.*, 87 Tex. 117; s. c. 26 S. W. Rep. 1052.

<sup>27</sup> *Missouri &c. R. Co. v. Bartlett*, 69 Tex. 79; s. c. 6 S. W. Rep. 549.

<sup>28</sup> *Post v. Buffalo &c. R. Co.*, 108 Pa. St. 585.

<sup>29</sup> *Denver &c. R. Co. v. Morton*, 3 Colo. App. 155; s. c. 32 Pac. Rep. 345.

<sup>31</sup> Vol. I, § 235, *et seq.*; § 243, *et seq.*

<sup>32</sup> 10 Mees. & W. 546; s. c. 2 Thomp. Neg., 1st ed., 1105.



managed, are liable to scatter *some* fire, and hence that it is opposed to the suggestions of ordinary prudence for the owner of personal property which is highly inflammable, like cotton, or straw, or lumber, to leave it unguarded and uncovered in the immediate vicinity of a railroad track.<sup>33</sup>

**§ 2319. When such Acts not Deemed Contributory Negligence as Matter of Law.**—It has been well observed that the test by which to determine whether or not the owner of cotton was guilty of contributory negligence in leaving it near a railroad, so as to preclude recovery for its destruction from a fire originating from sparks emitted by an engine, is whether, in so placing it, he used such care and caution as a person of ordinary prudence would have done.<sup>34</sup> And this is no doubt the test to be applied in most cases where a person exposes his property to danger from fire in the immediate vicinity of a railroad track; and whether this measure of care has been used must, in most cases, be a question for a jury. Applying the well-known doctrine of the leading case of *Davies v. Mann*,<sup>35</sup> it has been held that contributory negligence in placing cotton so near a railroad track as to endanger it from escaping sparks by passing locomotives will not bar recovery for its destruction, where the company discovered, or by the exercise of ordinary diligence could have discovered, that the cotton was in imminent danger, and could, in the exercise of ordinary diligence with the means at its control, have prevented its destruction.<sup>36</sup> Under a statute making railway companies liable *as insurers*, another court has held that the fact that goods were stored without leave in a building erected on the right of way of a railroad company, and owned by a third person, does not prevent the owner of the goods from recovering damages from the railroad company for their destruction by fire escaping from one of its locomotives.<sup>37</sup> For reasons quite as strong, a railway company will not be released from liability for injuries to goods by fire communicated by its engines

<sup>33</sup> The decision of one of the divisions of the Texas Court of Appeals to the effect that contributory negligence of persons in placing their lumber on a railroad right of way and allowing it to remain there will prevent a recovery for its loss by fire communicated from the engines, although they were operated so negligently as to indicate an indifference to the right of the owner of the lumber (*Paris & Co. v. Nesbitt*, 11 Tex. Civ. App. 608; s. c. 33 S. W. Rep. 280), can not be commended as being consonant with law or jus-

tice, or with other holdings of Texas courts, as will be shown in the next paragraph.

<sup>34</sup> *Bennett v. Missouri & Co. R. Co.*, 11 Tex. Civ. App. 423; s. c. 32 S. W. Rep. 834.

<sup>35</sup> 10 Mees & W. 546; s. c. 2 Thomp. Neg., 1st ed., 1105; Vol. I, § 235, *et seq.*

<sup>36</sup> *Edwards v. Campbell*, 12 Tex. Civ. App. 237; s. c. 33 S. W. Rep. 761.

<sup>37</sup> *Walker v. Missouri & Co. R. Co.*, 68 Mo. App. 465.



because the building in which the goods are kept extends, by the express license of the company, a few feet upon its right of way.<sup>38</sup> Under a statute making the railroad company liable *as an insurer*, a land-owner is not chargeable with negligence merely because he piles wood near a railroad track, whether on his own land, or (with the consent of the company) partially upon its right of way; but in such a case the relative rights and liabilities of the owner of the wood and the railroad company, in case of the destruction of the wood by fire scattered from a locomotive of the company, are the same as though the owner of the wood were the owner of the land on which it was piled.<sup>39</sup> And it is especially true that contributory negligence will not be imputable to one who deposits wood near a railway upon an agreement with the company that, after it is measured, the company will pay him at a certain rate for it; but if it is destroyed by a negligent fire set out by the company in running its trains, the owner of the wood will have an action to recover its value.<sup>40</sup> From these and other cases we may conclude that it is not negligence, as matter of law, for a land-owner to pile wood near a railway track.<sup>41</sup>

**§ 2320. Stacking Hay or Straw near a Railroad Track.**—So, it is generally held that a farmer is not guilty of contributory negligence in stacking his hay so near a railway track as to render him liable for a penalty under a statute making it unlawful for him to stack his hay within a particular distance,<sup>42</sup>—though it seems doubtful. But it seems clear enough that contributory negligence will not be imputed to a farmer for stacking his hay near a railway track, where it is shown that the fire was not communicated directly from the locomotive to the hay-stack, but that it was communicated to the grass along

<sup>38</sup> *Sherman v. Maine &c. R. Co.*, 86 Me. 422; s. c. 30 Atl. Rep. 69.

<sup>39</sup> *Boston Excelsior Co. v. Bangor &c. R. Co.*, 93 Me. 52; s. c. 44 Atl. Rep. 138 (the court say that the conclusion would have been the same at common law).

<sup>40</sup> *Pittsburgh &c. R. Co. v. Noel*, 77 Ind. 110. Compare *Pennsylvania Co. v. Gallentine*, 77 Ind. 322.

<sup>41</sup> *Northern &c. R. Co. v. Lewis*, 51 Fed. Rep. 658; s. c. 7 U. S. App. 254; 2 C. C. A. 446; *Boston Excelsior Co. v. Bangor &c. R. Co.*, 93 Me. 52; s. c. 44 Atl. Rep. 138. The contributory negligence of a land-owner in permitting the door in his barn near a railway track to remain open, will not prevent a recovery for its destruction by fire from sparks, neg-

ligently allowed to escape from a locomotive, under Mo. Rev. Stat. 1889, § 2615, imposing upon railroad companies an *absolute liability* for all damages caused by fires communicated directly or indirectly by locomotive engines in use on railroads owned or operated by them: *Matthews v. Missouri &c. R. Co.*, 142 Mo. 645; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 673; 44 S. W. Rep. 802.

<sup>42</sup> *Reed v. Missouri &c. R. Co.*, 50 Mo. App. 504; *American Strawboard Co. v. Chicago &c. R. Co.*, 177 Ill. 513; rev'g s. c. 75 Ill. App. 420 (manufacturing company stacked a large quantity of straw near to a switch track in daily use, and straw was ignited by a spark from a passing engine).



the right of way, and thence to the hay-stack;<sup>43</sup> nor for stacking his hay, on a newly-mown meadow, thirty rods from a railway track.<sup>44</sup>

§ 2321. **Whether Contributory Negligence to Erect Buildings near Railway Tracks.**<sup>45</sup>—On the other hand, there are circumstances under which a property owner who erects buildings near a railway track, for convenience in managing his own business in connection with the railway, the better to avail himself of its facilities, is deemed to accept the risk of the danger of such buildings being destroyed by railway fires. Somewhat in line with this, it has been held that a land-owner who authorizes the use of a locomotive engine on his premises, for convenience in loading and unloading to and from his dock and warehouse, can not maintain an action against the railroad company operating the engine, to recover damages caused by sparks from such engine.<sup>46</sup> So, where the owners of a warehouse owned a railroad track running over their own premises near it, and employed a railroad company to send an engine to draw cars over it for their accommodation, and the engine threw off sparks badly, and this they observed and complained of, but nevertheless, continued to make use of it for a long time, and finally the warehouse was set on fire and burned by sparks emitted by it,—it was held that the owner had no redress against the railroad company for the burning.<sup>47</sup> Contrasting these with other decisions upon the subject, they suggest a radical distinction between the rule of liability in cases where the plaintiff invites the dangerous agency to come upon his premises, and cases where it is brought there without his invitation.<sup>48</sup> As in the case of fences,

<sup>43</sup> *Union &c. R. Co. v. Arthur*, 2 Colo. App. 159; s. c. 29 Pac. Rep. 1031 (though a statute made the railroad company liable as an insurer).

<sup>44</sup> *St. Joseph &c. R. Co. v. Chase*, 11 Kan. 47 (not negligence as matter of law, but question for jury). But whether to stack hay in such proximity to a railway track as to expose the hay to danger from fire is contributory negligence is a question for a jury: *Missouri &c. R. Co. v. Kincaid*, 29 Kan. 654. An instruction that, if plaintiff did not use any effort to protect the hay by plowing around the ricks, or making fire guards around the same, or using such other means as a careful, prudent person would have done, and the hay was burned because of such failure, he can not recover, is properly refused in the absence of any evidence that a careful, prudent person would have plowed

around the hay-stack, or made fire guards, or used other special means to protect it from fire: *Gulf &c. R. Co. v. Johnson*, 10 U. S. App. 627; s. c. 54 Fed. Rep. 474.

<sup>45</sup> This section is cited in § 2324.

<sup>46</sup> *Spear v. Marquette &c. R. Co.*, 49 Mich. 246.

<sup>47</sup> *Marquette &c. R. Co. v. Spear*, 44 Mich. 169; s. c. 38 Am. Rep. 242.

<sup>48</sup> See the observation of the judges in *Vaughan v. Taff Vale R. Co.*, 3 Hurl. & N. 742; s. c. reversed 5 Hurl. & N. 679; 1 Thomp. Neg., 1st ed., p. 122. "The company," says Beasley, C. J., "uses a dangerous agent, and must provide proper safe-guards; the land-owner does nothing of the kind, and has a right to remain quiescent." *Salmon v. Delaware &c. R. Co.*, 38 N. J. L. 5, 13; *Delaware &c. R. Co. v. Salmon*, 39 N. J. L. 299. See also *Bass v. Chicago &c. R. Co.*, 28 Ill. 9.



hay-stacks and other combustible property,<sup>49</sup> the general rule is, that a person, not bringing such property to the railroad, or not inviting the railroad to come to it, is not guilty of contributory negligence in failing to take precautions against its being destroyed by fires communicated in the operation of the railroad, where he uses it in the customary manner,—in other words, as he might lawfully have used it if the railroad had not been there.<sup>50</sup>

**§ 2322. Not Contributory Negligence to Erect and Maintain Buildings near Railway Tracks.**—Thus, the fact that a land-owner erects and uses a building for ordinary purposes near a railway track is not, in case of its destruction by a railway fire, imputable to him as contributory negligence, although such building is more exposed to fire from the company's engines than if it were at a greater distance.<sup>51</sup> So, it is not contributory negligence, as matter of law, to build a house within thirty yards of a railroad track;<sup>52</sup> nor to fail to remove a barn which stands so far away from a railway track as to render its destruction by fire unlikely;<sup>53</sup> nor to erect upon land adjoining the right of way of a railroad company, a warehouse for the storage of elm hoops;<sup>54</sup> nor to erect and maintain a house but sixty-three feet from the center of a railroad track, roofed with poplar shingles, with a depression extending from the house to the railway in which dry leaves are suffered to accumulate;<sup>55</sup> nor to erect and maintain a wooden mill in close proximity to a railway track;<sup>56</sup> nor to erect an oil tank within thirty-six feet of a side track, so as to prevent a recovery for its destruction by fire communicated from a tar-car standing on the side track immediately opposite the oil-tank, the tar-car having been set on fire by sparks from a locomotive.<sup>57</sup>

<sup>49</sup> *Ante*, § 2317.

<sup>50</sup> *Cincinnati &c. R. Co. v. Smock*, 133 Ind. 411; s. c. 33 N. E. Rep. 108; *Briant v. Detroit &c. R. Co.*, 104 Mich. 307; s. c. 62 N. W. Rep. 365; 61 Am. & Eng. Rail. Cas. 516; *Louisville &c. R. Co. v. Malone*, 116 Ala. 600; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 878; 22 South. Rep. 897; *Cleveland &c. R. Co. v. Scantland*, 151 Ind. 488; s. c. 1 Rep. 283; 14 Am. & Eng. Rail. Cas. (N. S.) 75; 51 N. E. Rep. 1068; *Confer v. New York &c. R. Co.*, 146 Pa. St. 31; s. c. 23 Atl. Rep. 202; *Pittsburgh &c. R. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322; s. c. 56 N. E. Rep. 766; *Kansas City &c. R. Co. v. Chamberlain*, 61 Kan. 859; s. c. 60 Pac. Rep. 15.

<sup>51</sup> *Cincinnati &c. R. Co. v. Barker*,

94 Ky. 71; s. c. 21 S. W. Rep. 347; 14 Ky. L. Rep. 750.

<sup>52</sup> *Burke v. Louisville &c. R. Co.*, 7 Heisk. (Tenn.) 451.

<sup>53</sup> *Caswell v. Chicago &c. R. Co.*, 42 Wis. 193.

<sup>54</sup> *Cleveland &c. R. Co. v. Scantland*, 151 Ind. 488; s. c. 1 Rep. 283; 14 Am. & Eng. Rail. Cas. (N. S.) 75; 51 N. E. Rep. 1068.

<sup>55</sup> *Louisville &c. R. Co. v. Malone*, 116 Ala. 600; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 878; 22 South. Rep. 897.

<sup>56</sup> *Briant v. Detroit &c. R. Co.*, 104 Mich. 307; s. c. 61 Am. & Eng. Rail. Cas. 516; 62 N. W. Rep. 365.

<sup>57</sup> *Confer v. New York &c. R. Co.*, 146 Pa. St. 31; s. c. 1 Pa. Adv. Rep. 296; 23 Atl. Rep. 202.



§ 2323. **An Impressive Statement of the Reasons which Support this Doctrine.**—The following impressive statement of the reasons which support this doctrine is found in an opinion of the Supreme Court of New York, written by Beardsley, J., in a case where the plaintiff's mill, built on the margin of Lake Champlain, had been destroyed by fire communicated from the defendant's steamboat: "The property destroyed was in an exposed and hazardous position, and therefore in more than ordinary danger from mere accidental fires. This risk the plaintiffs assumed, but not the risk of another's negligence. They were on their own land, and free to use it in any manner and for any purpose which was lawful. As was correctly observed by the circuit judge, 'the plaintiffs had as good a right to erect their mill on the shore of the lake as the defendants had to sail on its bosom.' It would be a startling principle, indeed, that a building placed in an exposed position on one's own land is beyond the protection of the law; and yet it comes to this result upon the argument urged in this case. A land-owner builds immediately on the line of a railroad, as he has an unquestionable right to do; it may be an act of great imprudence, but in no sense is it illegal. Is he remediless if his house is set on fire by the sheer negligence of an engineer in conducting his engine over the railway? There must be some wrongful act or culpable negligence on the part of the plaintiff to bar him on this principle; and neither can be affirmed of any one for simply occupying a position of more or less exposure on his own premises. If the principle urged on the argument is correct, it must be applied in all cases of the same character. The owner of a lot builds upon it, although in close proximity to the shop of a smith. The house is more exposed than it would be at a greater distance from the shop; but is this to exempt the smith from the obligation of care, and to screen him from the consequences of his own negligence? I certainly think not. A horse or carriage on the open ground of the owner may be more exposed to injury than they would be in a yard or a barn; but if damaged by the carelessness of a passer-by, is the owner remediless because he chose to leave them in a place of comparative exposure and hazard? No one, I think, can doubt what the answer to this question should be. I refer to no authorities on this part of the case, for, in my opinion, none are requisite. It is but clearly to comprehend the principle on which this species of defense must rest, to see that it has no application to such a case as this. By what criterion, let me ask, are we to determine the hazards of a particular position, and on that ground say that the owner by his own folly has deprived himself of all protection? In this respect everything is comparative; but where is the true standard



to be found? A house forty feet from a steamboat-landing is in more hazard than one at the distance of forty rods; but it is less exposed than one immediately on the wharf. Goods at the window of a shop are less safe than they would be on a shelf at the rear of the room; but is the owner remediless if they are carelessly soiled or broken by some one in the street? We may run through every imaginable variety of position, some of more and some of less exposure and hazard; and we must at last, I think, come to the conclusion that while a person confines himself to a lawful employment on his own premises, his position, however injudicious and imprudent it may be, is not therefore wrongful; and that his want of due care or judgment in its selection can never amount to negligence, so as thereby to deprive him of redress for wrongs done to him by others."<sup>58</sup>

§ 2324. **Care of Buildings Erected near Railway Tracks so as to Prevent their Taking Fire.**—Expressions may be met with in judicial opinions to the effect that the owner of a building erected near a railway track, or the owner of any other kind of property which is exposed to danger from fire by being deposited near a railway track, is required to exercise only such care to prevent its destruction by fire communicated from passing engines, as a person of ordinary prudence would exercise under similar circumstances.<sup>59</sup> But the drift of judicial opinion seems to be that the person erecting a building on his own land near a railway track is not bound to take any special precautions to prevent its taking fire, any more than if the railway were not there.<sup>60</sup> He may leave it unguarded, although he is aware that combustible material has accumulated on the company's right of way.<sup>61</sup> He may maintain a wooden building near a railroad track and leave it unoccupied and unguarded after noticing sawdust and shavings near it on the right of way of the company, placed thereon by its employes, where the employes have promised him to cover them up upon his calling their attention to them.<sup>62</sup> He may permit a window in a side of a building in which hay is stored, near a railroad track, to remain broken for two or three days, so that sparks from a passing locomotive enter and ignite the hay and destroy the building.<sup>63</sup> He

<sup>58</sup> *Cook v. Champlain Transp. Co.*, 1 Denio (N. Y.) 91.

<sup>59</sup> Owner of a barn 130 feet from railroad track required to exercise only such care to prevent injury by sparks from passing engines as a person of ordinary prudence would exercise under similar circumstances: *Gulf & C. R. Co. v. Jagoe* (Tex. Civ. App.), 32 S. W. Rep. 717 (no off. rep.).

<sup>60</sup> *Ante*, §§ 2314, 2321.

<sup>61</sup> *Pittsburgh & C. R. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322; s. c. 56 N. E. Rep. 766.

<sup>62</sup> *Briant v. Detroit & C. R. Co.*, 104 Mich. 307; s. c. 62 N. W. Rep. 365; 61 Am. & Eng. Rail. Cas. 516.

<sup>63</sup> *Wild v. Boston & C. R. Co.*, 171 Mass. 245; s. c. 50 N. E. Rep. 533.



may expose hay below the sills of a barn, to the extent of eight inches, near a railway track.<sup>64</sup> He may maintain an ice house near a railway station, in which there is a small open space, two or three inches wide, under the eaves of the roof, next to the railroad track.<sup>65</sup> With such a building so exposed, he may neglect to look for a fire after observing a passing train emitting large quantities of sparks which drift toward the building.<sup>66</sup> He may permit the door of his barn, which stands near a railway track, to remain open so that sparks from a passing locomotive enter and set it on fire.<sup>67</sup> In all these cases, the buildings having been destroyed by fire communicated from locomotives of the railway company, it was held that the owner was not precluded from recovering damages on the ground of contributory negligence. And one court has gone so far as to raise a species of estoppel against the railway company, in such a case, against setting up the defense of contributory negligence in an action for damages for destroying the building by fire, where it has consented to the erection of the building upon its right of way.<sup>68</sup>

§ 2325. **Further of the Care of Buildings so Erected.**—In like manner, it has been held not contributory negligence as matter of law to leave the doors of an unfinished building, situated near a railway, open, although a considerable quantity of shavings were scattered on the floor, but it is a question for a jury.<sup>69</sup> In Missouri, it has been held that, to allow shavings to accumulate around an unfinished house, situated about one hundred feet from the track, would be such negligence as to preclude a recovery for its loss.<sup>70</sup> In a Georgia case, a fire was communicated by sparks from the defendant's engine to a pile of wood in its yard, and from there was carried to the plaintiff's premises adjacent thereto. It was held that the latter, in

<sup>64</sup> *Campbell v. McGregor*, 29 N. B. 644 (exposure of eight inches).

<sup>65</sup> *Hygienic &c. Man. Co. v. Raleigh &c. R. Co.*, 122 N. C. 881; s. c. 29 S. E. Rep. 575.

<sup>66</sup> *Hygienic &c. Man. Co. v. Raleigh &c. R. Co.*, 122 N. C. 881; s. c. 29 S. E. Rep. 575.

<sup>67</sup> *Matthews v. Missouri &c. R. Co.*, 142 Mo. 645; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 673; 44 S. W. Rep. 802 (but this under a statute making railroad companies liable as insurers for property destroyed by fire communicated from their locomotives).

<sup>68</sup> The holding was that the defendant railway company, in an action for a fire started by a locomotive, could not urge that the plaintiff was

guilty of negligence in erecting and maintaining for a number of years a small part of a dry and inflammable building on its right of way, where it had made no objection thereto, and had thus licensed plaintiff to so occupy a part of its right of way: *Kansas City &c. R. Co. v. Chamberlain*, 61 Kan. 859; s. c. 60 Pac. Rep. 15. Upon the question whether a person who, under a license from a railway company, erects a building on its right of way, takes the risk of its destruction by fire from passing locomotives, see *ante*, § 2319; *post*, § 2347.

<sup>69</sup> *Fero v. Buffalo &c. R. Co.*, 22 N. Y. 209.

<sup>70</sup> *Coates v. Missouri &c. R. Co.*, 61 Mo. 38.



building his house so near the wood-yard, had assumed the increased risk.<sup>71</sup> In an Illinois case,<sup>72</sup> the plaintiff had placed his house some distance from the railroad track, but subsequently, through the erection by another of a building more contiguous to the track, it was placed in a much more hazardous position, and was a short time afterwards destroyed by fire communicated in the first instance to the later and nearer building, and from thence to the plaintiff's property. It was sought to charge him with contributory negligence, but the court refused to sustain this plea. In a Wisconsin case,<sup>73</sup> the fact that a pane of glass was out of the window of plaintiff's house, adjoining the defendant's road, through which sparks from its engine were blown, and destroyed a quantity of goods, was held not to be such contributory negligence as would prevent a recovery. The court very properly thought that occupants of adjacent dwellings were not to be held to such a degree of care in preventing accidents of this kind as would require them, contrary to common usage, to keep their windows closed when it would be more convenient and comfortable for them to leave them open. Then, if a whole window open would not amount to negligence, a part of a pane could hardly be. In a case decided in the New York Supreme Court,<sup>74</sup> the plaintiff's barn, in which he kept his horses, stood within two feet of the line fence. Straw and manure from the barn were thrown outside, and a pile had accumulated during the summer, and had become very dry and combustible. A spark from the defendant's engine set it on fire. The Supreme Court held,

<sup>71</sup> *Macon &c. R. Co. v. McConnell*, 27 Ga. 481.

<sup>72</sup> *Toledo &c. R. Co. v. Maxfield*, 72 Ill. 95.

<sup>73</sup> *Martin v. Western &c. R. Co.*, 23 Wis. 437. See *Rowell v. Railroad*, 57 N. H. 132.

<sup>74</sup> *Collins v. New York &c. R. Co.*, 5 Hun (N. Y.) 499. So, the fact that grain is improperly stacked, so as to increase the risk of its taking fire from sparks escaping from a *threshing engine*, does not render the owner of the grain guilty of contributory negligence, precluding a recovery of damages in case the stack is set on fire and burned by sparks emitted from the engine: *Holman v. Boston Land &c. Co.*, 8 Colo. App. 282; s. c. 43 Pac. Rep. 519. A decision of the Supreme Court of Minnesota is to the effect that a father can not recover damages for the fatal burning of his *infant daughter*, whose clothing became ignited from a fire upon the right of way of the defendant railway company, set

to consume dry grass and rubbish, where the undisputed evidence shows that the child voluntarily went on the right of way, where her clothing took fire: *Kalz v. Winona &c. R. Co.*, 76 Minn. 351; s. c. 79 N. W. Rep. 310. See Vol. I, §§ 945, 1025; *ante*, § 1705, *et seq.*; § 1805, *et seq.* In an action against a railway company for the destruction of the plaintiff's property by fire, it appeared that defendant built a siding to plaintiff's factory under a contract by which plaintiff agreed "to exercise the greatest care in the management of the siding herein provided for; to prevent cars or other obstructions from getting out upon, or too close to, the main or other track; to secure the safe closing and locking of the main switch or switches, and to keep the inner safety switch in proper position; also to use such means and care generally as will tend to avoid accidents of any kind." It was held that plaintiff was not



reversing the ruling of the judge below, that this was such evidence of contributory negligence as should have been submitted to the jury. The true doctrine is that he takes the risk of such destruction, *provided there is no negligence* on the part of the company. It would be monstrous to hold that, by accepting such a license and going to the expense of erecting the building, for purposes beneficial no doubt to the company as well as to himself, he absolves the company from all duty of using care to avert its destruction by fire.

§ 2326. **A Limit Suggested to the Foregoing Doctrine.**—Other decisions suggest a limit to the doctrine that a land-owner can build where he pleases, and allow combustible material to accumulate around his building as much as it will, or negligently expose his building to the inroads of sparks, and throw the responsibility for its loss upon the railroad company, if it takes fire from a passing locomotive. Experience, as well as the teachings of the judicial reports, shows that, no matter how well locomotive engines may be equipped, or how carefully managed, they are liable to scatter *some* fire. This seems to be unavoidable under the best conditions. We have already had occasion to note, in many of its relations, the principle that it is contributory negligence, as matter of law, for a person to thrust himself needlessly and recklessly into a known danger.<sup>75</sup> Ought a person to occupy any better position in the eye of the law, who needlessly and recklessly thrusts his property into a known danger in *unnecessary* proximity to the railroad, and it may be so near a railroad track as to be exposed to constant peril from the scattering of fire from passing locomotives, even in the absence of negligence in the construction, the reparation, and the management of such locomotives? In such a case, it is not a hard rule which imposes upon a land-owner the affirmative duty of proving negligence in case of the destruction of his building by fire, and which refuses to make the fact of its destruction by a fire communicated from a locomotive of the railway company *prima facie* evidence of negligence.<sup>76</sup> In the construction of buildings in

liable for accumulations of rubbish beside the track through which fire was communicated to its building: Pittsburgh &c. R. Co. v. Indiana Horseshoe Co., 154 Ind. 322; s. c. 56 N. E. Rep. 766. So, it has been held that the mere fact that the owner of lands adjoining a railroad knew that a fire had been set by the company's employes upon its right of way, and was still smouldering thereon in stumps and logs, does not, as a matter of law, require him to leave his

harvesting and go and extinguish the fires: Clune v. Milwaukee &c. R. Co., 75 Wis. 532; s. c. 44 N. W. Rep. 843.

<sup>75</sup> Vol. I, § 186; *ante*, §§ 1471, 1664, 1665.

<sup>76</sup> It was so reasoned where the building which was destroyed was but three-and-a-half feet distant from the defendant's railway track: Flinn v. New York &c. R. Co., 142 N. Y. 11; s. c. 36 N. E. Rep. 1046; 58 N. Y. St. Rep. 431.



such situations and in the care of them after they have been built, it is obviously proper and just that the builder should be held to the exercise of that reasonable care which ought to be exercised by a man of ordinary prudence, having due regard for the rights of others, under the same circumstances. This question has been reasoned at length in accordance with the views here submitted, by the Supreme Court of Wisconsin,—the conclusion of the court being that, “where a person places a building so constructed as to be easily ignited by fire, or other property of a highly combustible nature, in the immediate vicinity of a railroad, without any protection, and thereby increases the chances of its destruction, or where he carries on a business in the immediate vicinity of such road, which from its nature is extremely hazardous in such vicinity on account of its susceptibility to ignition and combustion from the sparks emitted from the passing engines, and such property is destroyed from fire communicated by such engines, in an action to recover for the value thereof on account of the negligence of the railroad company, it necessarily becomes a question whether such building was constructed in such manner as a person of ordinary care and prudence would have constructed it under like circumstances; or, if it be combustible property, whether a man of ordinary prudence would have placed the same where it was placed by the plaintiff, and with like protection against fire; and, in the case of a business carried on, whether the business was conducted with that care with which a man of ordinary prudence would have conducted the same under the circumstances. In these cases, the court can not say, as a matter of law, that there was no contributory negligence on the part of the plaintiff, but the question should be submitted to the jury, under proper instructions.”<sup>77</sup> Accordingly, where the evidence showed that the plaintiff, in erecting a building near the defendant’s railway track, permitted an accumulation of hay and shavings under it and allowed the side next the railway to be open below the sills,—it was held that the question whether he was guilty of contributory negligence in so doing ought to be submitted to the jury.<sup>78</sup>

#### § 2327. Contributory Negligence in Failing to Put Out the Fire.—

As already seen, when discussing the subject of contributory negligence,<sup>79</sup> the law imposes upon a person who is injured or endangered by the negligence of another, the duty of using reasonable or ordinary care and exertions to *reduce the damages* flowing from the injury or to avert the threatened danger. This principle applies with peculiar

<sup>77</sup> *Murphy v. Chicago &c. R. Co.*,  
45 Wis. 222; s. c. 4 N. W. Rep. 81.

<sup>78</sup> *Murphy v. Chicago &c. R. Co.*,  
45 Wis. 222.

<sup>79</sup> Vol. I, § 251, *et seq.*



force to the subject under consideration. A property owner, after discovering that a railway fire has been started, and that it is advancing toward his property, is bound to exercise the care which ought to be exercised by a prudent man having a just regard for the rights of others, to the end of extinguishing the fire and preventing it from damaging his property. He can not, negligently or wantonly, stand still and allow the fire to advance and destroy his property, when he might have prevented that catastrophe by making a reasonable exertion, and then hold the railway company liable in damages for its destruction, on the footing of its being an *insurer* against such result, or even on the footing of its having started the fire through *negligence*; but in such a case, his own intervening contributory negligence will be, in theory of the law, the *proximate*, and the negligence of the railroad company the *remote cause* of the catastrophe.<sup>80</sup> It follows, where the rule has not been made otherwise by statute, that the railway company, in such an action, under a proper state of pleadings and evidence, is entitled to have the court instruct the jury that if, after the discovery of the fire by the plaintiff, he neglected to use reasonably practicable means to suppress it, he can not recover.<sup>81</sup> But the law in this situation goes no further than to require the plaintiff to act reasonably. It does not deny him a recovery for failing to make the attempt where it would obviously prove fruitless;<sup>82</sup> and in such a state of facts it is error to instruct the jury, without any reference to the inquiry whether the plaintiff would have been able to cope with the fire, that if he had noticed that his property had been set on fire, and made no attempt to put it out, he can not recover for any damages subsequently resulting.<sup>83</sup> So, the mere fact that an owner of lands adjoining a railroad neglected for ten or fifteen minutes to

<sup>80</sup> *Tilley v. St. Louis & C. R. Co.*, 49 Ark. 535; s. c. 6 S. W. Rep. 8; *Illinois & C. R. Co. v. McKay*, 69 Miss. 139; s. c. 12 South. Rep. 447.

<sup>81</sup> *Hogle v. New York & C. R. Co.*, 28 Hun (N. Y.) 363. In Indiana, where, until a recent statute, the burden was upon the plaintiff of disproving his own contributory negligence, and where *special findings* by juries are in vogue, a finding that the plaintiff and his family made efforts, but without specifying what the efforts were, to subdue the fire, at some stage of its progress not designated, fails to establish freedom from contributory negligence on the part of the plaintiff: *Wabash R. Co. v. Miller*, 18 Ind. App. 549; s. c. 48 N. E. Rep. 663; criticising

*New York & C. R. Co. v. Grossman*, 17 Ind. App. 652; s. c. 46 N. E. Rep. 546. In the same State, a special verdict which merely shows certain precautions taken by the property-owner before the fire, to protect his property from such fires, but without showing any effort to protect the property after the fire had started, or any excuse for such failure, is not sufficient to negative negligence on his part: *Chicago & C. R. Co. v. Bailey*, 19 Ind. App. 163; s. c. 46 N. E. Rep. 688.

<sup>82</sup> *Sugarman v. Manhattan & C. R. Co.*, 42 N. Y. St. Rep. 30; s. c. 16 N. Y. Supp. 533.

<sup>83</sup> *Tilley v. St. Louis & C. R. Co.*, 49 Ark. 535; s. c. 6 S. W. Rep. 8.



attempt to extinguish a fire set by an engine, after discovering it, will not preclude a recovery where, if he had started at once he could not have reached the fire in time to extinguish it, and prevent the damage.<sup>84</sup> Whether or not a person failed to exercise reasonable prudence in neglecting to burn the grass around his hay stack, to protect it from an approaching prairie fire which he saw twenty-four hours before it reached him, was held a question *for the jury*.<sup>87</sup>

§ 2328. **Not Negligence for Property Owner to Act Erroneously under Impulse of Sudden Fear.**—Nor will contributory negligence be imputed as matter of law to the property owner, because of his acting erroneously under an impulse of sudden fear caused by the breaking out of a fire.<sup>86</sup> In such a situation, the question whether the plaintiff acted reasonably and carefully,—in other words, the question of his contributory negligence in failing to make due exertions towards extinguishing the fire, is peculiarly a *question for a jury*.<sup>87</sup>

§ 2329. **Exceptions to the Foregoing Doctrines.**—In summing up the question of contributory negligence in this relation, it may be said that the doctrine that the plaintiff is not imputable with negligence because of not taking special pains to prevent the communication of fire to his land has three exceptions; or perhaps it may be more proper to say that there are three cases to which the rule does not extend: 1. The first is, where the escape of the fire from the locomotive is the result of accident, and in spite of the care and watchfulness of the defendant. Here, if the fire be carried to the property of another on account of accumulation of dry grass, weeds, or other

<sup>84</sup> *Mills v. Chicago &c. R. Co.*, 76 Wis. 422; s. c. 45 N. W. Rep. 225.

<sup>86</sup> *Brown v. Brooks*, 85 Wis. 290; s. c. 55 N. W. Rep. 395. The owner of an orchard destroyed by fire was held not chargeable with negligence for not plowing or burning a fire guard along his premises adjacent to the company's right of way, whence the fire was communicated, when there was an exceptionally high wind prevailing on the day of the fire, and the precaution could not have saved the property: *Missouri &c. R. Co. v. Steinberger*, 6 Kan. App. 585; s. c. 51 Pac. Rep. 623. Where the servant of the plaintiff, who was in charge of his property, went to the scene of the fire and made some effort to extinguish it, the plaintiff was not chargeable with contributory negligence as matter of law; but whether the

servant was diligent in the performance of his duty was a question *for the jury*: *Richmond v. McNeil*, 31 Ore. 342; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 691; 49 Pac. Rep. 879 (citing *Illinois &c. R. Co. v. McClelland*, 42 Ill. 355; criticising *St. Louis &c. R. Co. v. Hecht*, 38 Ark. 357).

<sup>86</sup> *Sugarman v. Manhattan &c. R. Co.*, 42 N. Y. St. Rep. 30; s. c. 16 N. Y. Supp. 533.

<sup>87</sup> It was so held where the property-owner had poured water upon the fire until he supposed that he had extinguished it, and it afterwards broke out and did the damage complained of: *Haverly v. State Line &c. R. Co.*, 135 Pa. St. 50; s. c. 19 Atl. Rep. 1013; 47 Phila. Leg. Int. 336; 26 W. N. C. 321; 43 Am. & Eng. Rail. Cas. 31; 21 Pitts. L. J. (N. S.) 30; 18 Wash. L. Rep. 499.



combustibles on the company's right of way, it would certainly be proper that the defendant should be permitted to show that the plaintiff was in this respect equally in fault,—that his lands were in no better condition than were those of the railroad.<sup>88</sup> 2. The second case is that of a “seen” danger. While, as to a mere anticipated or unseen danger, the plaintiff may well be permitted to use his property as he desires, yet in the presence of a “seen” danger he must use his best efforts to prevent it.<sup>89</sup> “The distinction is between a known, present, or immediate danger arising from the negligence of another,—that which is imminent and certain unless the party does or omits to do some act by which it may be avoided,—and a danger arising in like manner, but which is remote and possible, or probable only, or contingent and uncertain, depending on the course of future events, such as the future conduct of the negligent party, and other, as yet unknown, circumstances. The difference is that between realization and anticipation. A man in his senses, in face of what has been aptly termed a ‘seen danger,’—that is, one which presently threatens and is known to him,—is bound to realize it, and to use all proper care and make all reasonable efforts to avoid it; and if he does not, it is his own fault, and he having thus contributed to his own loss and injury, no damages can be recovered from the other party, however negligent the latter may have been.”<sup>90</sup> An example of the latter may be seen in a case decided in Illinois, where the plaintiff's son saw the fire in the stubble near his fence, while on his way home, but, instead of endeavoring to extinguish it, went on, so that half an hour later, when he returned, it had extended so far as to be beyond control; this was held an act of negligence chargeable to the plaintiff, and sufficient to bar a recovery.<sup>91</sup> 3. The third case is, where the contributory negligence of the plaintiff is the remote, and not the proximate cause of the injury.<sup>92</sup>

§ 2330. **Miscellaneous Cases Illustrating the Doctrines of this Chapter.**—Contributory negligence was not imputed to the owner of a building used for the *storage of dry hoop-poles*, from the fact that he left the premises to go to his house while the train which set the fire to his building was approaching, where the building was damp from recent rain, and had never taken fire, though it had stood there

<sup>88</sup> *Fitch v. Pacific R. Co.*, 45 Mo. 325; *Ohio & C. R. Co. v. Shanefelt*, 47 Ill. 497.

<sup>89</sup> *Snyder v. Pittsburgh & C. R. Co.*, 11 W. Va. 15.

<sup>90</sup> *Kellogg v. Chicago & C. R. Co.*, 26 Wis. 223.

<sup>91</sup> *Illinois & C. R. Co. v. McClelland*, 42 Ill. 355. And see *Toledo & C. R. Co. v. Pindar*, 53 Ill. 447; *McNarra v. Chicago & C. R. Co.*, 41 Wis. 69.

<sup>92</sup> *Fitch v. Pacific R. Co.*, 45 Mo. 325; *Doggett v. Richmond & C. R. Co.*, 78 N. C. 305.



for four years, and where the owner promptly returned and used all available means to save the property;<sup>93</sup> nor to the owner of cotton deposited on the platform of a compress company near railway tracks, because of an agreement between the compress company and the owner of the cotton that it was left there at the owner's risk;<sup>94</sup> nor to the owner of a meadow near a railroad who let the hay lie upon it in windrows, in the customary manner of husbandry;<sup>95</sup> nor to one who sustained personal injury in consequence of a prairie fire which was negligently set by the locomotive of a railway company, merely because he might have escaped the injury if he had been familiar with the locality.<sup>96</sup>

**§ 2331. Whether the Contributory Negligence of the Property Owner was the Proximate Cause of his Loss.**—Where the plaintiff piled his wood on the division line between his own land and the right of way of the railroad company, and it was burned by fire scattered from a passing locomotive, the negligence of the plaintiff, if any, in piling his wood so near the track, was not deemed the *proximate cause* of his loss, so as to prevent him from recovering damages from the company.<sup>97</sup> The failure of a land-owner to keep the grass down in his orchard is not deemed the proximate, but is deemed the remote cause of the destruction of his property by a fire negligently set out by a railway locomotive.<sup>98</sup>

**§ 2332. Evidentiary Facts Bearing upon the Question of Contributory Negligence.**—The fact that the land to which the fire is communicated is *woodland* is said to have a bearing on the question of the plaintiff's negligence, which should be considered by the court in

<sup>93</sup> *Cleveland &c. R. Co. v. Scantland*, 151 Ind. 488; s. c. 1 Rep. 283; 51 N. E. Rep. 1068.

<sup>94</sup> *Edwards v. Campbell*, 12 Tex. Civ. App. 237; s. c. 33 S. W. Rep. 761.

<sup>95</sup> *Union &c. R. Co. v. Ray*, 46 Neb. 750; s. c. 65 N. W. Rep. 773.

<sup>96</sup> *McTavish v. Great Northern R. Co.*, 8 N. D. 333; s. c. 79 N. W. Rep. 443. A man whose property is destroyed by the negligence of another, is not compelled to bear the loss merely because two other persons have agreed between themselves that one of them shall bear the risk of the negligence of the other. Therefore, a covenant in a lease of a warehouse owned by a railroad company, that all damages caused by fire shall be sustained by the lessee, does not

affect an agent of such lessee whose property is destroyed while in the warehouse, by fire caused by the lessor's negligence, whether or not he knew of such covenant: *King v. Southern &c. Co.*, 109 Cal. 96; s. c. 41 Pac. Rep. 786; 29 L. R. A. 755.

<sup>97</sup> *Boston Excelsior Co. v. Bangor &c. R. Co.*, 93 Me. 52; s. c. 44 Atl. Rep. 138.

<sup>98</sup> *Patton v. St. Louis &c. R. Co.*, 87 Mo. 117; s. c. 56 Am. Rep. 446; 1 West. Rep. 760. That the negligence of the property owner, in order to prevent a recovery under the Kansas statute, must have contributed as a proximate cause of his loss,—see *Union &c. R. Co. v. Eddy*, 2 Kan. App. 291; s. c. 42 Pac. Rep. 413.



*instructing the jury.* The greater difficulty of keeping such land clear of inflammable matter will abate the degree of diligence required of the land-owner.<sup>99</sup> Where a land-owner had claimed and obtained damages for the occupation by the company of a certain breadth of his land, and then ran his fence inside of that space, so as to enclose a portion of the company's right of way, it was held that evidence of that fact should be received as bearing on the question of negligence.<sup>100</sup>

§ 2333. **Obsolete Doctrines in this Connection.**—It was held, in one case, that the owner of *cotton*, whose *bailees* had, with his knowledge, actual or constructive, negligently allowed it to remain on a railroad platform, where it took fire from sparks emitted by an engine of the company, could not recover damages from the company, because the negligence of his *bailees* would be imputed to him in law.<sup>101</sup> While the obsolete doctrine of *comparative negligence* obtained in Illinois, no longer the law in that State,<sup>102</sup> in an action against a railroad company for the burning of the plaintiff's hotel by sparks emitted from one of the defendant's locomotives, it was held that the jury, in assessing damages, should take into consideration the question whether the plaintiff had exercised proper care in protecting his hotel from fire, and should also consider whether it was negligence in the railway company to *use wood for fuel in a coal-burning engine*.<sup>103</sup>

<sup>99</sup> *Chicago &c. R. Co. v. Simonson*, 54 Ill. 505.

<sup>100</sup> *Railroad Co. v. Yeiser*, 8 Pa. St. 366.

<sup>101</sup> *Texas &c. R. Co. v. Tankersley*, 63 Tex. 57.

<sup>102</sup> Vol. I, §§ 259, 264.

<sup>103</sup> *Chicago &c. R. Co. v. Pennell*, 94 Ill. 448.



## CHAPTER LXXVIII.

## STATUTORY LIABILITY FOR RAILWAY FIRES.

| SECTION  | SECTION  |
|--|--|
| 2337. Statutes making the railroad company liable as an insurer.                                 | 2343. Not necessary that the property should have been insurable.                        |
| 2338. Statutes making the setting of the fire <i>prima facie</i> evidence of negligence.         | 2344. Duty under these statutes to keep right of way clear.                              |
| 2339. Further of these statutes in detail—Minnesota, Iowa, Illinois, Montana.                    | 2345. Statutes extend to fires communicated in burning off right of way.                 |
| 2340. Still further of these statutes—New Jersey, Arkansas, Mississippi, Kansas, Michigan, Ohio. | 2346. What property embraced within these statutes.                                      |
| 2341. Constitutionality of statutes making railway companies liable for fires.                   | 2347. Further of the kinds of property embraced within these statutes.                   |
| 2342. These statutes take the question of negligence to the jury.                                | 2348. When a fire is deemed to have been "communicated" from the defendant's locomotive. |
|  | 2349. Contributory negligence as a defense against this statutory liability.             |
|  | 2350. Other holdings under these statutes.   |

§ 2337. Statutes Making the Railroad Company Liable as an Insurer.<sup>1</sup>—Some of the statutes are held to make the railroad company liable as an insurer. Such is the construction placed upon the statute of Missouri,<sup>2</sup> declaring that the railroad corporation "shall be responsible in such cases;"<sup>3</sup> the statute of South Carolina,<sup>4</sup> making railroad companies liable for property destroyed by fire communicated by their locomotive engines, originating within the limits of their right of way in consequence of any act of their authorized agents or employés, etc., under which it is held that the questions of negligence and proximate cause are irrelevant;<sup>5</sup> and the statute of

<sup>1</sup> This section is cited in §§ 1895, 2275, 2357, 2380.

<sup>2</sup> Rev. Stat. Mo. 1889, § 2615.

<sup>3</sup> Mathews v. St. Louis & C. R. Co., 121 Mo. 298; s. c. 24 S. W. Rep. 591; 25 L. R. A. 161.

<sup>4</sup> Gen. Stat. S. C., § 1511.

<sup>5</sup> Thompson v. Richmond & C. R. Co., 24 S. C. 366. The South Carolina statute above referred to (now, Rev. Stat. S. C., § 1688) does not restrict the liability of the railroad company to insurable property: such is not the effect of the last clause



Colorado,<sup>6</sup> providing that every railroad company shall be liable for all damages by fire that is set out or caused by operating its line of railroad.<sup>7</sup> Such, also, is the statute of Maine,<sup>8</sup> and of Massachusetts,<sup>9</sup> providing that when any injury is done to any building or other property of any person, by fire "communicated"<sup>10</sup> by a locomotive of any railroad company, the latter shall be responsible in damages to the person or corporation so injured. A statute of Connecticut,<sup>11</sup> like that of South Carolina, referred to in a preceding note, makes railroad companies liable for injuries to property by fire communicated by their locomotives, and gives them an insurable interest in property along their routes. The construction of the statute is that the railroad company is liable for property destroyed or injured by fire communicated from its locomotive, whether the property was of such a kind that it might have obtained insurance upon it or not.<sup>12</sup> Such, also, is the statute of Ohio,<sup>13</sup> "making railroad companies liable for loss or damage by fire in certain cases, and prescribing rules of evidence." Under this statute the liability of the company is established when it is admitted or proved that the fire which caused the destruction originated on the land of the company and was caused by the operation of its road.<sup>14</sup>

§ 2338. Statutes Making the Setting of the Fire *Prima Facie* Evidence of Negligence.—Statutes exist in Vermont,<sup>15</sup> Maryland,<sup>16</sup>

of the statute, authorizing the company to effect insurance on property along its route; but the railroad company is liable for the destruction of or damage to adjacent property, either real or personal, by fire communicated from its locomotive or originating within its right of way, whether it can get insurance upon such property or not: *Dean v. Charleston & C. R. Co.*, 55 S. C. 504; s. c. 33 S. E. Rep. 579.

<sup>6</sup> Gen. Stat. Colo., § 2798.

<sup>7</sup> *Union & C. R. Co. v. Arthur*, 2 Colo. App. 159; s. c. 29 Pac. Rep. 1031. See also *Union & C. R. Co. v. Tracy*, 19 Colo. 331; *Union & C. R. Co. v. De Busk*, 12 Colo. 294. A subordinate court in Colorado has ruled that, to entitle the plaintiff to recover in an action under the above statute, there must either be direct proof connecting the fire with the defendant's locomotive, or the circumstances must be such as to preclude all probability of the fire having originated in any other way: *Stratton v. Union & C. R. Co.*, 7 Colo. App. 126; s. c. 42 Pac. Rep. 602. This

is manifestly unsound—a mere judicial expletive. The question is to be determined by a preponderance of evidence, as in other civil cases.

<sup>8</sup> Stat. 1842, ch. 9, § 5; Revised Stat. 1883, § 64, p. 481.

<sup>9</sup> Gen. Stat. 1860, ch. 63, § 101; *Perley v. Eastern R. Co.*, 98 Mass. 414; *Ingersoll v. Stockbridge R. Co.*, 8 Allen (Mass.) 438.

<sup>10</sup> For a construction of this word, see *Hart v. Western R. Co.*, 13 Metc. (Mass.) 99; *Safford v. Boston & C. R. R.*, 103 Mass. 583.

<sup>11</sup> Conn. Stat. 1881, ch. 92, § 1.

<sup>12</sup> *Grissell v. Housatonic R. Co.*, 54 Conn. 447; s. c. 4 N. Eng. Rep. 585; 9 Atl. Rep. 137.

<sup>13</sup> 91 Ohio Laws, p. 187.

<sup>14</sup> *Lake Erie & C. R. Co. v. Falk*, 61 Ohio St. 312; s. c. 56 N. E. Rep. 1020.

<sup>15</sup> Gen. Stat. Vt., ch. 28, §§ 78, 79; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; 3 Cent. L. J. 353; *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449.

<sup>16</sup> Md. Code, art. 77, § 2; *Baltimore & C. R. Co. v. Woodruff*, 4 Md. 242;



New Jersey,<sup>17</sup> Kansas,<sup>18</sup> Iowa,<sup>19</sup> Illinois,<sup>20</sup> Minnesota,<sup>21</sup> Michigan,<sup>22</sup> Arkansas,<sup>23</sup> Mississippi,<sup>24</sup> Ohio,<sup>25</sup> Montana,<sup>26</sup> and Utah,<sup>27</sup> and perhaps in other States, which, either in terms or by judicial construction, make the mere fact of the communication of a fire by a railway company *prima facie* evidence of negligence.

Baltimore &c. R. Co. v. Shipley, 30 Md. 252; Baltimore &c. R. Co. v. Dorsey, 37 Md. 19.

<sup>17</sup> Rev. Stat. N. J., ch. 697, §§ 13, 14; Delaware &c. R. Co. v. Salmon, 39 N. J. L. 299; N. J. Rev. 911; Wiley v. West Jersey &c. R. Co., 44 N. J. L. 247.

<sup>18</sup> Gen. Stat. Kan. 1122, ch. 118, § 2; Missouri &c. R. Co. v. Davidson, 14 Kan. 349; Kan. Laws 1885, ch. 155; Missouri &c. R. Co. v. Cady, 44 Kan. 633; s. c. 24 Pac. Rep. 1088; Missouri &c. R. Co. v. Lamar, 44 Kan. 636; s. c. 24 Pac. Rep. 1089; Missouri &c. R. Co. v. Merrill, 40 Kan. 404; Clark v. Ellithorp, 9 Kan. App. 503; s. c. 59 Pac. Rep. 286.

<sup>19</sup> Iowa Code, § 1289; Rodemacherv. Milwaukee &c. R. Co., 41 Iowa 297. In Small v. Chicago &c. R. Co., 50 Iowa 338; s. c. 6 Cent. L. J. 310, it was held by a divided court that the liability of railroad companies for damages caused by fire from their engines was by this section of the Code made absolute. But, on a rehearing, this decision was overruled: See s. c. 8 Cent. L. J. 276; Iowa Code, § 1289; Babcock v. Chicago &c. R. Co., 62 Iowa 593; Small v. Chicago &c. R. Co., 55 Iowa 582; Slosson v. Burlington &c. R. Co., 51 Iowa 294; Rose v. Chicago &c. R. Co., 72 Iowa 625; s. c. 34 N. W. Rep. 450.

<sup>20</sup> Rev. Stat. Ill. 1877, p. 775, § 89. And see Chicago &c. R. Co. v. McCall, 56 Ill. 28; Pittsburgh &c. R. Co. v. Campbell, 86 Ill. 445; Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; Chicago &c. R. Co. v. Clampit, 63 Ill. 95; Rev. Stat. Ill. 1889, ch. 114, § 89; Chicago &c. R. Co. v. Goyette, 133 Ill. 21; s. c. 24 N. E. Rep. 549; 43 Am. & Eng. Rail. Cas. 36; affirming s. c. 32 Ill. App. 574; Starr & C. Ill. Stat., ch. 114, § 104; Toledo &c. R. Co. v. Kingman, 49 Ill. App. 43; Wabash R. Co. v. Smith, 42 Ill. App. 527; First National Bank v. Lake Erie &c. R. Co., 65 Ill. App. 21; Louisville &c. R. Co. v. Black, 54 Ill. App. 82.

<sup>21</sup> Minn. Gen. Stat. 1878, ch. 34, § 60; Bowen v. St. Paul &c. R. Co., 36 Minn. 522; s. c. 32 N. W. Rep.

751; Mahoney v. St. Paul &c. R. Co., 35 Minn. 361; Cantlon v. Eastern R. Co., 45 Minn. 481; s. c. 48 N. W. Rep. 22.

<sup>22</sup> How. Mich. Stat., § 3378; Jones v. Michigan &c. R. Co., 59 Mich. 437; construed in Peter v. Chicago &c. R. Co., 121 Mich. 324; s. c. 80 N. W. Rep. 295.

<sup>23</sup> Mansf. Ark. Dig., § 5537; St. Louis &c. R. Co. v. Jones, 59 Ark. 105; s. c. 26 S. W. Rep. 595.

<sup>24</sup> Miss. Code, § 1059; Louisville &c. R. Co. v. Natchez &c. R. Co., 67 Miss. 399; s. c. 43 Am. & Eng. Rail. Cas. 54; 7 South. Rep. 350.

<sup>25</sup> Ohio Act of April 26, 1894, 91 Ohio Laws, p. 187; construed in Baltimore &c. R. Co. v. Kreager, 61 Ohio St. 312; s. c. 56 N. E. Rep. 203; Cleveland &c. R. Co. v. Ringley, 61 Ohio St. 312; s. c. 56 N. E. Rep. 203; Lake Erie &c. R. Co. v. Falk, 61 Ohio St. 312; s. c. 56 N. E. Rep. 203; Continental Trust Co. v. Toledo &c. R. Co., 89 Fed. Rep. 637; s. c. 40 Ohio L. J. 379; Martz v. Cincinnati &c. R. Co., 12 Ohio C. C. 144; s. c. 1 Ohio C. D. 451. The Supreme Court of Ohio hold that, under the statute of that State, it is not necessary for the plaintiff to allege and prove negligence on the part of the company at all, and that the absence of such negligence is not a defense; but that the statute means what it says; and that a case under it is made out when it is proved that the plaintiff's property was damaged or destroyed by a fire communicated from a locomotive employed by the railway company in operating its road: Baltimore &c. R. Co. v. Kreager, 61 Ohio St. 312; s. c. 56 N. E. Rep. 203; Cleveland &c. R. Co. v. Ringley, 61 Ohio St. 312; s. c. 56 N. E. Rep. 203; Lake Erie &c. R. Co. v. Falk, 61 Ohio St. 312; s. c. 56 N. E. Rep. 203. See also Lake Erie &c. R. Co. v. Falk, 16 Ohio C. C. 125.

<sup>26</sup> Montana Laws of 1881, p. 71, construed in Diamond v. Northern &c. R. Co., 6 Mont. 580; s. c. 13 Pac. Rep. 367.

<sup>27</sup> Utah Comp. Laws, § 503, p. 217;



§ 2339. Further of these Statutes in Detail—Minnesota, Iowa, Illinois, Montana.<sup>28</sup>—Under the Minnesota statute,<sup>29</sup> the fact that the fire causing the damage was scattered or thrown from a railway engine is *prima facie* evidence only of defects in the engine and negligence of the employes of the company in operating it, and not of the negligence of leaving the right of way in an unsafe condition.<sup>30</sup> The ground of liability is negligence in having a defective engine, and the statute does not change the character of the issue, but merely relieves the plaintiff from taking the initiative.<sup>31</sup> This presumption is not rebutted where it is not affirmatively proved that the dampers ten inches deep and four inches long at the front and rear of the ash-pan beneath the fire-box, or either of them, were closed, or, if they were open, that this was necessary.<sup>32</sup> The Iowa code<sup>33</sup> was no doubt intended to make the railroad company liable as an insurer; for it used the unqualified words "shall be liable for all damages by fire that is set out or caused by the operation" of their roads, etc.; but this was held by judicial construction<sup>34</sup> to make the fact of the setting of the fire *prima facie* evidence of negligence only, which the railroad company might rebut by proof of due care.<sup>35</sup> In other words, the statute was whittled down so as to leave the liability where, under proper conceptions, it is left under the principles of the common law.<sup>36</sup> In order to rebut the presumption created by the Illinois statute, it is not only necessary to prove that the engine was provided with the best and most improved appliances, but also that those appliances were at the time of the setting of the fire in suitable order and repair, and that there was no negligence in their use and management.<sup>37</sup>

Anderson v. Wasatch & C. R. Co., 2 Utah 518.

<sup>28</sup> This section is cited in §§ 2354, 2357.

<sup>29</sup> Gen. Stat. Minn., ch. 34, § 60.

<sup>30</sup> Bowen v. St. Paul & C. R. Co., 36 Minn. 522; s. c. 32 N. W. Rep. 751.

<sup>31</sup> Mahoney v. St. Paul & C. R. Co., 35 Minn. 361. The statute provides that the fact of fire being scattered shall be *prima facie* evidence of negligence. The effect of the statute is to raise a presumption which makes out the case of the plaintiff until the presumption is rebutted. The issue is the use of a defective engine, or negligence in the manner of operating it: Mahoney v. St. Paul & C. R. Co., 35 Minn. 361.

<sup>32</sup> Cantlon v. Eastern R. Co., 45 Minn. 481; s. c. 48 N. W. Rep. 22.

<sup>33</sup> Iowa Code, § 1289.

<sup>34</sup> Two judges dissenting,—Beck, C. J., and Day, J.

<sup>35</sup> Small v. Chicago & C. R. Co., 50 Iowa 338; Slosson v. Burlington & C. R. Co., 51 Iowa 294; Rose v. Chicago & C. R. Co., 72 Iowa 625; s. c. 34 N. W. Rep. 450.

<sup>36</sup> *Ante*, § 2285.

<sup>37</sup> Chicago & C. R. Co. v. Goyette, 133 Ill. 21; s. c. 43 Am. & Eng. Rail. Cas. 36; 24 N. E. Rep. 549; aff'g s. c. 32 Ill. App. 574; Chicago & C. R. Co. v. Hunt, 24 Ill. App. 644. Another holding is that the statute does not render the railroad company liable where it has employed no improper means or appliances to prevent the escape of sparks, and has properly handled the means provided: First Nat. Bank v. Lake Erie & C. R. Co., 65 Ill. App. 21. For an instruction which was condemned as stating the rule too strongly, see Chicago & C. R. Co. v. Hunt, 24 Ill. App. 644. And this we have seen to be the general rule: *Ante*, § 2234. In another case



§ 2340. Still Further of these Statutes—New Jersey, Arkansas, Mississippi, Kansas, Michigan, Ohio.—The provision of the New Jersey statute,<sup>38</sup> that in an action to recover for damage caused by fire communicated by a locomotive, “in violation of the preceding sections of this act [which requires the use of screens or other appliances], proof that the injury was so done shall be *prima facie* evidence of such violation,” is held to mean that proof of the communication of fire by the engine should be *prima facie* evidence of the violation of the provisions of the act.<sup>39</sup> The Arkansas statute, affirming what we have seen to be the general rule, creates a presumption of negligence which can only be overcome by proving that the company was using proper and safe engines and that its employes were conducting them in a proper and safe manner.<sup>40</sup> The Mississippi statute more broadly provides that proof of an injury “inflicted by the running of the locomotive or cars” of a railroad company shall be *prima facie* evidence of want of reasonable skill and care on the part of the company. This is held to include an injury by scattering fire, so as to make proof of the communication of fire *prima facie* evidence of negligence.<sup>41</sup> The Kansas statute,<sup>42</sup> providing that the occurrence of a fire caused by the operation of a railroad is *prima facie* evidence of negligence on the part of the railroad company, applies to all cases where the fire results from any step in the operation of the road; and a coupling of a charge of negligence in allowing combustible material to accumulate on the roadway, with one that the fire was negligently permitted to escape from a passing locomotive, will not take the case outside of the application of the statute.<sup>43</sup> The Michigan statute<sup>44</sup> provides in substance that railroad companies shall not be held liable for injuries by fire originating from engines whose machinery, smokestacks or fire-

it is said that the statutory presumption is rebutted by evidence that the railroad company used a very high degree of care and skill, to avoid inflicting any injury, in the construction and operation of its engines: *Toledo & C. R. Co. v. Kingman*, 49 Ill. App. 43. Under the Illinois statute, a railroad company is liable for a fire set by its engines, although the fire is started outside of its right of way: *Louisville & C. R. Co. v. Black*, 54 Ill. App. 82. The operation of the Montana statute (Mont. Laws 1881, p. 71, § 7), seems to be merely that the fact of the communication of the fire makes out a *prima facie* case of negligence, which shifts the burden upon the company of showing that it was not in fault: *Diamond v. Northern & C. R. Co.*, 6 Mont. 580. This statute

was held not to trench upon the charter rights of the Northern Pacific Railroad Company under the act of Congress by which it was created: *Diamond v. Northern & C. R. Co.*, 6 Mont. 580.

<sup>38</sup> N. J. Rev., 911.

<sup>39</sup> *Wiley v. West Jersey & C. R. Co.*, 44 N. J. L. 247.

<sup>40</sup> *St. Louis & C. R. Co. v. Jones*, 59 Ark. 105; s. c. 26 S. W. Rep. 595.

<sup>41</sup> *Louisville & C. R. Co. v. Natchez & C. R. Co.*, 67 Miss. 399; s. c. 43 Am. & Eng. Rail. Cas. 54; 7 South. Rep. 350.

<sup>42</sup> Kan. Laws 1885, ch. 155.

<sup>43</sup> *Missouri & C. R. Co. v. Merrill*, 40 Kan. 404; s. c. 19 Pac. Rep. 793. Substantially to the same effect, see *Clark v. Ellithorp*, 9 Kan. App. 503; s. c. 59 Pac. Rep. 286.

<sup>44</sup> *How. Ann. St. Mich.*, § 3378.



boxes were in good order. Under this statute an instruction telling the jury that the railroad company is exonerated if the appliances it has used to prevent or limit the escape of sparks and fire are such as have been in use for a long time, and such as have substantially guarded against the danger sought to be avoided, has been held correct.<sup>45</sup> The Ohio statute<sup>46</sup> imposes an absolute liability upon railroad companies for damages to adjacent property from fires originating on their lands, and a *prima facie* liability for fires communicated from their locomotives and originating on lands adjacent to their rights of way. The statute equally applies where the railroad company obtained its right of way, in whole or in part, *by deed*, and where it acquired it by *condemnation* proceedings.<sup>47</sup>

**§ 2341. Constitutionality of Statutes Making Railway Companies Liable for Fires.**—Judicial decisions affirm the constitutionality of statutes making the railroad companies absolutely liable, liable as *insurers*, or liable without proof of negligence, for fires communicated by their locomotives, even with respect to charters previously granted.<sup>48</sup> The propriety of this conclusion becomes apparent in view

<sup>45</sup> *Peter v. Chicago & C. R. Co.*, 121 Mich. 324; s. c. 80 N. W. Rep. 295.

<sup>46</sup> Ohio Act of April 26, 1894, 91 Ohio Laws, p. 187.

<sup>47</sup> *Baltimore & C. R. Co. v. Kreager*, 61 Ohio St. 312; s. c. 56 N. E. Rep. 203; *Cleveland & C. R. Co. v. Ringley*, 61 Ohio St. 312; s. c. 56 N. E. Rep. 203; *Lake Erie & C. R. Co. v. Falk*, 61 Ohio St. 312; s. c. 56 N. E. Rep. 203. Under the statute, a railroad company is liable for the loss of a building burned by a fire communicated to it from another building, situated on the right of way of the company and set on fire by the sparks of a passing engine: *Martz v. Cincinnati & C. R. Co.*, 12 Ohio C. C. 144; s. c. 1 Ohio C. D. 451. So, a railroad company was held liable for the burning of an elevator building, the roof of which was discovered to be on fire immediately after a train had passed, although its locomotive was equipped with a spark-arrester, in spite of which pieces of live cinder escaped from it: *Lake Erie & C. R. Co. v. Falk*, 16 Ohio C. C. 125. But the attentive care which a Federal Court took of its own receiver and of the property in his custody, resulted in the view that, notwithstanding the language of this statute, negligence on the part of

a receiver operating a railroad is necessary to hold him liable for damages for a fire set out by sparks from one of his locomotives, destroying property adjoining the right of way. The fact that the statute makes the fact of communicating the fire *prima facie* evidence of negligence is not enough; specific negligence must be proved: *Continental Trust Co. v. Toledo & C. R. Co.*, 89 Fed. Rep. 637; s. c. 40 Ohio L. J. 379.

<sup>48</sup> *Atchison & C. R. Co. v. Mathews*, 174 U. S. 96; s. c. 43 L. ed. 909; 14 Am. & Eng. Rail. Cas. (N. S.) 89; 19 Sup. Ct. Rep. 609; aff'g s. c. 58 Kan. 447; 49 Pac. Rep. 602; *St. Louis & C. R. Co. v. Mathews*, 165 U. S. 12; *Mathews v. St. Louis & C. R. Co.*, 121 Mo. 298; *Lumbermen's & C. Ins. Co. v. Kansas & C. R. Co.*, 149 Mo. 165; s. c. 50 S. W. Rep. 284; *Grissell v. Housatonic R. Co.*, 54 Conn. 447; s. c. 4 N. Eng. Rep. 585; 9 Atl. Rep. 137 (with respect to railroads whose charters are granted subject to all general laws which the legislature may thereafter pass). See also *Drady v. Des Moines & C. R. Co.*, 57 Iowa 393; *Campbell v. Missouri & C. R. Co.*, 121 Mo. 340; s. c. 25 S. W. Rep. 936; *Union & C. R. Co. v. Tracy*, 19 Colo. 331; s. c. 35 Pac. Rep. 537;



of the obvious difficulty encountered by the land-owner whose property is thus destroyed of proving negligence on the part of the railway company in the construction, the reparation, or the management of the locomotive which set the fire; and in view of the further fact that the statutes in question go no further than to re-enact the rule of the ancient common law.<sup>49</sup> A statute of Iowa, enacting "that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway, and such damages may be recovered by the party damaged in the same manner as set forth in this section in regard to stock, except as to double damages,"—has been held not unconstitutional in its application to corporations already existent. The court upheld it on the ground that it is a police regulation, within the competency of the legislature, and that its propriety is a question of legislative, and not of judicial discretion.<sup>50</sup> Such statutes are not unconstitutional because of being *partial and unequal in their operation*.<sup>51</sup>

**§ 2342. These Statutes Take the Question of Negligence to the Jury.**—The necessary effect of all these statutes is *to take the question of negligence to the jury* in every case where evidence is submitted to them tending to show that the fire was communicated by a locomotive of the railway company; and no matter how strong the countervailing evidence may be, it is for the jury, and not for the court, to determine whether it is sufficient to rebut the statutory presumption of

Union &c. R. Co. v. De Busk, 12 Colo. 294; s. c. 20 Pac. Rep. 752; 3 L. R. A. 350; McCandless v. Richmond &c. R. Co., 38 S. C. 103; Hunter v. Columbia &c. R. Co., 41 S. C. 86; s. c. 19 S. E. Rep. 197. For a note on the constitutionality of statutes making railroad companies absolutely liable for damages from fire set by them,—see 25 L. R. A. 161.

<sup>49</sup> Union &c. R. Co. v. De Busk, 12 Colo. 294; s. c. 20 Pac. Rep. 752; 3 L. R. A. 350.

<sup>50</sup> Rodemacher v. Milwaukee &c. R. Co., 41 Iowa 297; s. c. 20 Am. Rep. 592. In like manner the Supreme Judicial Court of Massachusetts have held that a statute making the proprietors of railroad companies responsible for injuries by fire communicated from their locomotive engines applies to railroads established before, as well as to those established since the passage of the act: Lyman v. Boston &c. R. Corp., 4 Cush. (Mass.) 288.

<sup>51</sup> Missouri &c. R. Co. v. Merrill,

40 Kan. 404. That the Kansas statute is not unconstitutional by reason of the title of the act failing clearly to express its subject-matter,—see the same case. A court which has advanced its system of jurisprudence to the point of testing the validity of an act of sovereign legislation by the same rule by which it tests the validity of the by-laws of a corporation, the rule of reasonableness,—that is to say, the rule of what the judge, in opposition to what the legislature considers reasonable,—has reached the conclusion that a statute requiring screens "of the best approved kind, shown by experience to be proper and suitable for protection from fire," to be used *on vessels burning wood*, is *not unreasonable*, as it imposes no greater burden than the common law rule in most States imposes in the case of railroad locomotives: Burrows v. Delta Trans. Co., 106 Mich. 582; s. c. 29 L. R. A. 468; 64 N. W. Rep. 501; 2 Det. L. N. 503.



negligence. Any other rule would involve, on the part of the court, an invasion of the province of the jury.<sup>52</sup>

**§ 2343. Not Necessary that the Property should have been Insurable.**—Statutes have been enacted in several of the States making railroad companies absolutely liable for loss or damage to adjacent property caused by fires communicated from their locomotives or originating within their right of way, and authorizing the railway company to effect insurance upon the property of adjacent owners, to indemnify itself from possible loss in consequence of having to pay damage for property consumed by fires set by its engine or communicated from its right of way. The construction of such statutes is that, in order to charge the railroad company with liability as an insurer for property so destroyed, it is not necessary that the property should have been of such a character that the railroad company might have effected an insurance upon it; but the railroad company must pay damages for destroying or injuring such property whether it could have procured insurance upon it or not.<sup>53</sup>

**§ 2344. Duty under these Statutes to Keep Right of Way Clear.**—Many of these statutes impose in terms a liability upon the railway company for failing to keep its right of way clear of combustible material,<sup>54</sup>—though here, as in other cases, the damages sustained by the adjacent occupier must be traceable to such neglect.<sup>55</sup> Under the Illinois statute<sup>56</sup> this duty rests upon railroad companies in the winter as well as in the summer.<sup>57</sup> Evidence that the railway company cuts and burns the grass upon its right of way in October, and that the fire occurred in January, was accordingly held not sufficient to show a compliance with the statute.<sup>58</sup> So much of a street as is actually used and occupied by a railway company for railway purposes constitutes its "right of way," within the meaning of this statute.<sup>59</sup>

**§ 2345. Statutes Extend to Fires Communicated in Burning Off Right of Way.**—Although some of the statutes, in terms, require rail-

<sup>52</sup> *Babcock v. Chicago &c. R. Co.*, 62 Iowa 593; *Baltimore &c. R. Co. v. Tripp*, 175 Ill. 251; s. c. 51 N. E. Rep. 833.

<sup>53</sup> *Dean v. Charleston &c. R. Co.*, 55 S. C. 504; s. c. 33 S. E. Rep. 579; *Grissell v. Housatonic R. Co.*, 54 Conn. 447; s. c. 4 N. Eng. Rep. 585; 9 Atl. Rep. 137.

<sup>54</sup> *Mont. Comp. Stat. Div. 5*, § 719.

<sup>55</sup> *Spencer v. Montana &c. R. Co.*,

11 Mont. 164; s. c. 49 Am. & Eng. Rail. Cas. 678; 28 Pac. Rep. 681.

<sup>56</sup> *Starr & C. Ill. Stat.*, ch. 114, § 63.

<sup>57</sup> *Indiana &c. R. Co. v. Nicewan-der*, 21 Ill. App. 305.

<sup>58</sup> *Indiana &c. R. Co. v. Nicewan-der*, 21 Ill. App. 305.

<sup>59</sup> *Lake Erie &c. R. Co. v. Middle-coff*, 150 Ill. 27; s. c. 37 N. E. Rep. 660; aff'g s. c. 52 Ill. App. 175.



road companies to *burn off* the combustible material from their right of way, yet they are bound to do this at such a time, in such a manner, and with such safeguards as will prevent the communication of fire thus set out to adjacent property,—that is to say, they are bound to the exercise of reasonable care in this respect.<sup>60</sup> And it is a sound construction of a statute making railroad companies liable for damages caused by fire *in the operation* of their roads, that the statute embraces damages caused by fires set out by a railroad company for the purpose of clearing combustible materials from its right of way,—this being deemed a step in the operation of its road.<sup>61</sup>

§ 2346. **What Property Embraced within these Statutes.**—A statute making railroad companies responsible “to every person or corporation whose property may be injured or destroyed” by a fire set out by their locomotives will not be limited by construction to embrace only *insurable property*, although the companies are given by the statute an insurable interest in the property for the destruction of which they may be liable.<sup>62</sup> The words, “a building or other property,” in such a statute<sup>63</sup> include personal property,<sup>64</sup> growing trees, and herbage.<sup>65</sup> These statutes have generally been held to embrace in their provisions both real and personal property, provided it be permanently existing near the route of the railroad and capable of being insured by the railroad company under the statutory provision giving the company an insurable interest in it. Growing timber,<sup>66</sup> mechanics’ tools,<sup>67</sup> and fences<sup>68</sup> are within their protection. Their protection extends to property “along the route” of the road, when so near as to be exposed to the danger of fire; and the actual distance is immaterial.<sup>69</sup> It is not necessary that the railroad company have actual notice of the presence of the property along its line.<sup>70</sup> But such stat-

<sup>60</sup> *Ante*, § 2231, *et seq.*

<sup>61</sup> *Missouri &c. R. Co. v. Merrill*, 40 Kan. 404; *Missouri &c. R. Co. v. Cady*, 44 Kan. 633; s. c. 24 Pac. Rep. 1088; *Missouri &c. R. Co. v. Lamar*, 44 Kan. 636; s. c. 24 Pac. Rep. 1089.

<sup>62</sup> *Campbell v. Missouri &c. R. Co.*, 121 Mo. 340; s. c. 25 S. W. Rep. 936; 25 L. R. A. 175. So under Conn. Stat. 1881, ch. 92, § 1: *Grissell v. Housatonic R. Co.*, 54 Conn. 447; s. c. 9 Atl. Rep. 137; 4 N. Eng. Rep. 585.

<sup>63</sup> Conn. Gen. Stat., § 3581.

<sup>64</sup> *Martin v. New York &c. R. Co.*, 62 Conn. 331; s. c. 25 Atl. Rep. 239.

<sup>65</sup> *Grissell v. Housatonic &c. R. Co.*, 54 Conn. 447; s. c. 9 Atl. Rep. 137; 4 N. Eng. Rep. 585.

<sup>66</sup> *Pratt v. Atlantic &c. R. Co.*, 42 Me. 579.

<sup>67</sup> *Trask v. Hartford &c. R. Co.*, 16 Gray (Mass.) 71.

<sup>68</sup> *Trask v. Hartford &c. R. Co.*, 16 Gray (Mass.) 71.

<sup>69</sup> *Pratt v. Atlantic &c. R. Co.*, 42 Me. 579; *Perley v. Eastern &c. R. Co.*, 98 Mass. 414; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; 3 Cent. L. J. 353. Property which is so near a railroad as to be exposed to the danger of fire from the engines is “along the route” within Me. Rev. Stat., ch. 51, § 64, making railroad companies responsible for injury by fire communicated by its engines to property “along the route.” *Martin v. Grand Trunk R. Co.*, 87 Me. 411; s. c. 32 Atl. Rep. 976.

<sup>70</sup> *Ross v. Boston &c. R. Co.*, 6 Allen (Mass.) 87.



utes do not apply so as to interfere with the obligations arising out of contractual relations, where they exist. For example, a statute<sup>71</sup> providing that any railroad company operating any line shall be liable for all damages sustained by fire originating from the operation of its road,—does not apply to a case where goods are destroyed while in the possession of a railroad company as a warehouseman or depository, although the fire was communicated to the building from the locomotive of the railway company in the operation of its road.<sup>72</sup> A statute enacts that railroads running through the Territory shall keep their right of way free from dead grass, weeds, or any dangerous or combustible material. Under the statute, it is as much the duty of the company to keep its right of way clear of combustible material as it is to prevent the scattering of fire from its locomotives.<sup>73</sup>

§ 2347. **Further of the Kinds of Property Embraced within these Statutes.**<sup>74</sup>—A statute of Maine using the words a “building or other property,” was originally restrained by construction to include only property permanently existing along the route of the railway and capable of being insured, excluding any liability for the burning of movable property, having no permanent location, but leaving the liability of the railway company for the burning of such property to be determined according to the principles of the common law;<sup>75</sup> and, accordingly, it was held not to extend to the protection of a quantity of sleepers piled near a railway track for temporary purposes.<sup>76</sup> But where the lumber which was burned was a part of a quantity of lumber which the plaintiff piled in that particular place from year to year, using it as his piling place in the prosecution of his business as a lumber manufacturer, it was held, without overruling the two decisions previously cited, that it was within the rule of temporary occupancy there laid down, and that the railroad company was liable.<sup>77</sup> Subsequently the court held that the statute was not to be restrained to giving damages for the destruction of real property, but extended to the protection of personal property as well.<sup>78</sup> Following and applying this rule of construction, the court, in a subsequent case, held a railroad company liable for damages for the destruction by fire of a manufacturing establishment, its machinery, tools, appliances, mate-

<sup>71</sup> Okla. Gen. Stat. 1893, ch. 37.

<sup>72</sup> Walker v. Eikleberry, 7 Okla. 599; s. c. 13 Am. & Eng. Rail. Cas. (N. S.) 253; 54 Pac. Rep. 553; citing Bassett v. Connecticut & C. R. Co., 145 Mass. 129; s. c. 13 N. E. Rep. 370.

<sup>73</sup> Diamond v. Northern & C. R. Co., 6 Mont. 580.

<sup>74</sup> This section is cited in § 2324.

<sup>75</sup> Chapman v. Atlantic & C. R. Co., 37 Me. 92.

<sup>76</sup> Lowney v. New Brunswick R. Co., 78 Me. 479.

<sup>77</sup> Thatcher v. Maine & C. R. Co., 85 Me. 502; s. c. 27 Atl. Rep. 519.

<sup>78</sup> Pratt v. Atlantic & C. R. Co., 42 Me. 579.



rials, etc.;<sup>79</sup> and still later, for the destruction of a stock of goods in a store occupied by the owner near the defendant's railway track.<sup>80</sup> So, the New Hampshire statute<sup>81</sup> extends to the protection of wood, coal, etc., deposited by a dealer upon land adjoining the railway, and there used as his stock in trade.<sup>82</sup> The Massachusetts statute,<sup>83</sup> providing that a railroad corporation shall be responsible in damages to a person whose buildings or other property may be injured by fire communicated from its locomotive engines, does not apply to the protection of goods delivered to a railroad company as a *carrier* for shipment, and which are in its custody as a warehouseman at the time of the fire.<sup>84</sup> Where the statute<sup>85</sup> gives an action or makes the railroad company liable for the destruction by fire of property situated "along its route," and gives an insurable interest therein, this is held to embrace a building erected by the plaintiff on the right of way of the railroad company, under a license from the latter for the mutual convenience of the parties.<sup>86</sup>

§ 2348. When a Fire is Deemed to have been "Communicated" from the Defendant's Locomotive.—Statutes of the kind under consideration, so far as they have been examined by the author, appear to have been modeled upon a common original, and they begin by reciting that "when any injury is done to a building or other property by fire *communicated* by a locomotive engine of any railroad corporation, the said corporation shall be responsible," etc.<sup>87</sup> It is the settled construction of this clause in these statutes that it is not to be restrained to cases where there has been a *direct communication* of the fire from the locomotive to the property which is destroyed, but that it equally extends to cases where the fire has been set out in other property by the locomotive, and where, in a course of direct sequence or causation, it has travelled to and destroyed the property for which the plaintiff sues.<sup>88</sup>

§ 2349. Contributory Negligence as a Defense against this Statutory Liability.—Where the statute makes the railroad company

<sup>79</sup> Stearns v. Atlantic & C. R. Co., 46 Me. 95.

<sup>80</sup> Bean v. Atlantic & C. R. Co., 63 Me. 294.

<sup>81</sup> Gen. Laws N. H., ch. 162, § 3.

<sup>82</sup> Haseltine v. Concord R. Corp., 64 N. H. 545; s. c. 15 Atl. Rep. 997; 6 N. Eng. Rep. 545.

<sup>83</sup> Pub. Stat. Mass., ch. 112, § 214.

<sup>84</sup> Bassett v. Connecticut Riv. Co., 145 Mass. 129.

<sup>85</sup> Gen. Stat. Vt., ch. 28, §§ 78, 79.

<sup>86</sup> Grand Trunk R. Co. v. Richardson, 91 U. S. 454.

<sup>87</sup> Mass. Stat. 1840, ch. 85, § 1; Gen. Stat. Vt., ch. 28, § 78; Comp. Laws Utah, § 503.

<sup>88</sup> Grand Trunk R. Co. v. Richardson, 91 U. S. 454 (construing the statute of Vermont); Hart v. Western R. Corp., 13 Met. (Mass.) 99; Anderson v. Wasatch & C. R. Co., 2 Utah 518; Martin v. New York & C. R. Co., 62 Conn. 331; s. c. 25 Atl. Rep. 239.



liable as an insurer, then obviously contributory negligence is no defense,<sup>89</sup> unless the statute so provides,<sup>90</sup> and nothing other than the voluntary act of the property owner in exposing his property to injury by fire will avail the railroad company against the liability thus imposed upon it.<sup>91</sup> Some of the statutes so provide in terms.<sup>92</sup> In Iowa, where, as we have seen, the construction of the statute—contrary to its obvious intent—was held to be that it established merely a *prima facie* presumption of negligence, it is nevertheless held that contributory negligence on the part of the land-owner will be no defense.<sup>93</sup> Even where this is the effect of the statute, the use by the adjacent land-owner or tenant, of his property in such a manner as it must have been used by him had the railroad not passed through it, will not be ascribed to him as contributory negligence;<sup>94</sup> but the company, on the other hand, is required to take steps to avert the burning of the plaintiff's property by keeping its own right of way clear of combustible matter.<sup>95</sup> Even where the statute leaves the defense of contributory negligence available, yet it will not avail the railroad company where the negligence of an intervening land-owner enables the fire to reach the plaintiff's land.<sup>96</sup> Where the statute<sup>97</sup> provided

<sup>89</sup> *Matthews v. Missouri & C. R. Co.*, 142 Mo. 645; s. c. 10 Am. & Eng. Rail. Cas. (N. S.) 673; 44 S. W. Rep. 802. It was so held under a statute of Maine (Maine Rev. Stat. ch. 51, § 64) which provides that, when a building or other property is injured by fire communicated by a locomotive, the company using it is responsible therefor, and it has an insurable interest in the property along the route for which it is responsible, and may procure insurance thereon, but shall be entitled to the benefit of any insurance on such property effected by the owner thereof, less the premium and expense of recovery: *Boston Excelsior Co. v. Bangor & C. R. Co.*, 93 Me. 52; s. c. 44 Atl. Rep. 138. See *Peter v. Chicago & C. R. Co.*, 121 Mich. 324; s. c. 80 N. W. Rep. 295, and *Laird v. Railroad*, 62 N. H. 254, where statutes, which seem to the author to be merely an affirmance of the common law, were held to exclude the defense of contributory negligence, though the statute did not, in either case, say so in terms.

<sup>90</sup> As in *Laws Conn.* 1881, ch. 92, making the company liable where there is no contributory negligence

on the part of the property-owner. See *Simmonds v. New York & C. R. Co.*, 52 Conn. 264; s. c. 52 Am. Rep. 587.

<sup>91</sup> *Union & C. R. Co. v. Williams*, 3 Colo. App. 526; s. c. 34 Pac. Rep. 731; *Union & C. R. Co. v. Arthur*, 2 Colo. App. 159; s. c. 29 Pac. Rep. 1031.

<sup>92</sup> For example, the South Carolina statute uses the language "except in case where property shall have been placed on the right of way of such corporation unlawfully or without its consent:" *Gen. Stat. S. C.*, § 1511.

<sup>93</sup> *West v. Chicago & C. R. Co.*, 77 Iowa 654; s. c. 35 N. W. Rep. 479; *Engle v. Chicago & C. R. Co.*, 77 Iowa 661, 666; s. c. 37 N. W. Rep. 6; 42 N. W. Rep. 5\*2. Prior to the statute, contributor negligence on the part of the plaintiff would defeat a recovery: *Kesee v. Chicago & C. R. Co.*, 30 Iowa 78.

<sup>94</sup> *Ante*, § 2314.

<sup>95</sup> *Ft. Scott & C. R. Co. v. Tubbs*, 47 Kan. 630; s. c. 28 Pac. Rep. 612; 49 Am. & Eng. Rail. Cas. 685.

<sup>96</sup> *Simmonds v. New York & C. R. Co.*, 52 Conn. 264; s. c. 52 Am. Rep. 587.

<sup>97</sup> *Ill. Rev. Stat.*, p. 814.



that it should not, in any case, be considered as negligence on the part of the land-owner, that he should use his land in the same manner as if no railroad had passed near it,—it was held that an owner of land adjoining the right of way of a railroad was not guilty of contributory negligence in failing to keep his premises free from combustible matter.<sup>98</sup>

§ 2350. **Other Holdings under these Statutes.**—Even under a statute which excludes any liability in case of contributory negligence, the property owner who is injured by the fire will be able to maintain an action against the railroad company where, but for the negligence of an intervening land-owner, the fire would not have reached the premises of the plaintiff.<sup>99</sup> A statute of Kentucky<sup>100</sup> makes it the duty of railroad companies to place on or around the tops of chimneys of such car or locomotive a screen fender, damper, or other such preventive as will prevent, so far as possible, sparks of fire from escaping from such cars into fields, etc. Under judicial construction, the operation of this statute is such as to exonerate the railroad company from liability for a fire set by the escape of sparks from a chimney of its locomotive, except where it has failed to apply and use appliances required by the act; which does not require the use of such as will certainly prevent the escape of sparks, but only the best and most effectual known to science and experience.<sup>101</sup> As thus construed,—and this seems to be the obvious construction,—the statute is merely declaratory of the common law.<sup>102</sup> Under the stat-

<sup>98</sup> *Cleveland &c. R. Co. v. Stephens*, 173 Ill. 430; s. c. 11 Am. & Eng. Rail. Cas. (N. S.) 268; 51 N. E. Rep. 69; aff'g s. c. 74 Ill. App. 586. It is perceived that the statute is a mere affirmation of the common law: *Ante*, § 2314. There is a decision of a subordinate Appellate Court in Kansas to the effect that any neglect by a property owner in permitting accumulation of combustible material on his land next to a railroad track, precludes recovery under the statute of that State for injuries from a fire originating upon the company's right of way, and communicated to the property destroyed by the material so left by him, although such negligence was slight and that of the company *gross*: *Missouri &c. R. Co. v. Haynes*, 1 Kan. App. 586; s. c. 42 Pac. Rep. 259. It is safe to say that no legislature ever assembled in Kansas which could have enacted a statute intended to receive an inter-

pretation so foolish, so unjust to the agricultural communities, and so plainly opposed to the principles of the common law. --- For what constitutes contributory negligence on the part of the property owner within the meaning of the statute of Connecticut (Conn. Gen. Stat., § 3581),—see *Hubbard v. New York &c. R. Co.*, 72 Conn. 24; s. c. 43 Atl. Rep. 550.

<sup>99</sup> *Simmonds v. New York &c. R. Co.*, 52 Conn. 264; s. c. 52 Am. Rep. 587. In this case fire caught in A.'s land. The defendant's servants were successfully extinguishing it when A. desired them to desist, as he wished to have it burn the bogs. They desisted, therefore, and it spread to B.'s land. It was held that the company was liable to B.

<sup>100</sup> Ky. Act Jan. 30, 1874.

<sup>101</sup> *Kentucky &c. R. Co. v. Barrow*, 89 Ky. 638; s. c. 20 S. W. Rep. 165.

<sup>102</sup> *Ante*, § 2234, *et seq.*



ute of New Jersey,<sup>103</sup> making the communication of the fire *prima facie* evidence of negligence, "subject, nevertheless, to be rebutted by evidence of the taking and using of all practicable means to prevent such communication of fire as by said section required," it is a question for a jury whether a railroad company has complied with the statute in using what is known as a Smith screen or Diamond top-stack, instead of some other appliance, and a verdict finding that it has not will not be disturbed. The reason was that an inspection of the models of these spark-arresters, which were produced on the trial, and the oral evidence, warranted the opinion that one of these contrivances was not the best preventive of the escape of fire in the use of soft coal.<sup>104</sup> These statutes apply to corporations which have obtained their charters before their enactment,<sup>105</sup> and a railroad company which has leased its line to another company remains responsible for any damage by the latter, caused by fire,<sup>106</sup> as also does the lessee.<sup>107</sup> To an action under them, the defense of contributory negligence is not good.<sup>108</sup> A *fire guard* one hundred and forty feet wide along the right of way of a railroad company, whose right of way is in most places fixed by Congress at the width of four hundred feet, is not, as matter of law, sufficient to prevent the escape of fire from passing locomotives, although, under the Washington statute, the maximum width of railroad rights of way is fixed at one hundred feet.<sup>109</sup>

<sup>103</sup> N. J. Rev., p. 911.

<sup>104</sup> Wiley v. West Jersey & C. R. Co., 44 N. J. L. 247, 251.

<sup>105</sup> Pratt v. Atlantic & C. R. Co., 42 Me. 578; Ingersoll v. Stockbridge & C. R. Co., 8 Allen (Mass.) 438; Lyman v. Boston & C. R. Co., 4 Cush. (Mass.) 288; Diamond v. Northern & C. R. Co., 6 Mont. 580.

<sup>106</sup> Ingersoll v. Stockbridge & C. R. Co., 8 Allen (Mass.) 438. A railroad company may be held liable, independent of statute, for injuries caused by fire thrown from the locomotive of another company permitted to run over its track, and whose want of proper appliances is known to its agents: Delaware & C. R. Co. v. Salmon, 39 N. J. L. 299; Pierce v. Concord & C. R. Co., 51 N. H. 590; Stearns v. Atlantic & C. R. Co., 46 Me. 96.

<sup>107</sup> Pierce v. Concord & C. R. Co., 51

N. H. 132; Davis v. Providence & C. R. Co., 121 Mass. 134.

<sup>108</sup> Rowell v. Railroad Co., 57 N. H. 132; Ingersoll v. Stockbridge & C. R. Co., 8 Allen (Mass.) 438.

<sup>109</sup> Buck v. Union & C. R. Co., 59 Kan. 328; s. c. 52 Pac. Rep. 866. On a principle already considered (*ante*, § 1494), a statute which enacts that railroad companies shall place upon their locomotives some device or contrivance which will most effectually guard against the emission of fire and sparks and which exempts them from the duty of complying with the statute *during the months of December, January and February*, does not relieve them from the duty of observing *reasonable care* to avoid injuring adjacent proprietors by fire, even during those months: Toledo & C. R. Co. v. Wickenden, 1 Ohio C. D. 171; s. c. 11 Ohio C. C. 378.



## CHAPTER LXXIX.

## ACTIONS FOR DAMAGES FROM RAILWAY FIRES.

ART. I. Pleadings in these Actions, §§ 2353-2365.

ART. II. Questions of Evidence in these Actions, §§ 2368-2381.

ART. III. Questions of Procedure and Damages in these Actions, §§ 2383-2389.

## ARTICLE I. PLEADINGS IN THESE ACTIONS.

| SECTION   | SECTION  |
|---|--|
| 2353. What particularity of averment in the complaint has been held sufficient. | 2360. Necessity of definite statement as to time of the accident.                                      |
| 2354. Further of sufficient particularity of averment.                          | 2361. What allegations will not authorize particular evidence: variance between allegations and proof. |
| 2355. When aver negligence in allowing fire to escape.                          | 2362. Allegations to show that the fire was the proximate cause of the injury.                         |
| 2356. How aver negligence in allowing fire to escape.                           | 2363. Negating contributory negligence in the property owner.  |
| 2357. When not necessary to aver negligence at all.                             | 2364. What specific averments in the answer necessary.   |
| 2358. Examples of complaints stating a good cause of action.                    | 2365. When proper to permit an amendment of complaint.   |
| 2359. Matters which the complaint need not allege.                              |  |

§ 2353. **What Particularity of Averment in the Complaint has been Held Sufficient.**—Upon the question of the particularity of averment in declarations or complaints in actions against railway companies for damages caused by fires, it has been held in substance that where such a complaint avers negligence in setting out the fire, it need not go further and aver negligence in permitting it to *escape* to the land of the plaintiff.<sup>1</sup> It is not necessary to specify the particular defects of the engine in consequence of which the fire was communicated. But a complaint which avers negligence in suffering the accumulation of combustibles upon the defendant's right of way, and negligence in the use of its engines, and that its engine was not

<sup>1</sup> Louisville &c. R. Co. v. Hanmann, 87 Ind. 422.



in proper condition and repair to prevent the escape of fire, and that the fire when thus started on the right of way of the defendant was a continuous fire until it burned over the intervening space and reached the land of the plaintiff, etc., states a good cause of action.<sup>2</sup> So a complaint which charges in substance that defendant "negligently permitted" dry litter to accumulate along the track; that it employed no spark-arresters; that the netting on the smoke-stack of the locomotive was defective, whereby sparks of fire were emitted and carried into said litter, and "into the adjoining fields of the plaintiff, and by which the same became ignited,"—contains sufficient allegations of negligence.<sup>3</sup> A complaint charging that "sparks and fire escaped from the locomotive and negligently set fire to grass on plaintiff's land, and that said fire, injury, and damage were caused wholly by the neglect and carelessness of defendant,"—sufficiently charges negligence on the part of the defendant.<sup>4</sup> So, also, in an action for negligence against a railroad company for setting fire to some wood piled by the track, the charge that "defendant's locomotive emitted sparks which communicated with said wood and destroyed it, \* \* \* through the carelessness of the defendant and its agents and employes, without the fault of the plaintiff," is good after verdict.<sup>5</sup> So, a complaint averring that the defendant negligently permitted dry leaves, grass, rubbish, and other combustible matter to accumulate and lie upon its right of way; that said combustible matter took fire from sparks emitted from a passing engine, and which fell thereon; and "that the fire, caused and caught as aforesaid from the carelessness and negligence of said defendant, was permitted to, and did, spread over and onto said plaintiff's land, and did then and there burn up, consume, and destroy" the property of the plaintiff,—has been held good on demurrer.<sup>6</sup> So, also, is a complaint which sufficiently shows that a railroad company suffered combustible material to accumulate upon its right of way, which was set on fire by a passing engine, and that the railroad company negligently permitted such fire to escape to complainant's land.<sup>7</sup> So, also, is a complaint alleging in substance that defendant railroad company so carelessly and negligently managed its engine and train as to set fire to dry grass on land adjoining its right of way, which, without negligence on plaintiff's part, spread and caused the damages complained of.<sup>8</sup>

<sup>2</sup> Louisville &c. R. Co. v. Krinning, 87 Ind. 351.

<sup>3</sup> Louisville &c. R. Co. v. Parks, 97 Ind. 307.

<sup>4</sup> Ohio &c. R. Co. v. McCartney, 121 Ind. 385; s. c. 23 N. E. Rep. 258.

<sup>5</sup> Pittsburgh &c. R. Co. v. Noel, 77 Ind. 110.

<sup>6</sup> Chicago &c. R. Co. v. House, 10 Ind. App. 134; s. c. 37 N. E. Rep. 731.

<sup>7</sup> Chicago &c. R. Co. v. Burger, 124 Ind. 275; s. c. 24 N. E. Rep. 981.

<sup>8</sup> Haugen v. Chicago &c. R. Co., 3 S. D. 394; s. c. 53 N. W. Rep. 769.



§ 2354. **Further of Sufficient Particularity of Averment.**—Under a statute<sup>9</sup> making railroad companies responsible for damages for fires resulting from the acts of their “authorized agents,” a complaint is not defective in alleging that such a fire resulted from the act of defendant’s “agent,” omitting the word “authorized.”<sup>10</sup> So, under a statute of Iowa,<sup>11</sup> which was construed by the Supreme Court of that State,<sup>12</sup> making the setting of the fire by a railroad company presumptive evidence of negligence merely, it is held (though the holding seems untenable) that it is not necessary for the plaintiff to allege in his complaint that the defendant was guilty of negligence in setting out the fire, but that he need do no more than to allege that the fire was set out and that it caused the injury for which the action is brought,—in other words, that it is not necessary to allege that which, under the statute, is a presumption of law.<sup>13</sup> Beyond that, in the view of the Iowa court, the allegation of negligence is redundant matter. But the correct view would seem to be that here, as in other cases, negligence is the gravamen of the action—the essential fact to be alleged and proved, and which consequently ought to be alleged, although, in regard to the *mode of proving* the fact, the statute supplies the evidence in the presumption of negligence from the fact of scattering the fire. If the plaintiff alleges that the defendant railroad company, by its servants and agents, carelessly and negligently set fire to certain property, and caused it to be burned, this will be sufficient, without alleging any fact showing that its servants and agents were acting within the scope of their employment.<sup>14</sup> A complaint which claims damages from a railroad company in a specified sum, “caused by fire from engines operated by the defendant, \* \* \* ” counts upon negligence in allowing combustible material to accumulate on the right of way by means of which fire might be communicated to adjoining premises, as well as in permitting engines to be operated while in a defective condition.<sup>15</sup> A complaint in such an action, which alleges that defendant carelessly and negligently permitted coals of fire to be dropped and sparks to be emitted from the locomotive engine, which set fire to dry grass and other combustibles which defendant had negligently permitted to remain on its right of way, and negligently permitted such fire to escape to plaintiff’s adjoining premises and burn his property without the lat-

<sup>9</sup> Gen. Stat. S. C., § 1611.

<sup>10</sup> Mayo v. Spartanburg &c. R. Co., 40 S. C. 517; s. c. 19 S. E. Rep. 73.

<sup>11</sup> Code Iowa, § 1289.

<sup>12</sup> Ante, § 2339.

<sup>13</sup> Seska v. Chicago &c. R. Co., 77 Iowa 137; s. c. 41 N. W. Rep. 596.

<sup>14</sup> Louisville &c. R. Co. v. Spring Water Distillery Co., 21 Ky. L. Rep. 769; s. c. 53 S. W. Rep. 275 (no off. rep.).

<sup>15</sup> Louisville &c. R. Co. v. Miller, 109 Ala. 500; s. c. 19 South. Rep. 989.



ter's fault, carelessness, or negligence,—sufficiently shows negligence on the part of defendant, and freedom from contributory negligence on the part of the plaintiff.<sup>16</sup> The plaintiff should state in his petition, as definitely as he can, the train from which, and the time when, the fire escaped.<sup>17</sup>

**§ 2355. When Aver Negligence in Allowing Fire to Escape.**<sup>18</sup>—In Indiana, it is said to be settled “that a complaint against a railroad company for damages resulting from the escape of fire from its right of way, must aver negligence on the part of the company in permitting the fire, if started on its right of way, to escape therefrom to the adjoining premises.”<sup>19</sup> But, qualifying this doctrine, it was subsequently held in the same State that where the complaint avers that the fire was negligently set by the railroad company, it is not necessary to aver that the company negligently allowed it to escape upon the plaintiff's premises.<sup>20</sup> If this is a sound rule of pleading, it follows from it that a railroad company permitting a fire to be ignited upon its own right of way is under a legal obligation to use reasonable care in extinguishing it or guarding it, so as to prevent it from spreading upon adjoining lands; and this, we have seen, within qualified limits, is the law.<sup>21</sup> Therefore, a complaint alleging that a locomotive of the defendant set fire to rubbish “negligently suffered to gather on defendant's right of way,” “by the medium” of which the crops upon adjoining land of the plaintiff were destroyed, was held insufficient because it did not allege that the fire was suffered to escape from the right of way of the defendant to the land of the plaintiff.<sup>22</sup> Another refinement of the same kind was to the effect that a complaint which, after alleging negligence on the part of the defendant in setting fire to dry grass and combustibles allowed to accumulate upon its right of way, failed to allege that the defendant negligently permitted the fire to escape to the plaintiff's land, was not cured by a general averment at the end of the complaint that the fire was caused wholly by the negli-

<sup>16</sup> *Chicago &c. R. Co. v. Daily*, 18 Ind. App. 308; s. c. 47 N. E. Rep. 1078.

<sup>17</sup> *Missouri &c. R. Co. v. Merrill*, 40 Kan. 404; s. c. 19 Pac. Rep. 793.

<sup>18</sup> This section is cited in § 2367.

<sup>19</sup> *Louisville &c. R. Co. v. Parks*, 97 Ind. 307, 308; *Pittsburgh &c. R. Co. v. Culver*, 60 Ind. 469; *Pittsburgh &c. R. Co. v. Hixon*, 79 Ind. 111; *Louisville &c. R. Co. v. Spenn*, 87 Ind. 322; *Louisville &c. R. Co. v. Ehlert*, 87 Ind. 339; *Indiana &c. R.*

*Co. v. Adamson*, 90 Ind. 60; *Indiana &c. R. Co. v. McBroom*, 91 Ind. 111; *Lake Erie &c. R. Co. v. Miller*, 9 Ind. App. 192.

<sup>20</sup> *Louisville &c. R. Co. v. Hanmann*, 87 Ind. 422; *Indiana &c. R. Co. v. Adamson*, 90 Ind. 60.

<sup>21</sup> *Ante*, §§ 2242, 2243, 2247.

<sup>22</sup> *Pittsburgh &c. R. Co. v. Hixon*, 79 Ind. 111. From this refinement Elliott, C. J., and Woods, J., dissented.



gence of the defendant.<sup>23</sup> An allegation that the defendant negligently permitted the fire to escape to the land of the plaintiff is (or was) in this proceeding, essential; and an allegation that the servants of the defendant did so, is not sufficient without a further allegation that they were then engaged in the line of their employment, or acting under the directions of the defendant.<sup>24</sup> In another jurisdiction it has been held that a complaint alleging negligence on the part of a railroad company in managing an engine, whereby combustibles on its right of way and on lands adjacent were set on fire, from which the fire, without any negligence of the plaintiff, spread to his lands and destroyed his property, need not aver negligence of defendant in permitting the fire to escape from its right of way.<sup>25</sup>

**§ 2356. How Aver Negligence in Allowing Fire to Escape.—**

Where the plaintiff predicates the negligence of the defendant in allowing the fire to escape from its right of way upon the plaintiff's premises, it will be sufficient for it to charge such negligence in general terms without undertaking to set out specific acts; and consequently an averment "that said fire also, by the carelessness and negligence of defendant, was allowed to, and did, spread from defendant's right of way to the plaintiff's meadow, and burn," etc., is sufficient.<sup>26</sup> But a complaint merely alleging that defendant railroad company failed to provide its engines with sufficient and proper spark-arresters, and therefore sparks and coals emitted from its engines communicated to and burned plaintiff's property, without alleging that the engine was negligently run or the fire was negligently permitted to escape either to the right of way or to adjoining lands, is not sufficient; the reason being that negligence in equipping the engine does not necessarily constitute negligence in permitting the fire to escape, and is not the proximate cause of the destruction alleged.<sup>27</sup>

**§ 2357. When not Necessary to Aver Negligence at All.—**Under statutes already considered,<sup>28</sup> making the railroad company liable as

<sup>23</sup> Louisville &c. R. Co. v. Palmer, 13 Ind. App. 161; s. c. 39 N. E. Rep. 881. That it is essential in Indiana to aver that the defendant *negligently permitted the fire to escape*, see Pittsburgh &c. R. Co. v. Hixon, 79 Ind. 111; Louisville &c. R. Co. v. Parks, 97 Ind. 307; Wabash &c. R. Co. v. Johnson, 96 Ind. 44, 62; Louisville &c. R. Co. v. Nitsche, 126 Ind. 229.

<sup>24</sup> Louisville &c. R. Co. v. Palmer,

13 Ind. App. 161; s. c. 39 N. E. Rep. 881.

<sup>25</sup> Haugen v. Chicago &c. R. Co., 3 S. D. 394; s. c. 53 N. W. Rep. 769.

<sup>26</sup> Lake Erie &c. R. Co. v. Griffin, 8 Ind. App. 47; s. c. 35 N. E. Rep. 396.

<sup>27</sup> Lake Erie &c. R. Co. v. Miller, 9 Ind. App. 192; s. c. 36 N. E. Rep. 428; Lake Erie &c. R. Co. v. Pettijohn, 9 Ind. App. 695; s. c. 36 N. E. Rep. 429.

<sup>28</sup> *Ante*, § 2337.



an insurer, for the destruction of property from fire emitted from its locomotives, it is not necessary to aver negligence at all, since the railway company is liable at all events and without proof of negligence.<sup>29</sup> As negligence is not an issuable fact under the statute, the plaintiff does not, by making an averment of negligence on the part of the defendant, assume the burden of proving it, the allegation being mere surplusage.<sup>30</sup>

**§ 2358. Examples of Complaints Stating a Good Cause of Action.**—A complaint alleging that the railroad ties in a certain part of a track in a city were rotten; that a train containing several oil tanks filled with oil was passing over the track where it crossed another railroad track, at a high and dangerous rate of speed, and in violation of the statute of the State; and that, by reason of the high rate of speed and the defective condition of the track, the train jumped the track, and the oil was spilled and ran over the plaintiff's property and set fire to and destroyed it,—was held to state a good cause of action.<sup>31</sup> A complaint which alleged that, on January 13, 1897, the defendant, by the negligence of its servants, who were then and there engaged in the operation of a train of cars and engine upon defendant's railway track, at Bozeman, Alabama, negligently threw from its engine sparks which set fire to cotton, the property of plaintiff, of the value of \$2,500, and by means thereof destroyed seventy bales of cotton, to the plaintiff's damage in the sum aforesaid,—was held to state facts constituting a good cause of action.<sup>32</sup>

**§ 2359. Matters which the Complaint Need not Allege.**—In Kentucky, a petition stating a case of negligence grounded on the emission

<sup>29</sup> Such is the construction of the Ohio Act of April 26, 1894, 91 Ohio Laws, p. 187: *Baltimore & C. R. Co. v. Kreager*, 61 Ohio St. 312; s. c. 56 N. E. Rep. 203; *Cleveland & C. R. Co. v. Ringley*, 61 Ohio St. 312; s. c. 56 N. E. Rep. 203; *Lake Erie & C. R. Co. v. Falk*, 62 Ohio St. 297; s. c. 56 N. E. Rep. 203. Such, also, is the illogical construction of the Iowa statute, though it is held to extend no further than to make the setting of the fire *prima facie* evidence of negligence (*ante*, § 2339) or to raise a presumption of negligence on proof of the damage: *Rose v. Chicago & C. R. Co.*, 72 Iowa 625; s. c. 34 N. W. Rep. 450.

<sup>30</sup> *Engle v. Chicago & C. R. Co.*, 77 Iowa 661, 666; s. c. 37 N. W. Rep. 6; 42 N. W. Rep. 512.

<sup>31</sup> *Lake Erie & C. R. Co. v. Lowder*,

7 Ind. App. 537; s. c. 34 N. E. Rep. 447.

<sup>32</sup> *Louisville & C. R. Co. v. Marbury Lumber Company (Ala.)*, 28 South. Rep. 438. In a complaint against a railway company, alleging that the company negligently permitted combustible matter to accumulate on its right of way, and that it took fire from the sparks of the passing engines, an averment "that the fire, caused and caught as aforesaid through the carelessness and negligence of said defendant, was permitted to and did spread," upon plaintiff's land, and destroyed his property,—was construed as referring to the spread of the fire, and not to the manner in which it was caused, and was held sufficient: *Chicago & C. R. Co. v. House*, 10 Ind. App. 134; s. c. 37 N. E. Rep. 731.



of sparks from the defendant's locomotive, need not allege that the defendant had failed to provide a spark-arrester, as required by a statute, since a compliance with the requirement of the statute is a matter of defense.<sup>33</sup> The omission to allege, in a complaint for burning plaintiff's land through setting fire to dry grass and combustibles allowed to accumulate on defendant's right of way, that the defendant negligently permitted the fire to escape to the plaintiff's land, is not cured by a general averment at the end of the complaint that the fire was caused wholly by the negligence of the defendant.<sup>34</sup>

**§ 2360. Necessity of Definite Statement as to Time of the Accident.**—The complaint ought to be specific as to the time when the accident took place. An allegation that the fire was set from sparks from the locomotive of the defendant in the month of May, was held not sufficiently definite.<sup>35</sup>

**§ 2361. What Allegations will not Authorize Particular Evidence: Variance between Allegations and Proof.**—An allegation that the defendant permitted its engine to be out of repair, and to be carelessly and negligently used, will not authorize the judge to submit to the jury an issue as to the *competency* and *skill* of the engineer and fireman in charge of it.<sup>36</sup> An allegation that the defendant was negligent, through its servants, agents, and employés, in operating and running its engine, whereby it cast out sparks into the dry grass on its right of way and set fire thereto, which spread over the land of plaintiff,—will not be construed as including an allegation that the engine was defective.<sup>37</sup>

**§ 2362. Allegations to Show that the Fire was the Proximate Cause of the Injury.**—A complaint sufficiently complies with the rule here under consideration, by alleging that, by the force with which the sparks were thrown out from the locomotive of the defendant "and the wind," they were thrown and carried upon and against

<sup>33</sup> Louisville &c. R. Co. v. Spring Water Distillery Co., 21 Ky. L. Rep. 769; s. c. 53 S. W. Rep. 275 (no off. rep.).

<sup>34</sup> Louisville &c. R. Co. v. Palmer, 13 Ind. App. 161; s. c. 39 N. E. Rep. 881. A complaint in an action to recover damages for the *loss of goods caused by fire* set by a locomotive engine, averring that the goods were tendered to and accepted by the defendant to be transported, and were destroyed by fire before being shipped from the station, need not

allege that the charges for transportation were tendered, and that the fire occurred without plaintiff's fault: Evansville &c. R. Co. v. Keith, 8 Ind. App. 57; s. c. 35 N. E. Rep. 296.

<sup>35</sup> Melvin v. St. Louis &c. R. Co., 89 Mo. 106; s. c. 4 West. Rep. 442.

<sup>36</sup> Babcock v. Chicago &c. R. Co., 72 Iowa 197; s. c. 33 N. W. Rep. 628.

<sup>37</sup> St. Louis &c. R. Co. v. Fudge, 39 Kan. 543; s. c. 18 Pac. Rep. 720.



the plaintiff's building. The reason is that if it were an ordinary wind, the negligence of the defendant in throwing out sparks which would be transported by it to the plaintiff's building, would be the proximate cause of the injury; and that the word "extraordinary" may not be inserted in the plaintiff's pleading by judicial interpolation so as to destroy his cause of action.<sup>38</sup> But under a rule of pleading already considered,<sup>39</sup> a complaint alleging that a fire was set out by the negligence of defendant railway company in failing to provide a proper and sufficient spark-arrester, and that such fire was communicated to plaintiff's land at a considerable distance from the railway right of way, without any averment that such communication to plaintiff's land was due to the company's negligence,—was held defective in failing to show that the injury to plaintiff's land was the proximate result of the alleged negligence of the company in setting out the fire.<sup>40</sup>

**§ 2363. Negating Contributory Negligence in the Property Owner.**—In Indiana, as elsewhere seen,<sup>41</sup> prior to a recent statute, which makes contributory negligence an affirmative defense,<sup>42</sup> it was necessary for the plaintiff to aver that he was not guilty of contributory negligence. At one time it was held that this was not sufficiently done by an allegation in a complaint that the destruction of the property of the plaintiff by fire escaping from the defendant's locomotive, happened *without fault* on the part of the plaintiff.<sup>43</sup> But this senseless strictness in pleading was mitigated by later decisions, to the effect that a general allegation that the plaintiff was without fault is sufficient, unless the concrete facts stated by him in his pleading otherwise show that he was guilty of negligence.<sup>44</sup>

**§ 2364. What Specific Averments in the Answer Necessary.**—A claim as to the violation by the plaintiff of a contract with the defendant in regard to the erection of the building which was destroyed

<sup>38</sup> *Cincinnati &c. R. Co. v. Smock*, 133 Ind. 411; s. c. 33 N. E. Rep. 108.

<sup>39</sup> *Ante*, § 2355.

<sup>40</sup> *Lake Erie &c. R. Co. v. Miller*, 9 Ind. App. 192; s. c. 36 N. E. Rep. 428; *Lake Erie &c. R. Co. v. Pettijohn*, 9 Ind. App. 695; s. c. 36 N. E. Rep. 429.

<sup>41</sup> Vol. I, p. 342, note.

<sup>42</sup> Ind. Acts 1897, p. 51. The attention of the author was not called

to the Indiana statute until it was too late to expunge this section.

<sup>43</sup> *Wabash &c. R. Co. v. Johnson*, 96 Ind. 40, 44, 62.

<sup>44</sup> Vol. I, § 375; *Chicago &c. R. Co. v. Smith*, 6 Ind. App. 262; s. c. 33 N. E. Rep. 241 ("all without the fault of the plaintiff," sufficient); *Phoenix Ins. Co. v. Pennsylvania Co.*, 134 Ind. 215; s. c. 20 L. R. A. 405; 33 N. E. Rep. 970 ("without fault or negligence of the plaintiff").



will not be considered where no breach of contract is alleged in the answer, by way of counterclaim or otherwise.<sup>45</sup>

**§ 2365. When Proper to Permit an Amendment of Complaint.—**

As the complaint may be predicated on negligence in one particular, such as the use of defective appliances to prevent the communication of fire, and as the evidence may disclose negligence in another particular, such as negligence in running the engine,<sup>46</sup> or negligence in allowing combustible material to accumulate upon the right of way,<sup>47</sup> or negligence in failing to use the proper exertions to arrest the spread of the fire after it has been set,<sup>48</sup> there is obvious propriety in allowing the plaintiff to amend his complaint after the evidence is in, subject, of course, to the right of the defendant to a continuance if the amendment works surprise to it. Where, at the trial of such an action, both parties gave testimony, pro and con, as to a defective spark-arrester and ash-pan, and as to the accumulation of dry grass and weeds on the defendant's right of way, though no such negligence was alleged in the complaint,—it was held proper, under a statute, to permit the plaintiff, after judgment, to amend his complaint by alleging negligence in these particulars. The statute was the usual one, authorizing the court, at any time, to permit either party to amend a defect in his pleading, upon such conditions as the court may prescribe.<sup>49</sup>

**ARTICLE II. QUESTIONS OF EVIDENCE IN THESE ACTIONS.**

| SECTION  | SECTION  |
|--|--|
| 2368. Evidence to show that the fire was communicated from defendant's locomotive. | 2375. Evidence that other engines did not scatter fire.                            |
| 2369. Not necessary to prove what particular engine communicated the fire.         | 2376. Evidence of other fires not shown to have been set by any particular engine. |
| 2370. Evidence that the engine set other fires.                                    | 2377. Other evidence admissible for the plaintiff in such actions.                 |
| 2371. Evidence of other and distinct fires set by other engines.                   | 2378. Other such evidence held admissible.   |
| 2372. Such evidence admissible on the cause of the injury.                         | 2379. Admissibility of evidence under particular allegations.                      |
| 2373. Such evidence admissible on the question of negligence.                      | 2380. Evidence for the defendant.  |
| 2374. The same rule in the Federal Courts, followed generally by the State Courts. | 2381. Evidence on the question of damages.   |

<sup>45</sup> *Pittsburgh &c. R. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322; s. c. 56 N. E. Rep. 766.

<sup>46</sup> *Ante*, § 2263, *et seq.*

<sup>47</sup> *Ante*, § 2270, *et seq.*

<sup>48</sup> *Ante*, §§ 2242, 2243, 2247.

<sup>49</sup> *Chaffee v. Rutland R. Co.*, 71 Vt. 385; s. c. 45 Atl. Rep. 750.



§ 2368. **Evidence to Show that the Fire was Communicated from Defendant's Locomotive.**—At the outset, it is to be observed that the burden is upon the plaintiff to prove, by a preponderance of evidence, legally competent, that the fire was communicated either from a passing locomotive of the defendant or otherwise from its right of way.<sup>50</sup> From the nature of the case, this fact is seldom susceptible of proof by the evidence of witnesses who saw the actual communication of the fire; but it is generally to be inferred from the circumstance that the fire sprang up soon after the passage of the locomotive. The courts are generally agreed that evidence that the fire sprang up immediately or very soon after the passage of a train of the defendant and that there was no fire in the vicinity before and no other apparent cause for a fire, is admissible, and is sufficient to warrant a jury in inferring that the fire was emitted from the passing locomotive.<sup>51</sup> This is especially so where there is other evidence aiding the same conclusion, such as evidence to the effect that when the train passed sparks were flying from the smoke-stack of the engine, and that soon afterwards the fire broke out, and that live pieces of coal about an inch long and three-quarters of an inch thick, were found near by;<sup>52</sup> or evidence that, two instances on the same day, a few minutes after the defendant's train had passed, fire broke out in the dry leaves and herbage on the plaintiff's land;<sup>53</sup> where there was evidence that coals and cinders of an unusual size were thrown from the defendant's engine and were carried by the wind upon the plaintiff's barn, which was seen to be on fire a few minutes afterwards;<sup>54</sup> where there was evidence that a railroad train was ascending a grade of thirty feet to the mile, requiring the frequent use of fresh coal, which was applied; that thick smoke was emitted from the stack in unusual quantities,

<sup>50</sup> *Union &c. R. Co. v. Keller*, 36 Neb. 189; s. c. 54 N. W. Rep. 420.

<sup>51</sup> *Union &c. R. Co. v. De Busk*, 12 Colo. 294; s. c. 20 Pac. Rep. 752; 3 L. R. A. 350; 2 Denver Leg. News 122; *Dean v. Chicago &c. R. Co.*, 39 Minn. 413; s. c. 40 N. W. Rep. 270; *Norfolk &c. R. Co. v. Bohannon*, 85 Va. 293; s. c. 7 S. E. Rep. 236; *Hagan v. Chicago &c. R. Co.*, 86 Mich. 615; s. c. 49 N. W. Rep. 509; 49 Am. & Eng. Rail. Cas. 670; *Kenney v. Hannibal &c. R. Co.*, 70 Mo. 243; s. c. 70 Mo. 252; *Chicago &c. R. Co. v. Emmons*, 42 Ill. App. 138; *Genung v. New York &c. R. Co.*, 21 N. Y. Supp. 97; 50 N. Y. St. Rep. 511; *Gram v. Northern &c. R. Co.*, 1 N. D. 252; s. c. 46 N. W. Rep. 972; 45 Am. & Eng. Rail. Cas. 544; *Red-*

*mond v. Chicago &c. R. Co.*, 76 Mo. 550; *Karsen v. Milwaukee &c. R. Co.*, 29 Minn. 12; *Lake Erie &c. R. Co. v. Helmerick*, 29 Ill. App. 270.

<sup>52</sup> *White v. Chicago &c. R. Co.*, 1 S. D. 326; s. c. 47 N. W. Rep. 146; 9 L. R. A. 824; 45 Am. & Eng. Rail. Cas. 565.

<sup>53</sup> *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247.

<sup>54</sup> *Brusberg v. Milwaukee &c. R. Co.*, 55 Wis. 106. Evidence that the fire was discovered soon after two passenger trains passed the land in close proximity, is not rebutted by evidence of the engineer of one of the trains, that he handled *his* locomotive in a careful manner: *Texas &c. R. Co. v. Gains* (Tex. Civ. App.), 26 S. W. Rep. 873 (no off. rep.).



and was drifted by the wind toward a powder-mill about two hundred feet from the track; that when the smoke was seen to settle over the mill, the mill exploded; that no other cause for the accident was discernible or suggested, and that the screen of the smoke-stack was so constructed as to emit sparks and burning coals of considerable size.<sup>55</sup> Where there was evidence that the fire broke out within a few minutes after the passing of one of the defendant's trains, and the evidence excluded the conclusion that it was set by any other person, it was held a question for the jury, whether it proceeded from the defendant's locomotive, although it actually started at a distance of one hundred and sixteen feet from the defendant's right of way.<sup>56</sup> Every such case will depend more or less upon the collection of circumstances disclosed by the evidence, and it will be a preliminary question for the decision of the court whether the fact of the breaking out of the fire soon after the passing of the train, was, under the circumstances disclosed in evidence, sufficient evidence to warrant the submission to the jury of the question whether the fire was communicated by the defendant's engine.<sup>57</sup>

**§ 2369. Not Necessary to Prove what Particular Engine Communicated the Fire.**—Where the engines of the railroad company pass along its road at frequent intervals, the land-owner would obviously be put to an unreasonable disadvantage if he were required to prove from what particular engine the fire was communicated. It has been held that this is not necessary where the plaintiff can show by circumstantial evidence that the fire probably originated from some one of them.<sup>58</sup> "The engines," it has been well said, "are all alike to him. He does not know them apart. Nor does he know when any particular engine is used, or who manages it. And when it passes at the rate of fifteen or twenty miles an hour, he could not see enough of it to afterwards identify it. What the engine is and how it is managed, is peculiarly within the knowledge of the company."<sup>59</sup> Where the evidence fails to identify the particular locomotive which set the fire which started outside of defendant's right of way, it has been held that the *prima facie* case made by the plaintiff

<sup>55</sup> Babcock v. Fitchburg R. Co., 140 N. Y. 308; s. c. 55 N. Y. St. Rep. 640; 35 N. E. Rep. 596.

<sup>56</sup> Greenfield v. Chicago & C. R. Co., 83 Iowa 270; s. c. 49 N. W. Rep. 95.

<sup>57</sup> For a collection of facts under which it was held proper to submit the question to the jury, see Tribette v. Illinois & C. R. Co., 71 Miss. 212.

<sup>58</sup> Union & C. R. Co. v. Keller, 36 Neb. 189, 198; s. c. 54 N. W. Rep. 420; Tribette v. Illinois & C. R. Co., 71 Miss. 212; s. c. 13 South. Rep. 899; Bevier v. Delaware & C. R. Co., 13 Hun (N. Y.) 254.

<sup>59</sup> Atchison & C. R. Co. v. Stanford, 12 Kan. 354.



is rebutted by showing, to the satisfaction of the jury, that all the locomotives of the defendant which passed on the day in question *were in good order, properly equipped, and properly operated*. Evidence to that effect is admissible for the purpose of rebutting the presumption of negligence.<sup>60</sup> Where the evidence showed with reasonable certainty that one of *two* locomotives communicated the fire, it was held that other evidence should be confined to the question of the equipment and management of these two locomotives, and that the inference of negligence was rebutted by evidence showing that *both of them* were properly constructed, in proper repair, and operated with due skill and care when the fire took place.<sup>61</sup>

§ 2370. **Evidence that the Engine Set Other Fires.**—In these actions, as the negligence of the defendant can seldom be proved by the plaintiff except from circumstances, it has been generally held admissible to prove that the particular locomotive from which the fire was communicated had set other fires at other times, or had dropped fire on other trips near the time of the particular fire,<sup>62</sup>—this being regarded as presumptive evidence that it was either not properly equipped or was out of repair,<sup>63</sup>—for example, evidence that the same locomotive set out several successive fires on the same day.<sup>64</sup> It is needless to say that negligence of a railroad company in setting fire to property can not be presumed from the occurrence of other fires along the road two or three years before, since the appliances of the company for preventing such accidents may have been improved since that time.<sup>65</sup> So, where it appeared that the plaintiff's loss, if caused at all by the defendant's negligence, was attributable entirely to the escape of sparks at a particular time from one of two particular engines, evidence that sparks of unusual size had been emitted for some time prior to the fire by defendant's engines generally, was held inadmissible.<sup>66</sup> It has been held admissible to prove that the engine

<sup>60</sup> Biering v. Gulf &c. R. Co., 79 Tex. 584; s. c. 15 S. W. Rep. 576.

<sup>61</sup> Tribette v. Illinois &c. R. Co., 71 Miss. 212; s. c. 13 South. Rep. 899.

<sup>62</sup> Steele v. Pacific &c. R. Co., 74 Cal. 323; s. c. 15 Pac. Rep. 851; Lanning v. Chicago &c. R. Co., 68 Iowa 502; Hazeltine v. Concord R. Corp., 64 N. H. 545; s. c. 6 N. Eng. Rep. 897; 15 Atl. Rep. 143; McTavish v. Great Northern R. Co., 8 N. D. 333; s. c. 79 N. W. Rep. 443 (set three fires on the same day within ten miles of the one in question); Patton v. St. Louis &c. R. Co., 87 Mo. 117 (set other fires on the same

trip); Butcher v. Vaca Valley &c. R. Co., 67 Cal. 518 (set a fire two weeks afterwards); Green Ridge R. Co. v. Brinkman, 64 Md. 52; s. c. 54 Am. Rep. 755.

<sup>63</sup> Slossen v. Burlington &c. R. Co., 60 Iowa 215.

<sup>64</sup> West v. Chicago &c. R. Co., 77 Iowa 654; s. c. 35 N. W. Rep. 479; Smith v. Chicago &c. R. Co., 4 S. D. 71; s. c. 55 N. W. Rep. 717.

<sup>65</sup> Galveston &c. R. Co. v. Rheiner (Tex. Civ. App.), 25 S. W. Rep. 971.

<sup>66</sup> Albert v. Northern &c. R. Co., 98 Pa. St. 316.



which caused the particular fire had, *for a month or two before the fire*, dropped quantities of live coals in the vicinity where the fire occurred, and that there were live coals upon the track at other places at the time of the fire; and that coals at other times had been dropped from the engine in question.<sup>67</sup> Evidence tending to prove that the locomotive engine which caused the destruction of the plaintiff's property also set two other fires about the same time is *not*, as a matter of law, rebutted by evidence that it was properly equipped with the best known appliances for arresting sparks, was in good condition, and managed by a competent and trustworthy engineer.<sup>68</sup> This rule is not restricted in its application to *railway fires*.<sup>69</sup> In an action for damage to property caused by the escape of fire from the *chimney of a manufactory*, evidence that smoke, sparks, and flame had been observed coming from the chimney *at other times* was held admissible on the question of the proper construction of the stack.<sup>70</sup> Evidence of this character is admitted for two purposes: First, to show the cause of the injury. Second, to show negligence in the construction or working of the particular engine which caused the damage.

**§ 2371. Evidence of Other and Distinct Fires Set by Other Engines.**—The business of running railroad trains suggests a unity of management and a general similarity in the construction of the engines. For this reason, and on account of the difficulty of proving negligence in these cases, as before pointed out, the admission of evidence as to *other and distinct fires* from the one alleged to have caused the injury is, in some courts, permitted. This rule may be stated as follows: That, in actions for damages caused by the negligent escape of fire from locomotive engines, it is competent for the plaintiff to show that, about the time when the fire in question happened, the engines which the company was running past the place of the fire were so managed in respect of their furnaces as to be likely to set on fire objects in the position of the property burned; or to show the emission of sparks or ignited matter from other engines of the defendant passing the spot upon other occasions, either before or after the damage occurred, without showing that they were under the charge of the same driver, or were of the same construction, as the one causing the damage.<sup>71</sup> But where the engine which scattered the fire is

<sup>67</sup> Webb v. Rome &c. R. Co., 49 N. Y. 420.

<sup>68</sup> Smith v. Chicago &c. R. Co., 4 S. D. 71; s. c. 55 N. W. Rep. 717.

<sup>69</sup> Hinds v. Barton, 25 N. Y. 544; Hoyt v. Jeffers, 30 Mich. 181.

<sup>70</sup> Gagg v. Vetter, 41 Ind. 228.

<sup>71</sup> Henry v. South Pacific R. Co., 50 Cal. 176; Home Ins. Co. v. Pennsylvania R. Co., 11 Hun 182; Diamond v. Northern &c. R. Co., 6 Mont. 580; Thatcher v. Maine &c. R. Co.,



identified, it is not competent to prove that *other* engines of the same company also scattered fire.<sup>72</sup> It has been held not erroneous to instruct the jury that they may consider the fact that defendant's engines had dropped fire at other times before or after the occurrence of the fire complained of, on the ground that it is not limited as to time, place, or to the particular engine, in the absence of any objection made at the time of the introduction of the evidence, on account of the remoteness of the other fires.<sup>73</sup> Ignoring the difficulty which the injured or ruined land-owner or tenant will have in proving what particular engine scattered the fire, or just how or why it came to do it, since it will generally be out of sight before he discovers that the fire has been set, and since all the evidence concerning its character and management is in the possession of the railroad company, its agents and employes,—other courts have held that it is not competent in such cases to prove that a locomotive of the railway company had, shortly before or shortly after the day on which the particular fire occurred, emitted sparks from which straw had become ignited, in the absence of evidence that such locomotive was run on the day in question;<sup>74</sup> or, the engine which ignited the particular fire being identified, to prove that other engines of the defendant emitted sparks on other occasions, the court proceeding upon the view—almost necessarily destructive of the rights of the person injured—that the liability of the railway company depended upon its negligence in operating the particular engine, and not on its negligence in operating engines generally.<sup>75</sup>

§ 2372. Such Evidence Admissible on the Cause of the Injury.—“I think it clearly was admissible,” said Tindal, C. J., in an early

85 Me. 502; s. c. 27 Atl. Rep. 522; *Diamond v. Northern & C. R. Co.*, 6 Mont. 584; s. c. 13 Pac. Rep. 369; *Northern & C. R. Co. v. Lewis*, 51 Fed. Rep. 677; s. c. 7 U. S. App. 254; *Gulf & C. R. Co. v. Johnson*, 54 Fed. Rep. 474; s. c. 10 U. S. App. 629; *Evansville & C. R. Co. v. Keith*, 8 Ind. App. 64; s. c. 35 N. E. Rep. 298; *Campbell v. Missouri & C. R. Co.*, 121 Mo. 340; s. c. 42 Am. St. Rep. 585; 25 S. W. Rep. 398; 25 L. R. A. 177; *Chicago & C. R. Co. v. Gilbert*, 52 Fed. Rep. 712, 714; s. c. 10 U. S. App. 375; *Dunning v. Maine & C. R. Co.*, 91 Me. 99; s. c. 64 Am. St. Rep. 212; 39 Atl. Rep. 356; *Gulf & C. R. Co. v. Holt*, 1 Tex. App. Cas. 480; *Missouri & C. R. Co. v. Donaldson*, 73 Tex. 127; s. c. 11 S. W. Rep. 164. In *Pennsylvania R. Co. v. Stranahan*, 79 Pa. St. 405, it was held admissi-

ble for a witness living nineteen miles from the barn of the plaintiff which was burned, to state that it was a common occurrence for engines on the defendant's road, where he lived, to set fires four rods from the track.

<sup>72</sup> *Missouri & C. R. Co. v. Wilder* (Ind. Ter.), 53 S. W. Rep. 494; *Gibbons v. Wisconsin & C. R. Co.*, 58 Wis. 339; s. c. 17 N. W. Rep. 133; *Inman v. Elberton & C. R. Co.*, 90 Ga. 667; s. c. 35 Am. St. Rep. 235; 16 S. E. Rep. 959; *First Nat. Bank v. Lake Erie & C. R. Co.*, 174 Ill. 42; s. c. 50 N. E. Rep. 1026.

<sup>73</sup> *Steele v. Pacific & C. R. Co.*, 74 Cal. 323; s. c. 15 Pac. Rep. 851.

<sup>74</sup> *Akins v. Georgia R. & C. Co.*, 111 Ga. 815; s. c. 35 S. E. Rep. 671.

<sup>75</sup> *Missouri & C. R. Co. v. Wilder* (Ind. Ter.), 53 S. W. Rep. 490.



case,<sup>76</sup> "for the purpose for which it was received, namely, to ascertain the possibility of fire being projected from the engine to such a distance from the railway as the building in question. Whether or not it was admissible for any other purpose it is not necessary to inquire." And Maule, J., added: "The matter in issue was whether or not the plaintiff's property had been destroyed by fire proceeding from the defendant's engine; and involved in that issue, was the question whether or not the fire could have been so caused. The evidence was offered for the purpose of showing that it could, and for that purpose it was clearly material and admissible." And this rule has been followed in this country.<sup>77</sup> In a Massachusetts case,<sup>78</sup> the plaintiff's evidence showed that, within a *fortnight* previous to the fire in question, the engine complained of had emitted burning sparks, that fell upon the building injured. The defendant showed that similarly constructed engines had been in use on its own and other roads for years, and that they did not emit sparks that would set fire to buildings. In reply, plaintiff was permitted to show that *similar engines* on one of the other roads had emitted sparks which had set fire to objects along the track. "The evidence to which the defendant objected," said the court, "was clearly competent. One of the grounds of the defense was, that no sparks of coal from the engine of the defendant could reach the premises of the plaintiff so as to communicate fire. To meet this proposition, it was certainly fit and apposite for the plaintiff to prove the physical possibility that fire could be so communicated, by showing that on a previous occasion the same engine, using the same species of fuel, had emitted burning sparks which fell within the enclosure of the plaintiff. Such evidence would have been open to question if offered solely in support of the plaintiff's case; but it was rendered relevant and material by the ground taken in defense. On the same ground, evidence concerning the emission of sparks from *similar engines* used on other roads was admissible." If the origin of the fire be admitted, or if the possibility of its being caused by the defendant be not denied, evidence of subsequent fires would be inadmissible, for this purpose at least.<sup>79</sup>

§ 2373. Such Evidence Admissible on the Question of Negligence.—That *other fires* had occurred antecedent to the injury would be a circumstance which should have caused the defendant to be more

<sup>76</sup> Piggot v. Eastern &c. R. Co., 3 C. B. 230.

<sup>77</sup> Burke v. Louisville &c. R. Co., 7 Heisk. (Tenn.) 451; Field v. New York &c. R. Co., 32 N. Y. 339; Longa-

baugh v. Virginia &c. R. Co., 9 Nev. 271.

<sup>78</sup> Ross v. Boston &c. R. Co., 6 Allen (Mass.) 86.

<sup>79</sup> Smith v. Old Colony R. Co., 10 R. I. 22.



vigilant, and would be relevant on the question of negligence; and evidence of other fires, either antecedent or subsequent, would tend to show that the defendant's engines were not in right condition for arresting sparks,—either that they were not properly constructed, or were out of repair.<sup>80</sup> In a very well-reasoned case, on this question it is said: "What are the facts of this case? Plaintiff's wood caught fire in some manner to him, at the time, unknown. How did the fire originate? This was the first question to be established in the line of proof. Positive testimony could not be found. The plaintiff was compelled, from the necessities of the case, to rely upon circumstantial evidence. What does he do? He first shows, as in the New York cases, the improbabilities of the fire having originated in any other way except from coals dropping from the defendant's engines. He then shows the presence, in the wood-yard, of one of the engines of the defendant within half an hour prior to the breaking out of the fire; then proves that fires have been set in the same wood-yard, within a *few weeks* prior to this time, from sparks emitted from defendant's locomotives. I think such testimony was clearly admissible, under the particular facts of this case, upon the weight of reason as well as of authorities. \* \* \* Upon the question of negligence, it was admissible as tending to prove that if the engines were, as claimed by defendants, properly constructed, and supplied with the best appliances in general use, they could not have been properly managed, else the fires would not have occurred."<sup>81</sup> Proof of fires for *four years back* was allowed in this case, the court citing with approval the language of the New York Court of Appeals in an earlier case:<sup>82</sup> "The more frequent these occurrences, and the longer time they had been apparent, the greater the negligence of the defendant; and such proof would disarm the defendant of the excuse that, on the particular occasion, the dropping of fire was an unavoidable accident."

§ 2374. **The Same Rule in the Federal Courts, Followed Generally by the State Courts.**—The same rule of evidence prevails in the

<sup>80</sup> *Sheldon v. Hudson River R. Co.*, 14 N. Y. 221; *Field v. New York & C. R. Co.*, 32 N. Y. 339; *Chase v. St. Joseph & C. R. Co.*, 11 Kan. 47; *Huyett v. Philadelphia & C. R. Co.*, 23 Pa. St. 373; *Railroad Co. v. Yeiser*, 8 Pa. St. 366. But see *Erie R. Co. v. Decker*, 78 Pa. St. 293.

<sup>81</sup> *Longabaugh v. Virginia & C. R. Co.*, 9 Nev. 271, 288, 289.

<sup>82</sup> *Field v. New York & C. R. Co.*, 32 N. Y. 339. Other cases where evidence was admitted of other fires

having been communicated, without reference to the engine, are: *Westfall v. Erie R. Co.*, 5 Hun (N. Y.) 75; *Annapolis & C. R. Co. v. Gantt*, 39 Md. 115 (*Contra* *Baltimore & C. R. Co. v. Woodruff*, 4 Md. 242); *Boyce v. Cheshire R. Co.*, 43 N. H. 627 (*Contra* *s. c.* 42 N. H. 98). But in Missouri such evidence was deemed collateral to the issue, and hence not admissible: *Coale v. Hannibal & C. R. Co.*, 60 Mo. 227; *Lester v. Kansas & C. R. Co.*, 60 Mo. 265; 2 Cent. L. J. 641.



Federal courts. In *Grand Trunk Railway Company v. Richardson*,<sup>83</sup> the plaintiff was allowed to prove that, at various times during the same summer, before the fire occurred, some of the defendant's locomotives scattered fire when going past the property destroyed, without showing that either of the locomotives which it was claimed caused the fire was among the number, and without showing that such locomotives were similar in their make, state of repair, or management, to the latter ones. Mr. Justice Strong said: "The question, therefore, is, whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiff's property, was caused by any of the defendant's locomotives. The question has often been considered by the courts in this country and in England, and such evidence has, we think, been generally held admissible as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. There are, it is true, some cases that seem to assert the opposite rule. It is, of course, indirect evidence, if it be evidence at all. In this case, it was proved that engines run by these defendants had crossed the bridge not long before it took fire. The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire. And it seems to us that, under the circumstances, the probability was strengthened by the fact that some engines of the same defendants, at other times during the same season, had scattered fire during their passage."

§ 2375. **Evidence that Other Engines did not Scatter Fire.**—In a Kansas case,<sup>84</sup> it was held that evidence that other engines, under like circumstances, did *not* communicate fire at the place where the fire in question occurred, was competent, as tending to prove negli-

<sup>83</sup> 91 U. S. 454; s. c. 3 Cent. L. J. 353. This case has been cited with approval in a great many other cases, principally in the State Courts, on questions of evidence more or less similar. See 8 Notes on U. S. Reports, 702; and, for example, see *Northern & C. R. Co. v. Lewis*, 51 Fed. Rep. 664; s. c. 7 U. S. App. 254; *Gulf & C. R. Co. v. Johnson*, 54 Fed. Rep. 476; s. c. 10 U. S. App. 629; *Brown v. Benson*, 101 Ga. 758; s. c. 29 S. E. Rep. 217; *Evansville & C. R. Co. v. Keith*, 8 Ind. App. 64; s. c. 35 N. E. Rep. 298; *Thatcher v. Maine & C. R. Co.*,

85 Me. 509; s. c. 27 Atl. Rep. 522; *Campbell v. Missouri & C. R. Co.*, 121 Mo. 350; s. c. 42 Am. St. Rep. 533; 25 S. W. Rep. 938; 25 L. R. A. 177; all admitting evidence of other fires about the same time. Also *Chicago & C. R. Co. v. Gilbert*, 52 Fed. Rep. 712, 714; s. c. 10 U. S. App. 375; *Dunning v. Maine & C. R. Co.*, 91 Me. 99, 100; s. c. 64 Am. St. Rep. 212, 213; 39 Atl. Rep. 356 (collecting cases); and *Gulf & C. R. Co. v. Holt*, 1 Tex. App. Cas. 480.

<sup>84</sup> *Atchison & C. R. Co. v. Stanford*, 12 Kan. 354.



gence on the part of the defendant with regard to the engine which caused the fire, either as to its condition or management. So, in an earlier Vermont case,<sup>85</sup> in which it was held that where the evidence tends to show that engines of proper construction and suitable repair would not scatter fire so as to endanger property, the logical conclusion is that the engine which caused the fire was not properly constructed, or was not in suitable repair. It was also said that, in connection with this testimony, the plaintiff might show that, about the time the fire occurred, the defendant's engines frequently scattered fire. "For the inference would be from this evidence, in connection with that tending to show that engines which so scatter fire as that it kindles along the roadside are not of proper construction and suitable repair, that the fire in question was caused by one of those defective engines."

**§ 2376. Evidence of Other Fires not Shown to have been Set by any Particular Engine.**—In an action of this kind, evidence of other fires not shown to have been set by sparks escaping from engines, but discovered after an engine had passed, has been held irrelevant and not admissible.<sup>86</sup>

**§ 2377. Other Evidence Admissible for the Plaintiff in Such Actions.**—It has been held that, in such an action, on an issue of negligence in leaving burning packing from a "hot-box" near a warehouse, the plaintiff may prove that combustible materials were near;<sup>87</sup> that, in an action for damages for a railway fire, the plaintiff may prove that the defendant had settled with other land-owners, paying them damages for the same fire;<sup>88</sup> where the evidence showed that the fire was communicated directly to the plaintiff's barn by the escape of pieces of fire of unusual size, evidence that several stumps a short distance from the barn near the track were also found to be on fire a short time after the passing of the train;<sup>89</sup> under the same state of facts, evidence showing how the fire emitted by the engine on the particular occasion compared with that emitted by other engines on the road at other times;<sup>90</sup> evidence that, before the fire, the defendant ran its trains over the road, and that, after the fire, it sent an agent to see the plaintiff,—such evidence being ad-

<sup>85</sup> *Cleaveland v. Grand Trunk R. Co.*, 42 Vt. 449.

<sup>86</sup> *Missouri & C. R. Co. v. Donaldson*, 73 Tex. 124; s. c. 11 S. W. Rep. 163.

<sup>87</sup> *Whiting v. Chicago & C. R. Co.*, 5 Dak. 90; s. c. 37 N. W. Rep. 222.

<sup>88</sup> *Galveston & C. R. Co. v. Hertzog*, 3 Tex. Civ. App. 296; s. c. 22 S. W. Rep. 1013.

<sup>89</sup> *Brusberg v. Milwaukee & C. R. Co.*, 55 Wis. 106.

<sup>90</sup> *Brusberg v. Milwaukee & C. R. Co.*, 55 Wis. 106.



missible to show that the defendant was operating the road and regarded itself as the real party concerned with the settlement of the damages.<sup>91</sup> It has been held competent, as bearing upon the question of negligence, for the plaintiff to prove that, after the fire, more *track-walkers* were employed by the defendant than had been employed before the damage occurred.<sup>92</sup> Evidence of the use of the stack by others is admissible upon the question of the safety of the stack;<sup>93</sup> that the company, after the accident, changed the stack of the engine which caused the damage is likewise relevant.<sup>94</sup> Where it was proved that all the engines belonging to the defendant's road were coal-burners, and that it was more dangerous to burn wood in a coal-burner than to burn coal, it was held competent for the plaintiff, a stranger to the company, to show that the defendant was burning wood in all its engines in general, without showing more particularly that wood was burned in the particular engine which caused the fire.<sup>95</sup>

§ 2378. **Other Such Evidence Held Admissible.**—In such actions it has been held admissible for the plaintiff to prove, when suing to recover damages for the burning of certain stacks of hay, that certain other stacks around which he had plowed as a protection against fire, were also burned,—the evidence tending to negative the conclusion of contributory negligence.<sup>96</sup> Evidence of the carefulness and competency of the engineer in charge of the locomotive from which the fire proceeded is admissible, as tending to negative the conclusion of negligence on the part of the defendant.<sup>97</sup> As bearing upon the question whether the engine which set the fire was in good condition to prevent scattering fire, it may be shown that it was soon afterwards *repaired*.<sup>98</sup> In an action against a railroad company to recover damages caused by a prairie fire, started by the defendant while burning a fire guard on its right of way, evidence that, at the time the defendant started the fire, *a high wind was blowing*, is ad-

<sup>91</sup> Union &c. R. Co. v. Jones, 9 Colo. 379. In action by wife for damages, declaration of husband as to cause of fire not admissible without proof of agency: Louisville &c. R. Co. v. Richardson, 66 Ind. 43. Compare Long v. Brown, 66 Ind. 160.

<sup>92</sup> Westfall v. Erie R. Co., 5 Hun (N. Y.) 75.

<sup>93</sup> Frankford &c. Turnpike Co. v. Phila. &c. R. Co., 54 Pa. St. 345.

<sup>94</sup> St. Joseph &c. R. Co. v. Chase, 11

Kan. 47; Bevier v. Delaware &c. R. Co., 13 Hun (N. Y.) 254.

<sup>95</sup> St. Joseph &c. R. Co. v. Chase, 11 Kan. 47.

<sup>96</sup> Lewis v. Chicago &c. R. Co., 57 Iowa 127.

<sup>97</sup> Kenney v. Hannibal &c. R. Co., 70 Mo. 243. Compare s. c. 70 Mo. 252; Flynn v. Manhattan R. Co., 1 Misc. 188; s. c. 48 N. Y. St. Rep. 670; 20 N. Y. Supp. 652.

<sup>98</sup> Butcher v. Vaca Valley &c. R. Co., 67 Cal. 518.



missible.<sup>99</sup> In an action for damages for communicating fire to the premises of the plaintiff, the railway company offered to prove that it was an *old custom of the farmers* in the vicinity to set fire annually to the leaves and underbrush at that season of the year to improve their pasturage. The plaintiff had not been able to give direct evidence that the fire was communicated from a locomotive of the defendant, but only succeeded in proving that it originated near the track and shortly after the passing of a train, and that the same engine had been seen to drop glowing cinders and to start other fires. It was held that the defendant's tender of evidence was incompetent.<sup>100</sup>

§ 2379. **Admissibility of Evidence under Particular Allegations.—**

The propriety of admitting or excluding evidence as not being relevant to the issues, may be varied by the conduct of parties on the trial. They may abandon the paper issues and try the case as though an issue not raised by the pleadings were before the court,—in which case a party taking this course may waive his right to object to evidence on the ground that it does not support any allegation made by the opposite party in his pleading. For example, in an action of the kind under consideration, where the petition did not allege that the fire was scattered in consequence of the locomotive being defective, but counsel for the defendant tried the case on the assumption that the extent of the defects in the locomotive was an issuable fact,—it was held that the defendant could not object to evidence introduced by the plaintiff tending to show that the spark-arrester on the locomotive was defective.<sup>101</sup> In the same case the petition alleged that the fire was communicated by the negligent operation of the locomotive of the defendant, but did not allege that the locomotive was defective in respect of its appliances for preventing the scattering of fire. It was, nevertheless, held that the plaintiff might prove that the fire escaped through the spark-arrester, though such evidence tended to show that the spark-arrester was defective.<sup>102</sup>

<sup>99</sup> *Clark v. Ellithorp*, 9 Kan. App. 503; s. c. 59 Pac. Rep. 289.

<sup>100</sup> *Green Ridge R. Co. v. Brinkman*, 64 Md. 52; s. c. 54 Am. Rep. 755. The decision does not seem sound. In an action against a mill-owner, by whose negligence the property of the plaintiff was alleged to have been burned, it was held that evidence of the *usual means* employed in saw-mills for the extinguishment of fire accidentally originating therein, and for the preven-

tion of the spread of such fires to neighboring property, was admissible: *McNally v. Colwell*, 91 Mich. 527; s. c. 52 N. W. Rep. 70; *Cowley v. Colwell*, 91 Mich. 537; s. c. 52 N. W. Rep. 73.

<sup>101</sup> *Kansas City & C. R. Co. v. Chamberlain*, 61 Kan. 859; s. c. 60 Pac. Rep. 15.

<sup>102</sup> *Kansas City & C. R. Co. v. Chamberlain*, 61 Kan. 859; s. c. 60 Pac. Rep. 15.



§ 2380. **Evidence for the Defendant.**—It is admissible to prove, under appropriate allegations in such action, that the defendant used on the locomotive which scattered the fire all the appliances in use for preventing the escape of fire from locomotives,<sup>103</sup>—except where exceptional rules prevail, enacted by statute.<sup>104</sup> Enlarging the foregoing statement, the defendant may show that its engineer and fireman were competent and careful; that its locomotive was of a new and approved make, supplied with a good spark-arrester, and that it had been properly *inspected*.<sup>105</sup>

§ 2381. **Evidence on the Question of Damages.**—In an action for damage to the freehold of the plaintiff by a fire set from an engine of the railway company, if it appears that the plaintiff holds the land for the purpose of renting only, evidence of the rental value of the lands after the fire is admissible on the part of the defendant, for the purpose of showing the extent to which the plaintiff might have avoided the consequences of the fire by subsequently renting it.<sup>106</sup>

### ARTICLE III. QUESTIONS OF PROCEDURE AND DAMAGES IN THESE ACTIONS.

| SECTION   | SECTION  |
|---|--|
| 2383. Measure of damages where the property is not insured. | 2387. Instructions which were not erroneous.                           |
| 2384. Rule of damage where the property is insured.         | 2388. Instructions, the giving of which was erroneous.                 |
| 2385. Notice of claim for damages.                          | 2389. Special findings by the jury—answers to special interrogatories. |
| 2386. Questions of fact for the jury.                       |  |

§ 2383. **Measure of Damages where the Property is not Insured.**<sup>107</sup>—If the injury is to the freehold, the rule, in estimating the damage, is to take the *difference in the value of the land* before and after the fire.<sup>108</sup> Standing timber, growing trees, bushes, etc.,

<sup>103</sup> Missouri &c. R. Co. v. Donaldson, 73 Tex. 124; s. c. 11 S. W. Rep. 163.

<sup>104</sup> *Ante*, § 2337.

<sup>105</sup> Patton v. St. Louis &c. R. Co., 87 Mo. 117. The plaintiff having, on cross-examination, disclosed the fact that he was joint plaintiff in another suit pending against the defendant for damages arising from the same fire,—it was proper to ask him the *amount of his claim*, as showing the extent of his *interest*, and as affecting his credibility as a

witness: Pennsylvania Co. v. Hunsley, 23 Ind. App. 37; s. c. 54 N. E. Rep. 1071.

<sup>106</sup> St. Louis &c. R. Co. v. Ayres, 67 Ark. 371; s. c. 55 S. W. Rep. 159.

<sup>107</sup> This section is cited in § 2388.

<sup>108</sup> Pennsylvania Co. v. Hunsley, 23 Ind. App. 37; s. c. 54 N. E. Rep. 1071; Louisville &c. R. Co. v. Spencer, 149 Ill. 97; s. c. 36 N. E. Rep. 91; aff'd 47 Ill. App. 503; Missouri &c. R. Co. v. Pfuger (Tex. Civ. App.), 25 S. W. Rep. 792 (no off. rep.); Dwight v. Elmira &c. R. Co., 132 N. Y. 199.



being a part of the land, where these are destroyed, the same rule applies: the measure of damages is the difference in the value of the land before and after such trees, bushes, timber, etc., were burned.<sup>109</sup> In determining this value, the *opinions* of witnesses who are acquainted with such values are admissible under a well-known rule.<sup>110</sup> In making such determination, it is proper to consider the character of the soil, the state of its cultivation, and the kind, quality and age of the trees and bushes which have been destroyed.<sup>111</sup> In the case where *fence posts* have been destroyed, the rule of damages has been said to be the fair and reasonable market value of the posts at the time and place of the fire;<sup>112</sup> and the same rule applies in the case of the destruction of *grass*.<sup>113</sup> In a case of the burning of *meadow land* and an *orchard*, the rule of damage which was applied was that first above stated, the difference in the value of the land with and without the meadow, and the fruit trees on it.<sup>114</sup> Another decision is to the effect that for the burning of grass, the measure of damages is the market value of the grass as it stood on the ground at the time of the fire; but if the *land* was injured, if the fire burned the sod and timber thereon, then the rule of damages first above stated applies, which is the difference in the value of the land immediately before, and after the fire, exclusive of the value of the grass.<sup>115</sup> Another court has held that the rule of damages for the destruction of a *meadow* by a fire, is the cost of reseeding the meadow and its rental value until it is restored.<sup>116</sup> Where there are no bushes or trees on the land, the measure of damages is said to be the value of the fence posts and grass destroyed, and also the injury to the value of the land by the destruction of the turf, which would necessarily be the difference between its value before and its value after the fire.<sup>117</sup> For the burning of grass, the damage has been said to be the market value

<sup>109</sup> St. Louis &c. R. Co. v. Ayres, 67 Ark. 371; s. c. 55 S. W. Rep. 159; Easterbrook v. Erie &c. R. Co., 51 Barb. (N. Y.) 94; Hayes v. Chicago &c. R. Co., 45 Minn. 17.

<sup>110</sup> Pennsylvania Co. v. Hunsley, 23 Ind. App. 37; s. c. 54 N. E. Rep. 1071.

<sup>111</sup> Louisville &c. R. Co. v. Spencer, 149 Ill. 97; s. c. 36 N. E. Rep. 91; aff'g s. c. 47 Ill. App. 503.

<sup>112</sup> Missouri &c. R. Co. v. Pfluger (Tex. Civ. App.), 25 S. W. Rep. 792 (no off. rep.).

<sup>113</sup> Missouri &c. R. Co. v. Pfluger, (Tex. Civ. App.), 25 S. W. Rep. 792 (no off. rep.).

<sup>114</sup> Chicago &c. R. Co. v. Davis, 74 Ill. App. 595.

<sup>115</sup> Gulf &c. R. Co. v. Hendricks (Tex. Civ. App.), 25 S. W. Rep. 433 (no off. rep.); Missouri &c. R. Co. v. Goode, 7 Tex. Civ. App. 245; s. c. 26 S. W. Rep. 441; Fort Worth &c. R. Co. v. Hodgett, 67 Tex. 685; s. c. 4 S. W. Rep. 365.

<sup>116</sup> St. Louis &c. R. Co. v. Jones, 59 Ark. 105; s. c. 26 S. W. Rep. 595; Vermilyea v. Chicago &c. R. Co., 66 Iowa 108; s. c. 24 N. W. Rep. 234; Pittsburgh &c. R. Co. v. Hixon, 110 Ind. 225; s. c. 11 N. E. Rep. 285.

<sup>117</sup> Gulf &c. R. Co. v. Matthews, 3 Tex. Civ. App. 493; s. c. 23 S. W. Rep. 90. Much to the same effect, see Missouri &c. R. Co. v. Pfluger (Tex. Civ. App.), 25 S. W. Rep. 792 (no off. rep.).



of the grass if it has a market value; but if it has no market value, then its value when used for pasturage should be taken.<sup>118</sup> Where the land was leased and in the possession of a tenant, and the action was brought by the owner against the railway company, the rule of damage was said to be to allow only the value of such of the grass as would have been left on the land if there had been no fire at the time when the owner would have the right to possession, and also the amount of detriment to the sod and turf of the land, caused by the fire.<sup>119</sup>

§ 2384. **Rule of Damage where the Property is Insured.**—Upon this question there seem to be two opinions. One is that, whereas the land-owner buys the insurance and pays for it, it is his, and does not belong to the railroad company which has been guilty of the wrong done him, and which is not in privity with his contract of insurance; and, consequently, that notwithstanding the fact that he may have obtained insurance upon the property destroyed by the negligent fire set by the railroad company, and may have received its full value from the insurance company under the terms of the policy, he may nevertheless recover its full value from the railroad company, and that there is to be no abatement of the damages which he recovers from the railroad company by reason of the amount which has been paid him by the insurance company; since the plaintiff recovers but *once* for the wrong done him, and receives the insurance money on a contract to which the defendant is in no way privy, and in respect to which his own wrongful act can give him no equities.<sup>120</sup> And this is so, although the statute makes the railroad company absolutely liable for the loss, and gives it an insurable interest in property along its line.<sup>121</sup> It follows that where the owner and insurer are both parties to an action to recover damages from the railroad company for the property destroyed, there should be a recovery for the full value of the property, without any deduction in favor of the railroad company, on account of payments made to the owner by the insurer, in discharge of the obligation assumed by its policy; but the insurer is entitled to be repaid out of the amount collected from the railroad

<sup>118</sup> *Gulf &c. R. Co. v. Matthews*, 3 Tex. Civ. App. 493; s. c. 23 S. W. Rep. 90.

<sup>119</sup> *Missouri &c. R. Co. v. Fulmore* (Tex. Civ. App.), 26 S. W. Rep. 238 (no off. rep.). Damages in the sum of \$558 awarded for the destruction of an acre and a half of meadow, ninety-nine pear trees, and thirty-three peach trees, was not deemed

excessive in *Chicago &c. R. Co. v. Davis*, 74 Ill. App. 595.

<sup>120</sup> *Rolfe v. Boston &c. R. Co.*, 69 N. H. 476; s. c. 45 Atl. Rep. 251; *Texas &c. R. Co. v. Levi*, 59 Tex. 674.

<sup>121</sup> *Regan v. New York &c. R. Co.*, 60 Conn. 124; s. c. 22 Atl. Rep. 503; 10 Rail. & Corp. L. J. 313; 49 Am. & Eng. Rail. Cas. 590.



company, the amounts paid by it in settlement of its loss on the policy.<sup>122</sup> The insurance company may, under the principle of subrogation, acquire an interest in the prosecution of the action by the injured land-owner; but whether it does or not, the fact that it pays to the land-owner the amount payable to him under the terms of the policy, does not disable the land-owner from the further prosecution of the action.<sup>123</sup> The other rule is that where property destroyed by fire from a railroad under circumstances which make the company liable therefor is insured, the right of the owner, as against the railroad company and the insurer, is limited to indemnity for his loss.<sup>124</sup> Under this rule, the railroad company is not liable to a land-owner who has been so fortunate as to obtain insurance on his property, and who has received the full value of the property burned from the insurance company; but the railroad company—the wrong-doer—steps in and enjoys the benefit of the providential act of the land-owner, of his expenditure of his own money in obtaining the policy, and without paying anything therefor.<sup>125</sup>

<sup>122</sup> Lake Erie &c. R. Co. v. Falk, 62 Ohio St. 297; s. c. 56 N. E. Rep. 1020.

<sup>123</sup> Nichols v. Chicago &c. R. Co., 36 Minn. 452; s. c. 32 N. W. Rep. 176. This rule proceeds on the theory that the acceptance by the injured party, from the insurer, of the payment of his loss, subrogates the insurer to all the loser's rights against the railway company whose negligence caused the loss: Allen v. Chicago &c. R. Co., 94 Wis. 93. The insurance company, so subrogated, is entitled to maintain an action in its own name against the railroad company, to recover the damages, upon the original cause of action, without any assignment thereof by the insured: Swartout v. Chicago &c. R. Co., 49 Wis. 625. A part payment by an insurer of the loss, operates as an assignment *pro tanto*: Pratt v. Radford, 52 Wis. 114. The insurer, after payment of the loss, is a necessary party to any action brought by the insured to recover the damages: Pratt v. Radford, 52 Wis. 114. Other courts have held that fire insurance contracts are contracts of indemnity, and if a loss occurs by the wrongful act of another, the insurer is subrogated to the rights and remedies of the assured, and may maintain an

action against the wrong-doer. If the wrong-doer pays the assured after payment by the insurer, with knowledge of the facts, it will be regarded as a fraud on the insurer, and the wrong-doer will not be protected from liability to the insurer: Connecticut &c. Ins. Co. v. Erie &c. R. Co., 73 N. Y. 399.

<sup>124</sup> Lake Erie &c. R. Co. v. Falk, 62 Ohio St. 297; s. c. 56 N. E. Rep. 1020.

<sup>125</sup> Allen v. Chicago &c. R. Co., 94 Wis. 93; s. c. 68 N. W. Rep. 873. In Pratt v. Radford, 52 Wis. 114, which was cited with approval in Allen v. Chicago &c. R. Co., 94 Wis. 93, it was expressly held that an insurer, having paid the loss, might maintain an action against the wrong-doer for negligence, to recover back what it had paid. This is in complete consonance with the decisions of those courts which hold that the insurer, after payment, is entitled to be subrogated to the rights of the insured. The application of this rule is not limited to cases of railroad fires. It has been held to apply to a case where the fire which destroyed the plaintiff's mill was the result of the negligence of an individual: Pratt v. Radford, 52 Wis. 114.



§ 2385. **Notice of Claim for Damages.**—Statutes have been enacted in favor of railroad companies, such as exist in favor of municipal corporations, requiring persons injured in the operation of their roads to present their claims for damages within a stated period.<sup>126</sup> Where the statute required that such notice should be given “within one year after the happening of the event” causing the damage, it was held that it was in time when it was received at the general claim office of the railroad company by its general claim agent within a year after the fire has *ceased burning* on the land of the claimant.<sup>127</sup> Such a statute, providing that the notice “may” be given in the manner required for the service of a summons, was held permissive, and not to exclude the giving of the notice in some other proper mode.<sup>128</sup>

§ 2386. **Questions of Fact for the Jury.**—Where it was not shown that the fire was caused by either of two engines which were claimed to be in perfect order, but it was shown that it might have been caused by another engine, which had a hole cut in its fire screen, and which was not in good order,—it was, of course, a question of fact for the jury which engine caused the fire.<sup>129</sup> Where there was a conflict in the evidence as to whether the engine which caused the fire was sufficiently guarded by the screen on the smoke stack which would prevent fire from escaping, the question of negligence in the escape of the fire was for the jury, and a nonsuit was properly refused.<sup>130</sup> The point or place along the line at which a fire was set by a passing engine, was also a question for the jury.<sup>131</sup>

§ 2387. **Instructions which were not Erroneous.**—It has been held *not erroneous* to instruct the jury that if the engine which set out the fire in question had set out several other fires on the same trip, this should be regarded as evidence tending to show that the engine was not properly constructed, or was not in good repair, or was improperly used;<sup>132</sup> to instruct them that a railroad company is bound to use the most approved fire-arresters,—though it was conceded that it would be more satisfactory if the trial court had added the words “in use”;<sup>133</sup> to give a special instruction at the request of counsel

<sup>126</sup> As to statutes of this kind in case of the killing or injuring of domestic animals, see *ante*, § 2201, *et seq.* As to regulations of telegraph companies limiting time for presenting claims, see *post*, § 2429, *et seq.*

<sup>127</sup> *Atkinson v. Chicago & C. R. Co.*, 93 Wis. 362; s. c. 67 N. W. Rep. 703.

<sup>128</sup> *Atkinson v. Chicago & C. R. Co.*, 93 Wis. 362; s. c. 67 N. W. Rep. 703.

<sup>129</sup> *Seeley v. New York & C. R. Co.*, 102 N. Y. 719; s. c. 3 Cent. Rep. 743.

<sup>130</sup> *Seeley v. New York & C. R. Co.*, 102 N. Y. 719; s. c. 3 Cent. Rep. 743.

<sup>131</sup> *Chicago & C. R. Co. v. Davis*, 74 Ill. App. 595.

<sup>132</sup> *Lanning v. Chicago & C. R. Co.*, 68 Iowa 502.

<sup>133</sup> *Missouri & C. R. Co. v. Bartlett*, 81 Tex. 42; s. c. 16 S. W. Rep. 638.



for the plaintiff, repeating an instruction in the general charge, to the effect that evidence tending to prove that the engine which caused the fire had set two other fires about the same time, is entitled to their consideration as tending to prove negligence on the part of defendant in setting the particular fire;<sup>134</sup> to instruct them to the effect that a railroad company has the right to use its right of way and track to carry on its business as a common carrier, and that, in operating and running its trains, it has the right to use engines propelled by steam, but that, in so using engines, it is required to use ordinary care to prevent injury to others,—this not being deemed improper as liable to mislead the jury about the right of way, or as incorrectly stating the degree of care imposed by the law upon the defendant in the use of its engines;<sup>135</sup> to instruct the jury, in substance, that the only question left for them to decide is whether there was **any** negligence on the part of the defendant in leaving combustible material within the right of way,—this not being deemed erroneous on the ground of not leaving the jury free to find from the evidence whether the leaving of such combustible material within the right of way was or was not negligence.<sup>136</sup>

§ 2388. **Instructions, the Giving of which was Erroneous.**—The giving of instructions in substance and effect as follows, has been held to have been erroneous:—An instruction that the question as to whether the defendant negligently started the fire and permitted it to spread, “is governed by what would be the ordinary usage and custom that people observe in the use of fire,”—the proper measure of care being (in the opinion of the court) such as the great mass of mankind ordinarily exercise under the same or similar circumstances;<sup>137</sup> an instruction that, so long as the railroad company might reasonably use a single engine of a certain pattern, negligence can not be predicated on the fact that such engine started a fire,—since the fact that such an engine might be reasonably used at some seasons of the year, and in some localities, might not make it proper to use it at other seasons, and in other localities;<sup>138</sup> an instruction

<sup>134</sup> *Smith v. Chicago &c. R. Co.*, 4 S. D. 71; s. c. 55 N. W. Rep. 717 (in substance).

<sup>135</sup> *Fischer v. Bonner* (Tex. Civ. App.), 22 S. W. Rep. 755 (no off. rep.).

<sup>136</sup> *Abbott v. Gore*, 74 Wis. 509; s. c. 43 N. W. Rep. 365; 40 Am. & Eng. Rail. Cas. 244.

<sup>137</sup> *Nass v. Schulz*, 105 Wis. 146; s. c. 81 N. W. Rep. 133. The appel-

late court was as far from the true rule as was the trial court. The true rule is the care which *careful and prudent* people ordinarily exercise in the given situation, and under the circumstances disclosed by the evidence: Vol. I, §§ 23, 24.

<sup>138</sup> *Metzgar v. Chicago &c. R. Co.*, 76 Iowa 387; s. c. 41 N. W. Rep. 49.



which tells the jury simply that the defendant railroad company was bound to use the reasonable care and diligence of an ordinarily prudent person in preventing the escape of fire, and in keeping its right of way clear of combustible material, unless accompanied with the explanation that the care required is the ordinary care of an expert engineer or railroad servant;<sup>139</sup> an instruction that if the fire was set by the engine, the presumption is that it was due to negligence, and that if an expert witness testifies that the locomotive was properly constructed, so that it would not set fire, it is for the jury to consider which they will believe,—the court holding this misleading, as allowing the jury to suppose that the only question was to be whether the fire originated from the engine;<sup>140</sup> an instruction stating to the jury that the emission of sparks from a locomotive, if inconsistent with the common or known efficiency of approved spark-arresters in general use and properly used, justifies the inference of negligence;<sup>141</sup> in a case where the damage was done by successive fires, and the parties did not attempt to ascertain the loss therefrom until after the second fire, and the defendant omitted to examine the witnesses as to the separate amount of loss accruing from each fire,—an instruction requested by the defendant telling the jury to find the amount of each loss separately;<sup>142</sup> in an action predicated upon the negligence of the defendant, in allowing sparks to escape from its engine, by which dry grass which it had negligently allowed to remain upon its right of way was ignited, an instruction that the plaintiff could not recover if the defendant was not negligent in allowing the sparks to escape, but which ignores the question of its negligence in allowing the dry grass to accumulate upon its right of way;<sup>143</sup> in an action for damages done to the plaintiff's orchard by fire negligently set by the defendant, an instruction as to the measure of damages based on the value of the trees separate and apart from the land, where the petition of the plaintiff alleged that the trees were an orchard planted and growing upon the land of the plaintiff;<sup>144</sup> an

<sup>139</sup> *Diamond v. Northern &c. R. Co.*, 6 Mont. 580. The propriety of this ruling is challenged: See Vol. I, §§ 23, 24. If the agricultural communities are remitted, for protection from fire, to the "ordinary care of an expert engineer or railroad servant," where will they be?

<sup>140</sup> *Columbia &c. R. Co. v. Farrington*, 1 Wash. 202; s. c. 23 Pac. Rep. 413. The decision is a weak hypercriticism. The instruction is not misleading in the particular suggested at all.

<sup>141</sup> *Savannah &c. R. Co. v. Tiede-*

*man*, 39 Fla. 196; s. c. 22 South. Rep. 658.

<sup>142</sup> *Norfolk &c. R. Co. v. Bohannon*, 85 Va. 293; s. c. 7 S. E. Rep. 236 (instruction properly refused).

<sup>143</sup> *Steele v. Pacific Coast R. Co.*, 74 Cal. 323; s. c. 15 Pac. Rep. 851 (instruction was properly refused).

<sup>144</sup> *Missouri &c. R. Co. v. Steinberger*, 6 Kan. App. 585; s. c. 51 Pac. Rep. 623 (instruction properly refused). That the measure of damages in such a case is to regard the trees as a part of the freehold, and to assess the difference in value be-



instruction assuming the controverted fact as proved, that a certain fire set by the defendant was not the fire which damaged the plaintiff's land, where there was evidence from which the jury might properly have found that the fire referred to was communicated to the plaintiff's land.<sup>145</sup>

§ 2389. **Special Findings by the Jury—Answers to Special Interrogatories.**—A special finding that the fire by which growing timber was destroyed, was set by an engine of the defendant, which was not shown to have been operated in a careful manner at the time when the fire was started, was not wholly without support in the evidence, where there was proof that, at the time of the fire, dead grass and other inflammable material were in an unusually dry condition, and that there was an unusually high wind on the day of the fire.<sup>146</sup> Another court has held that a special verdict, to authorize a judgment against a railroad company for damages to property from fire communicated from its right of way, must show that the owner was free from negligence.<sup>147</sup> Where the issue was as to whether the fire originated on the right of way of the defendant, a special interrogatory, the purpose of which was to secure a finding that, at the time and place, there was a short green growth of grass upon the right of way, was held to be material.<sup>148</sup>

tween the land before the fire and after the fire,—see *ante*, § 2383.

<sup>145</sup> *Clifford v. Minneapolis & C. R. Co.*, 105 Wis. 618; s. c. 81 N. W. Rep. 143 (instruction properly refused). Where the evidence was doubtful as to whether or not the fire which destroyed the property of the plaintiff was ignited by sparks from the defendant's engine, the court did not err in failing to submit to the jury the question whether the defendant's engine was carefully handled, so as to prevent the escape of fire; since the burden of showing care was not on the defendant, and there was not a *prima facie* showing that the fire originated from the engine: *Scott v. Texas & C. R. Co.* (Tex. Civ. App.), 56 S. W. Rep. 97. If there was enough evidence to leave it doubtful whether or not the fire originated

from the engine, it was not for the judge to decide that a *prima facie* showing had not been made out, but the question should have been submitted to the jury. For an instruction which was held defective in not advising the jury that the contributory negligence of the plaintiff in exposing his property to fire must have been the proximate cause of the injury, see *Paris & C. R. Co. v. Nesbitt* (Tex. Civ. App.), 38 S. W. Rep. 243 (no off. rep.).

<sup>146</sup> *Burdick v. Chicago & C. R. Co.*, 87 Iowa 384; s. c. 54 N. W. Rep. 439.

<sup>147</sup> *Chicago & C. R. Co. v. Bailey*, 19 Ind. App. 163; s. c. 46 N. E. Rep. 688.

<sup>148</sup> *Pennsylvania Co. v. Hunsley*, 23 Ind. App. 37; s. c. 54 N. E. Rep. 1071.







## TITLE SIXTEEN.

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NEGLIGENCE OF TELEGRAPH COMPANIES.







# TITLE SIXTEEN.

## NEGLIGENCE OF TELEGRAPH COMPANIES.

### CHAPTER

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## CHAPTER LXXX.

### GENERAL RULES AND DOCTRINES.

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of such companies.

#### SECTION

2393. Not insurers, but liable for  
negligence, fraud, etc.



## SECTION

2394. Failure to transmit and deliver correctly constitutes *prima facie* evidence of negligence.
2395. Further of evidence of negligence.
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2397. Exceptional rule under the stipulation in regard to repeating the message.

## SECTION

2398. Analogous doctrines with regard to the loss of goods by carriers.
2399. Obligation of company to notify sender of its inability to transmit.
2400. Negligence of connecting lines.
2401. Contributory negligence as a defense in these cases.

§ 2392. General Nature of the Liability of Such Companies.<sup>1</sup>—By the English law, prior to the time when the telegraph passed under the control of the postoffice department, the obligations of a telegraph company to its customers were regarded as a mere matter of private contract between the parties.<sup>2</sup> But the American law regards the employment of a telegraph company as a *public employment*, like that of a railway company, subject to public regulation, to be exercised in behalf of the public distributively, under a responsibility for negligence, fraud or oppression, which is measured by the general principles of law, and not according to restraints of private contract, unless those restraints are reasonable.<sup>3</sup> In the discharge of their public

<sup>1</sup> This section is cited in §§ 2408, 2411, 2450, 2451.

<sup>2</sup> *Playford v. United Kingdom Tel. Co.*, L. R. 4 Q. B. 706; *Dickson v. Reuter's Tel. Co.*, 3 C. P. Div. 1; s. c. 2 C. P. Div. 62.

<sup>3</sup> *Parks v. Alta California Tel. Co.*, 13 Cal. 422; *De Rutte v. New York & c. Tel. Co.*, 30 How. Pr. (N. Y.) 413; 1 Daly (N. Y.) 547; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 242; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; s. c. 2 Thomp. Neg., 1st ed., 828; *Wann v. Western Union Tel. Co.*, 37 Mo. 472; *Western Union Tel. Co. v. Shotter*, 71 Ga. 760; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; s. c. 45 Am. Rep. 480; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; s. c. 14 Am. Rep. 38; *Sweatland v. Illinois & c. Tel. Co.*, 27 Iowa 433; s. c. Allen Tel. Cas. 471; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 214; *Breese v. United States Tel. Co.*, 48 N. Y. 132; s. c. 8 Am. Rep. 526, per Earl, C.; Allen Tel. Cas. 663; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301; s. c. 41 Am. Rep. 500; *New York & c. Tel. Co. v. Dryburg*, 35

Pa. St. 298; s. c. Allen Tel. Cas. 157; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; s. c. 1 Am. Rep. 387; *Western Union Tel. Co. v. Neill*, 57 Tex. 283; s. c. 44 Am. Rep. 589; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; s. c. 17 Am. Rep. 452; *Abraham v. Western Union Tel. Co.*, 6 West. Coast Rep. 163; s. c. 11 Sawy. (U. S.) 28. There is a line of cases holding that *telephone companies* are practically bound by the same rules that telegraph companies are: *Commonwealth v. Pennsylvania Teleph. Co. (Pa.)*, 2 Dauph. Co. Rep. 57; *Iowa Union Teleph. Co. v. Board of Equalization*, 67 Iowa 250; *Franklin v. Northwestern Teleph. Co.*, 69 Iowa 97; *Roberts v. Wisconsin Teleph. Co.*, 77 Wis. 589; *Bell Teleph. Co. v. Commonwealth (Pa.)*, 3 Cent. Rep. 907; *Central Union Teleph. Co. v. State*, 106 Ind. 1; *Attorney-General v. Edison Teleph. Co.*, L. R. 6 Q. B. Div. 244; *State v. Central N. J. Teleph. Co.*, 53 N. J. L. 341; s. c. 11 L. R. A. 664; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32; *Hockett v. State*, 105 Ind. 250. In Nebraska they are held to be common carriers



duty, these companies are bound, under reasonable regulations,<sup>4</sup> to exercise reasonable care and diligence, to the end of transmitting all lawful messages delivered to them for that purpose, where the proper fee is paid<sup>5</sup> or tendered;<sup>6</sup> and where they have received the maximum fee for the transmission of a message, they must send the same promptly and correctly; but they will not be held liable for an *unavoidable delay* in the delivery of the message.<sup>7</sup> On the other hand, they are not bound to transmit messages in favor of *unlawful undertakings*, such as carrying on what is called a "*bucket shop*,"<sup>8</sup> or where the message relates to dealing in "*futures*," a transaction void as against public policy.<sup>9</sup> But they may become liable in damages for the transmission of *libelous messages*, on the ground that such transmission is a publication.<sup>10</sup> They are bound to use reasonable care, skill, and diligence, to the end that messages shall be transmitted as written: like printers, they must endeavor to "follow copy," and they alter the text of a message at their peril;<sup>11</sup> though they are not liable, under all circumstances, for correcting an erroneous message, as where an unauthorized alteration was made by the agent, but the message was sent as originally written.<sup>12</sup> Nor are they bound to transmit *oral messages*.<sup>13</sup> And while they are not bound to receive messages for transmission not written upon the regular blanks furnished by them for that purpose, yet if they do so, it may preclude them from insisting upon the provisions of any stipulation printed upon such blank.<sup>14</sup>

of intelligence,—a rule by which telegraph companies are also governed: Nebraska Teleph. Co. v. State, 55 Neb. 627; s. c. 45 L. R. A. 113; 76 N. W. Rep. 171. To the same effect, Kirby v. Western Union Tel. Co., 7 S. D. 623; s. c. 65 N. W. Rep. 57. See *post*, § 2393.

<sup>4</sup> State & c. Turnpike Co. v. American & c. News Co., 43 N. J. L. 381.

<sup>5</sup> Western Union Tel. Co. v. DuBois, 128 Ill. 248.

<sup>6</sup> Berube v. Great Northwestern Tel. Co., Rap. Jud. Quebec 14 C. S. 178; Western Union Tel. Co. v. Yopst, 118 Ind. 248; s. c. 20 N. E. Rep. 222.

<sup>7</sup> Western Union Tel. Co. v. Stiles (Tex. Civ. App.), 35 S. W. Rep. 76 (no off. rep.).

<sup>8</sup> Smith v. Western Union Tel. Co., 84 Ky. 664; s. c. 2 S. W. Rep. 483.

<sup>9</sup> Western Union Tel. Co. v. Harper, 5 Tex. Civ. App. 37; s. c. 39 S. W. Rep. 599.

<sup>10</sup> Armchambault v. Great North Western Tel. Co. (Quebec Court

App. 1888), 11 Montr. Leg. News 368; s. c. 14 Queb. L. R. 8.

<sup>11</sup> New York & c. Tel. Co. v. Dryburg, 35 Pa. St. 298; s. c. 78 Am. Dec. 338. Public policy demands that a telegraph company, in the discharge of its duty, be held responsible to a very high degree of care: Jones v. Western Union Tel. Co., 101 Tenn. 442; s. c. 47 S. W. Rep. 699; Marr v. Western Union Tel. Co., 85 Tenn. 530; Western Union Tel. Co. v. Mellon, 96 Tenn. 68.

<sup>12</sup> See, for example, Western Union Tel. Co. v. Foster, 64 Tex. 220; s. c. 53 Am. Rep. 754.

<sup>13</sup> Western Union Tel. Co. v. Dozier, 67 Miss. 288; s. c. 7 South. Rep. 325.

<sup>14</sup> Western Union Tel. Co. v. Hinkle, 3 Tex. Civ. App. 518; s. c. 22 S. W. Rep. 1004; Western Union Tel. Co. v. Arwine, 3 Tex. Civ. App. 156; s. c. 22 S. W. Rep. 105; Western Union Tel. Co. v. Jones, 69 Miss. 658; s. c. 30 Am. St. Rep. 579; 13



§ 2393. Not Insurers, but Liable for Negligence, Fraud, etc.<sup>15</sup>—

Telegraph companies are not liable as *common carriers*; that is to say, they are *not insurers* of the performance of their undertakings,<sup>16</sup> but

South. Rep. 471; *Anderson v. Western Union Tel. Co.*, 84 Tex. 17; s. c. 19 S. W. Rep. 285; 11 Rail. & Corp. L. J. 295; 20 Wash. L. Rep. 462; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; s. c. 26 N. E. Rep. 534; 35 N. Y. St. Rep. 307; 43 Alb. L. J. 244; 32 Cent. L. J. 342. Compare *Gulf & C. R. Co. v. Geer*, 5 Tex. Civ. App. 349; s. c. 24 S. W. Rep. 86.

<sup>15</sup> This section is cited in §§ 2412, 2422, 2423, 2450, 2451.

<sup>16</sup> *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; s. c. 14 Am. Rep. 38; *Birney v. New York & C. Tel. Co.*, 18 Md. 341; s. c. Allen Tel. Cas. 195; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; s. c. Allen Tel. Cas. 306; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; s. c. 18 Am. Rep. 485; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; s. c. Allen Tel. Cas. 345; 2 Thomp. Neg., 1st ed., 828; *Leonard v. New York & C. Tel. Co.*, 41 N. Y. 544; s. c. 1 Am. Rep. 446; Allen Tel. Cas. 500; *Breese v. United States Tel. Co.*, 48 N. Y. 132; s. c. 8 Am. Rep. 526; Allen Tel. Cas. 663; *Schwartz v. Atlantic & C. Tel. Co.*, 18 Hun (N. Y.) 157; *De Rutte v. New York & C. Tel. Co.*, 1 Daly (N. Y.) 547; s. c. 30 How. Pr. (N. Y.) 403; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; s. c. 41 Am. Rep. 500; *New York & C. Tel. Co. v. Dryburg*, 35 Pa. St. 298; s. c. Allen Tel. Cas. 157; *Pinckney v. Western Union Tel. Co.*, 19 S. C. 71; *Abraham v. Western Union Tel. Co.*, 23 Fed. Rep. 315; s. c. 6 West Coast Rep. 162; *Baxter v. Dominion Tel. Co.*, 37 Up. Can. Q. B. 470; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; s. c. 54 Barb. (N. Y.) 505; 6 Abb. Pr. (N. S.) (N. Y.) 405; 1 Lans. (N. Y.) 125; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238; *Wann v. Western Union Tel. Co.*, 37 Mo. 472; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575, 584; *Aiken v. Telegraph Co.*, 5 S. C. 358; *Dickson v. Reuter's Tel. Co.*, 3 C. P. Div. 1, 7; s. c. 2 C. P. Div. 62; *Fowler v. Western Union Tel. Co.*, 80 Me. 381; s. c. 6 Am. Rep.

211, 214, opinion by Foster, J.; *Little Rock & C. Tel. Co. v. Davis*, 41 Ark. 79; *Western Union Tel. Co. v. Munford*, 87 Tenn. 190; s. c. 10 Am. St. Rep. 630; *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428; s. c. 25 South. Rep. 232; *Smith v. Western Union Tel. Co.*, 57 Mo. App. 259. The reasons of this rule are that they do not carry goods, and hence there is nothing to tempt their own servants to steal, also that they undertake a work which is subject to disturbances from atmospheric and other physical causes, notwithstanding the fact that they may use their best skill and diligence. The reasons of this rule are stated with clearness by *Johnson, J.*, in *Breese v. United States Tel. Co.*, 45 Barb. (N. Y.) 274, 292; s. c. 31 How. Pr. (N. Y.) 86. See *Thomp. Elect.* 163, where the language is quoted. That there is some analogy between the undertaking of a telegraph company and that of a common carrier,—see *Western Union Tel. Co. v. Hope*, 11 Ill. App. 289; *True v. International Tel. Co.*, 60 Me. 9; s. c. 11 Am. Rep. 156; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301; s. c. 41 Am. Rep. 500. See also *Manville v. Western Union Tel. Co.*, 37 Iowa 214; s. c. 18 Am. Rep. 8; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 427. That there is no analogy,—see *Playford v. United Kingdom & C. Tel. Co.*, L. R. 4 Q. B. 714, per *Lush, J.* That the analogy is imperfect,—see *Aiken v. Telegraph Co.*, 5 S. C. 358. It was held in California, in 1859, that telegraph companies are common carriers and subject to the severe rule of liability of such carriers: *Parks v. Alta California Tel. Co.*, 13 Cal. 422. But in 1874 this rule was changed in that State by the adoption of the Civil Code (Civ. Code Cal., § 2168), which provides that such companies are not common carriers but “must use great care and diligence in the transmission and delivery of messages.” A corporation which, though organized under the N. Y. Stat. of 1848, “for the incorporation and regulation of telegraph companies,” has in its service



they are responsible only on the principle of negligence, that is to say, for the want of reasonable care in the performance of the duties which they undertake, which care is to be measured on the one hand by a consideration of the difficulties of making an exact performance under all circumstances, and on the other hand by the probability of loss or damage to the customer for the failure of an exact performance.<sup>17</sup> As a general rule, a failure of performance, or an imperfect or inexact performance, is *prima facie* evidence of negligence, such as casts the burden upon the telegraph company of showing that it really exercised reasonable care under the circumstances.<sup>18</sup> It follows from this statement that the question whether reasonable care was exercised will generally be a *question for a jury*,<sup>19</sup> though cases may be supposed where, upon undisputed evidence, the conclusion may be so clear that the judge will be warranted in directing the verdict.<sup>20</sup>

§ 2394. Failure to Transmit and Deliver Correctly Constitutes Prima Facie Evidence of Negligence.<sup>21</sup>—In accordance with the principle involved in the maxim *res ipsa loquitur*, elsewhere considered,<sup>22</sup>

messengers to deliver parcels for those who may so employ it, is liable for a loss occasioned by the delivery, by its messenger, of a parcel contrary to the instructions of the sender: *Feiber v. Manhattan Dist. Tel. Co.*, 3 N. Y. Supp. 116; s. c. 22 Abb. N. C. (N. Y.) 121.

<sup>17</sup> There are expressions in judicial opinions which would seem to hold them to a very high and exact degree of care, such as that which judicial theory has imposed upon carriers of passengers. See, for example, *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Tyler v. Western Union Tel. Co.*, 60 Ill. 428, 434; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 242; *Fowler v. Western Union Tel. Co.*, 80 Me. 381; s. c. 6 Am. St. Rep. 211, 215, per Foster, J. But, on other authority and on sound principle, they are, like other undertakers of care and skill (Vol. I, § 5), responsible only for the failure to exercise what is termed ordinary or reasonable care: *Western Union Tel. Co. v. Edsall*, 63 Tex. 668; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; s. c. 10 S. W. Rep. 734; *Gulf & C. R. Co. v. Wilson*, 69 Tex. 739; s. c. 7 S. W. Rep. 653; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *Western Union Tel. Co. v. Davis* (Tex. Civ. App.), 51 S. W. Rep. 258. And

where the liability of the company was made throughout the charge to rest upon this principle, error in referring to the company as a common carrier was harmless: *Western Union Tel. Co. v. Hines*, 22 Tex. Civ. App. 315; s. c. 54 S. W. Rep. 627. This has been described as "ordinary care and vigilance: *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 751. Also as "due and reasonable care:" *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226. Want of due care, as used in a stipulation in an agreement limiting the liability of the company for mistake or delay in the transmission of unrepeatable messages, has been held to mean negligence: *Western Union Tel. Co. v. Odom*, 21 Tex. Civ. App. 537; s. c. 52 S. W. Rep. 632; *Western Union Tel. Co. v. Neil*, 57 Tex. 283, 289.

<sup>18</sup> *Western Union Tel. Co. v. Short*, 53 Ark. 434; s. c. 9 L. R. A. 744; 9 Rail. & Corp. L. J. 11; 14 S. W. Rep. 649; *Reed v. Western Union Tel. Co.*, 135 Mo. 661; s. c. 34 L. R. A. 492; 37 S. W. Rep. 904.

<sup>19</sup> *Gulf & C. R. Co. v. Wilson*, 69 Tex. 739; s. c. 7 S. W. Rep. 653 (*sub nom. Gulf & C. R. Co. v. Miller*).

<sup>20</sup> 2 Thomp. Trials, §§ 1663, 1665.

<sup>21</sup> This section is cited in §§ 2422, 2443.

<sup>22</sup> Vol. I, § 15.



the courts almost universally hold that proof of the undertaking and of the failure to perform it constitutes *prima facie* evidence of negligence and authorizes a recovery of the consequent damages, unless the company shows a state of facts excusing its default. Under this rule, the plaintiff makes out his case by proving the delivery of the message to the telegraph company for transmission, the payment or tender of the customary and usual charge, and the non-delivery of it to the addressee;<sup>23</sup> or by proving a *failure to transmit*, as where the dispatch is sent to an intermediate point only;<sup>24</sup> or by proving an *error in transmitting*,<sup>25</sup> as, for instance, the omission of a material word;<sup>26</sup> and by making additional proof of the resulting damages.<sup>27</sup>

<sup>23</sup> Sherrill v. Western Union Tel. Co., 116 N. C. 655; s. c. 21 S. E. Rep. 429; Sherrill v. Western Union Tel. Co., 117 N. C. 352; s. c. 23 S. E. Rep. 277; Western Union Tel. Co. v. Harper, 15 Tex. Civ. App. 37; s. c. 39 S. W. Rep. 599; Western Union Tel. Co. v. Nagle, 11 Tex. Civ. App. 539; s. c. 32 S. W. Rep. 707; Fowler v. Western Union Tel. Co., 80 Me. 381; s. c. 6 Am. St. Rep. 211, 216; 15 Atl. Rep. 29; 38 Alb. L. J. 276; 16 Wash. L. Rep. 591; 4 Rail. & Corp. L. J. 346 (citing Bartlett v. Western Union Tel. Co., 62 Me. 209, 221; s. c. 16 Am. Rep. 437; Baldwin v. United States Tel. Co., 45 N. Y. 744; s. c. 6 Am. St. Rep. 165; Western Union Tel. Co. v. Graham, 1 Colo. 230; s. c. 9 Am. Rep. 136; United States Tel. Co. v. Wenger, 55 Pa. St. 262; s. c. 93 Am. Dec. 751). The rule is the same where the plaintiff is suing for a *statutory penalty* for failure to deliver: Little Rock & C. R. Co. v. Davis, 41 Ark. 79.

<sup>24</sup> United States Tel. Co. v. Wenger, 55 Pa. St. 262; s. c. 93 Am. Dec. 751.

<sup>25</sup> Bartlett v. Western Union Tel. Co., 62 Me. 209; s. c. 16 Am. Rep. 437; Turner v. Hawkeye Tel. Co., 41 Iowa 458; s. c. 20 Am. Rep. 605; Rittenhouse v. Independent Line, 1 Daly (N. Y.) 475; s. c. affirmed 44 N. Y. 263; 4 Am. Rep. 673; Tyler v. Western Union Tel. Co., 60 Ill. 421; s. c. 14 Am. Rep. 38; Telegraph Co. v. Griswold, 37 Ohio St. 301; Pinckney v. Telegraph Co., 19 S. C. 71; Pope v. Western Union Tel. Co., 9 Ill. App. 283. See also New York & C. Tel. Co. v. Dryburgh, 35 Pa. St. 298; Bowen v. Lake Erie Tel. Co., 1 Am. Law Reg. 685; De Rutte v. New York & C. Tel. Co., 1 Daly (N.

Y.) 547. Compare Washington & C. Tel. Co. v. Hobson, 15 Gratt. (Va.) 122; Western Union Tel. Co. v. Short, 53 Ark. 434; s. c. 9 L. R. A. 744; 9 Rail. & Corp. L. J. 111; 14 S. W. Rep. 649; Western Union Tel. Co. v. Carew, 15 Mich. 525; s. c. 2 Thomp. Neg., 1st ed., 828. A *prima facie* case is made against the company by showing that the message delivered was not a copy of the message sent; and the company must then show that the error was not due to its negligence: Western Union Tel. Co. v. Chamblee, 122 Ala. 428; s. c. 25 South. Rep. 232. But the company will not be liable for an inadvertent departure from the letter of a message, under a statute (Miss. Code 1892, § 4326) requiring it "to transmit correctly messages delivered to it," where no damage results from the variance: Western Union Tel. Co. v. Clarke, 71 Miss. 157; s. c. 14 South. Rep. 452.

<sup>26</sup> Ayer v. Western Union Tel. Co., 79 Me. 493; s. c. 1 Am. St. Rep. 353.

<sup>27</sup> An inference of negligence on the part of a telegraph company is warranted by evidence that a message delivered to it was received at a relay office and forwarded to "Sanderson," instead of "Henderson," and was never delivered in consequence thereof, by an employé who has since been discharged for drunkenness: Western Union Tel. Co. v. Nagle, 11 Tex. Civ. App. 539; s. c. 32 S. W. Rep. 707. In an action for negligently failing to deliver a telegram, the defendant is entitled to have a verdict directed in its favor, where the plaintiff fails to show either the time of the receipt for transmission or its receipt at



§ 2395. **Further of Evidence of Negligence.**<sup>28</sup>—Under the discarded rule which predicates the liability of the company not upon *ordinary*, but upon *gross* negligence, it has been held that a failure to employ careful and skillful operators is gross negligence;<sup>29</sup> that the delivery of a message containing three substantial deviations from the message delivered to the company is *gross negligence*, and that the same is true of an omission of the word “six,” or of the word “answer.”<sup>30</sup> Negligence has also been predicated upon the act of such a company in delivering a message, quoting the prices of a commodity, which message had been corrected by a subsequent message, although the message thus erroneously delivered was marked “dup.,” meaning duplicate; and the fact that it was so marked was not deemed evidence of contributory negligence in the addressee, who acted upon it to his damage, such as would cut off his right of recovery against the company.<sup>31</sup> We may conclude, then, that where there is no special contract between the sender of a telegram and the company, limiting liability unless the message is repeated, proof of error in the message makes out a *prima facie* case against the company, and the burden is on it to show that the error resulted from some excusable cause and not from negligence.<sup>32</sup> On the other hand, evidence of the destruction of a night message by an accidental fire, without any circumstances imputing negligence to the agents of the company, has been held sufficient to rebut the *prima facie* case arising from the non-delivery of the message.<sup>33</sup> A Federal court has held that the maker and signer of a telegram must affix and cancel the *war revenue stamp* before he can charge the company with negligence in failing to transmit and deliver it;<sup>34</sup> but in point of fact the agent of the company affixes the stamp and collects one cent for it from the sender of the message.

§ 2396. **What Delay has been Held Evidence of Negligence.**—It has been held that a delay in the delivery of a message for periods of time and under the circumstances below stated, constitutes *prima facie* evidence of negligence on the part of the telegraph company, which casts upon it the burden of excusing the delay:—An interval of *twelve*

the address office: *Brumfield v. Western Union Tel. Co.*, 97 Iowa 693; s. c. 66 N. W. Rep. 898.

<sup>28</sup> This section is cited in § 2411.

<sup>29</sup> *Pegram v. Western Union Tel. Co.*, 97 N. C. 57; s. c. 2 S. E. Rep. 256.

<sup>30</sup> *Western Union Tel. Co. v. Goodbar* (Miss.), 7 South. Rep. 214.

<sup>31</sup> *Western Union Tel. Co. v. Virginia Paper Co.*, 87 Va. 418; s. c. 12 S. E. Rep. 755; 15 Va. Law J. 305.

<sup>32</sup> *Western Union Tel. Co. v. Hines*, 22 Tex. Civ. App. 315; s. c. 54 S. W. Rep. 627.

<sup>33</sup> *Fowler v. Western Union Tel. Co.*, 80 Me. 381; s. c. 6 Am. St. Rep. 211, 217; 15 Atl. Rep. 29; 38 Alb. L. J. 276; 16 Wash. L. Rep. 591; 4 Rail. & Corp. L. J. 346.

<sup>34</sup> *Kirk v. Western Union Tel. Co.*, 90 Fed. Rep. 809.



hours between the delivery of a message for transmission and its receipt at the terminal point, where the usual time was from fifteen to forty-five minutes;<sup>35</sup> a delay of more than five hours in the delivery of a telegram of an urgent nature, after its receipt at the transmitting office, although the addressee was at home and within the radius of free delivery, and although the messenger of the company called twice at his office, but left no notice under the door.<sup>36</sup>

§ 2397. **Exceptional Rule under the Stipulation in Regard to Repeating the Message.**—An exception to this rule of negligence is presented by a class of cases hereafter referred to,<sup>37</sup> which hold that a stipulation in the message blank against liability unless the message is repeated, operates to *shift the burden of proof* and to cast upon the plaintiff the onus of showing negligence or want of good faith, by other evidence than the undertaking and default in its performance.<sup>38</sup> In so far as these courts profess to adhere to the doctrine that a telegraph company will not be allowed to stipulate against responsibility for its own negligence, they involve the solecism that it may at the same time stipulate that the plaintiff shall not be allowed to prove negligence by the ordinary evidence available to him for that purpose. This absurd and unjust doctrine has been distinctly repudiated by some of the courts,<sup>39</sup> and is not likely to grow in favor.

§ 2398. **Analogous Doctrines with Regard to the Loss of Goods by Carriers.**<sup>40</sup>—There is a corresponding divergence of opinion as to the

<sup>35</sup> Kendall v. Western Union Tel. Co., 56 Mo. App. 192.

<sup>36</sup> Hendershot v. Western Union Tel. Co., 106 Iowa 529; s. c. 76 N. W. Rep. 828. Detailed state of facts under which a verdict was upheld against a telegraph company for negligence in failing to deliver a message in due time, to a travelling exhibitor of a fence who had stopped at the only hotel in a town of six hundred inhabitants, and had been engaged in exhibiting the fence within free delivery limits for three days, and the messenger of the company failed to discover his name, which was on the hotel register: Herron v. Western Union Tel. Co., 90 Iowa 129; s. c. 57 N. W. Rep. 696. Evidence which was held sufficient to sustain a finding of negligence, in an action for delay in sending a telegram, where it was delivered to the agent of the company at nine o'clock A. M., with information of

its great importance and of the necessity of an answer before twelve o'clock, and was not delivered to the addressee, although he called and asked for it several times, because of a change in his name: Western Union Tel. Co. v. Reeves (Tex. Civ. App.), 27 S. W. Rep. 318.

<sup>37</sup> Post, § 2422.

<sup>38</sup> Sweatland v. Illinois & C. Tel. Co., 27 Iowa 433; s. c. 1 Am. Rep. 285; United States Tel. Co. v. Gildersleve, 29 Md. 232; s. c. 96 Am. Dec. 519; Becker v. Western Union Tel. Co., 11 Neb. 87; s. c. 38 Am. Rep. 356; White v. Western Union Tel. Co., 14 Fed. Rep. 710; Aiken v. Western Union Tel. Co., 69 Iowa 31.

<sup>39</sup> Western Union Tel. Co. v. Griswold, 37 Ohio St. 301, 313, per Boynton, C. J.; s. c. 41 Am. Rep. 500. So in Tennessee: Marr v. Western Union Tel. Co., 85 Tenn. 529.

<sup>40</sup> This section is cited in § 2248.



burden of proof in actions against *carriers*.<sup>41</sup> Under the better theory, delivery to the carrier of goods, and a non-delivery of them by him within a reasonable time, or a delivery of them by him in a damaged condition, make out a *prima facie* case against him.<sup>42</sup> Under this view, mere non-delivery of the goods by the carrier casts the burden of proof with respect to negligence upon him, although there be a special contract exonerating him from liability.<sup>43</sup> Under the other theory, the plaintiff is required to show this and *also* that the carrier and his servants were guilty of negligence or fault in the premises.<sup>44</sup> Another class of cases hold that where the bill of lading contains a particular exception, such as that of loss by fire, when the evidence brings the case within the exception,—by showing, for example, that the goods were lost by fire,—then the burden shifts to the plaintiff, of showing that the carrier was guilty of negligence.<sup>45</sup> A qualified but clearer statement may be extracted from some of the decisions, to the effect that where the bill of lading contains certain exemptions from liability, the burden of proof in the first instance rests upon the carrier to prove that the case is within some of the exemptions; but that, when this is shown, unattended by circumstances indicating negligence, the burden of proof shifts upon the plaintiff to show that the carrier was guilty of negligence.<sup>46</sup> Another group of decisions support the rule that the mere loss or non-delivery of goods by a carrier, operating

<sup>41</sup> See 2 Thomp. Trials, § 1850, and cases collected on page 1345.

<sup>42</sup> *Spyer v. The Mary Belle Roberts*, 2 Sawy. (U. S.) 1; *Hunt v. The Cleveland*, 6 McLean (U. S.) 76, 78; *Wertheimer v. Pennsylvania R. Co.*, 17 Blatchf. (U. S.) 421; *The Neptune*, 6 Blatchf. (U. S.) 194; *Kelham v. The Kensington*, 24 La. An. 100; *Kirk v. Folson*, 23 La. An. 584; *Price v. Ship Uriel*, 10 La. An. 413; *Colton v. Cleveland &c. R. Co.*, 67 Pa. St. 211; *Patterson v. Clyde*, 67 Pa. St. 500, 506; *Mitchell v. United States Exp. Co.*, 46 Iowa 214; *Farnham v. Camden &c. R. Co.*, 55 Pa. St. 53; *Read v. St. Louis &c. R. Co.*, 60 Mo. 199; *Davis v. Wabash &c. R. Co.*, 89 Mo. 340, 352; reversing s. c. 13 Mo. App. 449; *Humphreys v. Reed*, 6 Whart. (Pa.) 435, 444; *Read v. Spaulding*, 30 N. Y. 630; *Michaels v. New York &c. R. Co.*, 30 N. Y. 564.

<sup>43</sup> *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Union Exp. Co. v. Graham*, 26 Ohio St. 595.

<sup>44</sup> *Berry v. Cooper*, 28 Ga. 543; *Levering v. Union Transp. Co.*, 42 Mo. 88, 95, 96 (overruled, it seems, by

*Read v. St. Louis &c. R. Co.*, 60 Mo. 199); *Brown v. Adams Exp. Co.*, 15 W. Va. 812, 818; *Humphreys v. Reed*, 6 Whart. (Pa.) 435, 444 (overruled, it seems, by *Patterson v. Clyde*, 67 Pa. St. 500, 506, and *Farnham v. Camden &c. R. Co.*, 55 Pa. St. 53); *South &c. R. Co. v. Henlein*, 52 Ala. 606, 612; *Read v. Spaulding*, 30 N. Y. 630, 645; *Michaels v. New York &c. R. Co.*, 30 N. Y. 564, 578; overruled by *Whitworth v. Erie R. Co.*, 87 N. Y. 413, 419, and *Lamb v. Camden &c. R. Co.*, 46 N. Y. 271. The sources of this divergence of opinion and the inconsistency of the courts in respect of it are treated in 2 Thomp. Tr., § 1851, *et seq.*

<sup>45</sup> *Whitworth v. Erie R. Co.*, 87 N. Y. 413; *Little Rock &c. R. Co. v. Corcoran*, 40 Ark. 375; *Little Rock &c. R. Co. v. Talbot*, 39 Ark. 523; *Little Rock &c. R. Co. v. Harper*, 44 Ark. 208.

<sup>46</sup> *Patterson v. Clyde*, 67 Pa. St. 500; *Farnham v. Camden &c. R. Co.*, 55 Pa. St. 53; *Hays v. Kennedy*, 41 Pa. St. 378, 384.



under a contract containing exceptions in his favor, casts upon him the burden of proof that the loss was within one of the exceptions, and *also* that it occurred without his fault or negligence.<sup>47</sup> Another group of decisions furnish authority for the doctrine that where a bill of lading contains a general exemption from liability in certain cases, such as fire or flood, and the loss falls within the exception, the burden of proof is on the plaintiff to avoid the effect of the exemption, and *also* to show that the loss resulted from the defendant's negligence or breach of duty.<sup>48</sup>

§ 2399. **Obligation of Company to Notify Sender of its Inability to Transmit.**—In the postal telegraphic service, which obtains on the continent of Europe, and especially in France, if, for any reason, the message can not be delivered, the sender is carefully and seasonably notified of the failure and of the reason of it. If the judges were properly regardful of the rights of the public in dealing with telegraph companies, they would require this measure of diligence of such companies, as a mere implication of law; since if I were to hire a man to perform an ordinary service for me, and if he, for any reason, should find it impossible for him to perform the service, the most obvious suggestion of diligence and good faith would require him to inform me of the fact, especially if he had been paid in advance for performing the service. Some recent tendency has been discovered in the judicial decisions to apply this rule to telegraph companies. One court has held that if a telegraphic message can not be transmitted by reason of storms or other atmospheric influences, the company will not be excused for failing to send it, unless it notifies the sender of its inability to do so, provided the fact is known to it.<sup>49</sup> A telegraph company can not make a valid stipulation in its contract relieving it from liability for delay in forwarding an unrepeatd message,

<sup>47</sup> *Brown v. Adams Exp. Co.*, 15 W. Va. 812, 818; *Swindler v. Hilliard*, 2 Rich. L. (S. C.) 286; *Baker v. Brinson*, 9 Rich. L. (S. C.) 201; *Davidson v. Graham*, 2 Ohio St. 131, 141; *Graham v. Davis*, 4 Ohio St. 362; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Grey v. Mobile & C. R. Co.*, 55 Ala. 387; *Chicago & C. R. Co. v. Moss*, 60 Miss. 1003; s. c. 45 Am. Rep. 428; *Chicago & C. R. Co. v. Abels*, 60 Miss. 1017; *Boies v. Railway Co.*, 37 Conn. 272; *Dunsth v. Wade*, 3 Ill. 285; *Singleton v. Hilliard*, 1 Strobn. (S. C.) 203; *Whitesides v. Russell*, 8 Watts & S. (Pa.) 44.

<sup>48</sup> *Clark v. Barnwell*, 12 How. (U. S.) 272; *Transportation Co. v. Downer*, 11 Wall. (U. S.) 129; *Whitworth v. Erie R. Co.*, 87 N. Y. 413; *Cochran v. Dinsmore*, 49 N. Y. 249; *Steers v. Steamship Co.*, 57 N. Y. 1; *Lamb v. Camden & C. R. Co.*, 46 N. Y. 271; *Read v. St. Louis & C. R. Co.*, 60 Mo. 199; *New Orleans Ins. Co. v. Railway Co.*, 20 La. An. 302.

<sup>49</sup> *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246; s. c. 34 N. E. Rep. 581. The proviso seems inapt, since it would be the *duty of the company to know*, and in the exercise of ordinary diligence it would know: Vol. I, § 8.



where it receives the same with knowledge of its great importance, and that its wires are down, and transmission impossible, when such facts are not made known to the sender.<sup>50</sup> And it has been held that where an agent of the company accepts, through mistake, a message which imports urgency, directed to a point at which there is no electrical connection, the company is bound to use reasonable diligence in transmitting it.<sup>51</sup> So, another court has held that where an important message is delivered to an addressee, and he writes out the reply and gives it to the messenger of the company to transmit, and the messenger takes it to the company's office, but the company fails to transmit it because the fee is not prepaid, the company must, in order to excuse itself from the payment of damages, notify the customer of its rule requiring the *prepayment of the fee*. The failure to send such a notice is justly held to amount to a waiver of the right to demand prepayment of the fee.<sup>52</sup>

**§ 2400. Negligence of Connecting Lines.**—The position of a telegraph company in respect of connecting lines is very much the same as that of a railroad company, or other common carrier. A telegraph company is not bound to do business beyond its own terminus. It is not bound to send dispatches to points beyond its own lines; though undoubtedly, it is bound to deliver any dispatch to the next connecting line, in order that such line may complete the transit. On the other hand, the connecting line is bound to receive and forward it under statutory penalties, in force, it may be assumed, in nearly all the States of the Union.<sup>53</sup> As such company is not bound to transmit messages beyond its own line, it is not responsible for the defaults of connecting lines to which it delivers messages for further transmission toward their destination; but when it delivers a message promptly and correctly to the appropriate connecting line, its own responsibility ceases and that of the connecting line begins.<sup>54</sup> No partnership or

<sup>50</sup> Pacific Postal Tel. &c. Co. v. Fleischner, 66 Fed. Rep. 899; s. c. 29 U. S. App. 227; 14 C. C. A. 166.

<sup>51</sup> Western Union Tel. Co. v. Hargrove, 14 Tex. Civ. App. 79; s. c. 36 S. W. Rep. 1077.

<sup>52</sup> Western Union Tel. Co. v. Cunningham, 99 Ala. 314; s. c. 14 South. Rep. 579. The case was a flagrant one. The original message notified the addressee of the severe illness of his mother. His reply inquired about her condition, and his place of business was only 150 yards from the telegraph office.

<sup>53</sup> Thomp. Elect., § 158; United

States Tel. Co. v. Western Union Tel. Co., 56 Barb. (N. Y.) 46. But it would seem that the sender might sustain this action in such a case: Thurn v. Alta California Tel. Co., 15 Cal. 472; Baldwin v. United States Tel. Co., 54 Barb. (N. Y.) 505; Leonard v. New York &c. Tel. Co., 41 N. Y. 544; Squire v. Western Union Tel. Co., 98 Mass. 232.

<sup>54</sup> Leonard v. New York &c. Tel. Co., 41 N. Y. 544; s. c. 1 Am. Rep. 446; Baldwin v. United States Tel. Co., 45 N. Y. 744; reversing s. c. 34 Barb. (N. Y.) 505; 1 Lans. (N. Y.) 125; 6 Abb. Pr. (N. S.) (N. Y.) 405.



mutual agency is implied in law from the fact that two connecting lines of telegraph receive messages from each other for transmission to their final destination; but, in the absence of a special agreement or arrangement varying the rule, the implication of law is that each company stands liable only for its own defaults.<sup>55</sup> It must follow that a stipulation on a message blank that the transmitting company will not be liable for the errors, negligences, or other defaults of any connecting line over which it may be obliged to send the message, beyond the terminus of its own line, is a reasonable and valid stipulation.<sup>56</sup> On the other hand, it may undoubtedly make itself *liable by contract* for such errors, negligences, or defaults,—as where it undertakes with a customer to furnish him reports of a grain market in a distant city,

<sup>55</sup> *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; s. c. 6 Am. Rep. 165; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; *Leonard v. New York & C. Tel. Co.*, 41 N. Y. 544, 570; *Stevenson v. Montreal Tel. Co.*, 16 Upper Canada Q. B. 539. *Contra*, *De Rutte v. New York & C. Tel. Co.*, 1 Daly (N. Y.) 547; s. c. 30 How. Pr. (N. Y.) 403. Although the name of the addressee of a telegraphic message is negligently changed in transmitting it to the connecting line (in this case from "Col. Sam. Tate" to "Col. William Tate"), yet, if it appears that the loss for which the action is brought was occasioned by a *delay* in the delivery of the message, which did not proceed from such error, but was the sole result of the subsequent and independent negligence of the connecting company, the receiving company is not liable for the damages sustained, under a contract with the sender exonerating itself from liability for the defaults of connecting lines. The reason is that the change of address is not the *proximate cause* of the loss: *Western Union Tel. Co. v. Munford*, 87 Tenn. 190; s. c. 10 Am. St. Rep. 630; 10 S. W. Rep. 313. But if the company fails to deliver a message to its connecting line with reasonable promptness and dispatch, it will be held liable for damages caused by a delay in the delivery of the telegram produced by its failure to make prompt delivery: *Western Union Tel. Co. v. Seals* (Tex. Civ. App.), 45 S. W. Rep. 964 (no off. rep.); *Weatherford & C. R. Co. v. Seals* (Tex. Civ. App.), 41 S. W. Rep. 841 (no off.

rep.). The receiver of a telegraph company is liable for the failure of an agent promptly to transmit a message, when the agent had notice of a failure to promptly transmit it, although it had to pass partly over the lines of another company in order to reach its destination: *Jones v. Roach*, 21 Tex. Civ. App. 301; s. c. 51 S. W. Rep. 549; *aff'd* on rehearing in 54 S. W. Rep. 240. Where a telegraph company receives and agrees to transmit promptly to a specified place and there deliver promptly to a telephone company, a message for transmission, announcing the death of the addressee's father, it is liable for failing to use reasonable diligence in notifying the telephone company that extra charges for its delivery have been guaranteed, in consequence of which the message is not delivered in time to permit the addressee to attend the funeral: *Western Union Tel. Co. v. Davis*, 16 Tex. Civ. App. 268; s. c. 41 S. W. Rep. 392.

<sup>56</sup> Note to *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 471; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; s. c. 2 Thomp. Neg., 1st ed., 829; *Western Union Tel. Co. v. Munford*, 87 Tenn. 190. Reasonableness of certain regulations in respect of connecting lines, where the dispatch is received for transmission to Europe: *Thomp. Elect.*, § 265; *Atlantic & C. Tel. Co. v. Western Union Tel. Co.*, 4 Daly (N. Y.) 527. That a stipulation in a message blank against responsibility for the errors or neglect of any connecting company can not be availed of by such company,—see *Thomp. Elect.*, § 268.



which reports it procures over a connecting line; since in such a case it stipulates with the customer for a certain result, and the customer is not concerned as to the means or agencies by which it undertakes to produce that result.<sup>57</sup> If the action is brought against the connecting line for the erroneous transmission of the dispatch, it will be presumed, in the absence of contrary evidence, that the dispatch was correctly delivered to it by the connecting line from which it received it, and that the error happened through its negligence;<sup>58</sup> since the plaintiff in such a case has not, but the defendant has, the means of showing what the real truth was.<sup>59</sup>

#### § 2401. Contributory Negligence as a Defense in these Cases.—

The contributory negligence which is sometimes relied upon as a defense to these actions, has been either that of the sender or the addressee, or the agent or servant of either. The contributory negligence of either the sender or the addressee may, of course, bar *his own* right of recovery; but whether the contributory negligence of the one will bar the right of recovery of the other, will depend upon the relations which they occupy towards each other. If, for example, the sender does not give a definite address, and if he fails, on the request of the company, to make it more definite, he can not recover the statutory penalty which he otherwise might have recovered for its non-delivery.<sup>60</sup> So, also, if a message as delivered to the addressee, is obviously garbled, and if the addressee acts upon it to his loss, without making further inquiry, his negligence will preclude him from recovering damages from the company.<sup>61</sup> But where the message does not, on its face, convey notice of the mistake, if it misleads the addressee into making a long and fruitless journey, his failure to make inquiry of the agent of the company will not be such contributory negligence as will bar his right of recovery.<sup>62</sup> A failure of the sender

<sup>57</sup> *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458; s. c. 20 Am. Rep. 605, 608; *Bank of New Orleans v. Western Union Tel. Co.*, 27 La. An. 49.

<sup>58</sup> *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458; s. c. 20 Am. Rep. 605; *De La Grange v. Southwestern Tel. Co.*, 25 La. An. 383.

<sup>59</sup> *De La Grange v. Southwestern Tel. Co.*, 25 La. An. 383. For a corresponding rule in relation to common carriers of goods, see *Southern Exp. Co. v. Hess*, 53 Ala. 19, 24; *Smith v. Railroad Co.*, 43 Barb. (N. Y.) 225; s. c. affirmed, see index 41 N. Y. 620; *Lin v. Terre Haute &c. R. Co.*, 10 Mo. App. 125.

<sup>60</sup> *Western Union Tel. Co. v. McDaniel*, 103 Ind. 294.

<sup>61</sup> *Hart v. Direct &c. Tel. Co.*, 86 N. Y. 633.

<sup>62</sup> *Tobin v. Western Union Tel. Co.*, 146 Pa. St. 375; s. c. 23 Atl. Rep. 324. Where a message is sent to an addressee, intended to advise him that his clerk has stolen some of the goods in his store and absconded, and there is a delay in transmitting and delivering this message, and thereafter the addressee sends telegrams which result in the capture of the thief, but fails to leave his own address at the place from which such telegrams are sent, whereby



of a message to deliver it to the company for transmission as early as he could have done, with reference to the business to which it relates, will not excuse the negligence of the company in failing to deliver it promptly.<sup>63</sup> The principle that it is the duty of the person injured by the negligence of another to do what he can to mitigate the damages, and that he can not recover the *enhanced damages* consequent upon his failure in this respect,<sup>64</sup> is applicable to the cases under consideration.<sup>65</sup> The person injured by the mistake or failure of the company is not, however, bound to *invest further money* to save himself from loss unless he has it to invest, and unless the circumstances are such that a reasonable man would take that course of action.<sup>66</sup> Where a mistake in transmitting a message from a principal to his agent has resulted in a purchase by the agent of a larger quantity of goods than was directed, the company can not escape liability for the resulting loss, on the ground that the agent might have sold the goods without loss after discovering the error, where his agency was special, and he had received no instructions to sell.<sup>67</sup>

he does not receive the responses of the officers who have apprehended the thief and taken the stolen goods into custody, so that, after detaining the thief for twenty-four hours, they release him and the goods,—the *plaintiff is estopped* from recovering, because of his contributory negligence, the company having advertised the undelivered message to him in the usual way: *Western Union Tel. Co. v. Cornwell*, 2 Colo. App. 491; s. c. 31 Pac. Rep. 393; 32 Am. L. Reg. 542.

<sup>63</sup> *Western Union Tel. Co. v. Bruner* (Tex.), 19 S. W. Rep. 149.

<sup>64</sup> Vol. I, § 201; *Hamilton v. McPherson*, 28 N. Y. 72, 76.

<sup>65</sup> For an apt illustration, see *Washington & C. Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122; s. c. *Thomp. Elect.*, § 411. For a state of facts where the plaintiff was exonerated from a charge of subsequent negligence, see *Leonard v. New York & C. Tel. Co.*, 41 N. Y. 544; s. c. *Thomp. Elect.*, § 412. That the plaintiff does not lose his right of action in consequence of failing to notify the defendant of the delay after the damage has accrued,—see *Rittenhouse v. Independent Line*, 44 N. Y. 263; aff'g s. c. 1 Daly (N. Y.) 474.

<sup>66</sup> *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; s. c. 10 S. W. Rep. 752. For illustration, see *Thomp. Elect.*, § 415.

<sup>67</sup> *Postal Tel. & C. Co. v. Lathrop*, 33 Ill. App. 400. A telegraph company can not escape liability for negligence in transmitting a message by claiming that the efforts of the party injured to avert damage to himself might have been *more judicious*: *Western Union Tel. Co. v. Cook*, 54 Neb. 109; s. c. 74 N. W. Rep. 395. Failure of the sender of a telegram to indicate the street and number of the sender is not such negligence as will preclude recovery by him, where the company receives the message and accepts the toll without inquiring the address: *Western Union Tel. Co. v. Smith*, 93 Ga. 635; s. c. 21 S. E. Rep. 166. The negligence of the agent of the sender of a telegram, in failing to give sufficient information as to the addressee's address, will not prevent a recovery against the company for failing to deliver the message, where the agent at the place to which it was sent failed to telegraph back for further information as to the address, and the telegram disclosed its importance and the sender's address was known: *Sherrill v. Western Union Tel. Co.*, 117 N. C. 352; s. c. 23 S. E. Rep. 277. The question of the contributory negligence of the receiver of a telegram which, as delivered to him, was antedated as to the time of its reception, in failing to notice a reference thereon to



the date on which it was delivered for transmission, is a question for the jury: *Western Union Tel. Co. v. Adair*, 115 Ala. 441; s. c. 22 South. Rep. 73. The failure of the sender of a telegram announcing the dangerous illness of the addressee's brother, to postpone the funeral of the latter until the addressee's arrival, does not relieve the company from liability for negligent delay in delivering the message: *Western Union Tel. Co. v. Johnson*, 16 Tex. Civ. App. 546; s. c. 41 S. W. Rep. 367. To the same effect, see *Western Union Tel. Co. v. Anderson* (Tex. Civ. App.), 37 S. W. Rep. 619 (no off. rep.). Where there has been a negligent delay in the delivery of a telegram, the company will not be held liable, where, im-

mediately after the receipt of the message, the addressee telegraphs the sender in time to avoid loss, and the sender neglects to reply until too late: *Western Union Tel. Co. v. Davis* (Tex. Civ. App.), 35 S. W. Rep. 189 (no off. rep.). Where the company makes an error in the transmission of a message, but the addressee immediately sends a reply which informs the sender of the error in time for it to be corrected, but the sender does not correct the error, for the reason that he does not notice it, on account of a failure to read the reply carefully, he can not recover damages occasioned thereby: *Western Union Tel. Co. v. Harper*, 15 Tex. Civ. App. 37; s. c. 39 S. W. Rep. 599.



## CHAPTER LXXXI.

## STATUTORY REGULATIONS AND PENALTIES.

| SECTION   | SECTION   |
|---|---|
| 2403. Statutory penalties against these companies.          | 2407. Application of these statutes to Sunday messages. |
| 2404. These statutes penal and strictly construed.          | 2408. Other holdings with reference to such statutes.   |
| 2405. Further of these statutes.                            | 2409. Still further of such statutes.                   |
| 2406. Application of these statutes to interstate messages. |   |

§ 2403. **Statutory Penalties against these Companies.**<sup>1</sup>—The public duty thus imposed upon telegraph companies by the principles of the common law, has been enforced in many of the States by statutes making it the duty of such companies under penalties, to receive dispatches from and for other such telegraph companies, and from and for any person, and, on payment of the usual charges, to transmit them faithfully, without unreasonable delay, and (with certain exceptions) in the order in which they are received;<sup>2</sup> and some of the stat-

<sup>1</sup> This section is cited in § 2450.

<sup>2</sup> Ark. Dig. Stat., §§ 7331, 7335; Penal Code Cal., § 638; Civil Code Cal., §§ 2207, 2208; Gen. Stat. Conn. 1888, § 3952; Rev. Stat. Ill. 1896, ch. 134, §§ 6, 7; Burns' Rev. Stat. Ind., §§ 5511, 5512, 5529; McClain's Code Iowa, § 2106; Gen. Stat. Ky. 1894, §§ 10, 1346; Rev. Stat. La. 1876, § 3761; Md. Code 1878, p. 343, § 136; Rev. Stat. Mo. 1889, § 2725; Rev. Stat. Me. 1883, ch. 53, § 1; Pub. Stat. Mass., ch. 109, § 10; Comp. Laws Mich. 1897, §§ 5268, 5269, 6661, 6680, 6681, 11,386; Gen. Stat. Nev. 1885, § 941; Rev. Stat. N. J. 1877, p. 1176, § 12; 3 Rev. Stat. N. Y. (8th ed.), pp. 2062, 2065; 1 Rev. Stat. Ohio 1890, §§ 3462, 3465; 2 Hill's Ann. Laws Oreg. 1887, § 4176; 2 Bright. Purd. Pa. Dig., p. 1629, § 11; Code Va. 1887, §§ 1291, 1292; 1 Thomp. & Steg. Tenn. Stat., §§ 1322, 1324; Rev. Stat. Wis. 1878, § 4557. By a statute in Connecticut, unjust discrimination by telegraph or telephone companies,

in respect to furnishing telegraph or telephone service, etc., is prohibited: Pub. Acts Conn. 1889, ch. 160, p. 87. A statute of Georgia (Ga. Act Nov. 12, 1889; Acts 1888-89, p. 175), applies only to such telegraph companies as construct their lines after the passage of the act, and does not repeal Ga. Act Oct. 22, 1887 (Ga. Acts 1886-87, p. 111), prescribing penalties for violations of its provisions as to sending messages: Western Union Tel. Co. v. Cooledge, 86 Ga. 104; s. c. 12 S. E. Rep. 264. The statute of Colorado (Colo. Stat. Act April 4, 1887: Laws 1887, p. 345), "to prevent discrimination in the sale or delivery of news items," etc., has been repealed: Colo. Act March 30, 1889: Laws 1889, p. 271. There are statutes of the same kind as those here considered in Great Britain. Stat. 7 & 8 Vict., ch. 85, § 13, requires railway companies to allow the use of electric telegraphs established on their lines for the service of the



utes add, with impartiality and without discrimination as to rates,<sup>3</sup>—making an exception in favor of newspapers and the transmission of public intelligence, the dispatches of public officers, etc. If there could have been any doubt upon the subject as a principle of common law, these statutes are justly regarded as dispelling that doubt, and as taking the business of telegraph companies out of the domain of a mere private employment, depending upon private contract, and placing it upon the footing of a *public employment* analogous to that of a common carrier.<sup>4</sup>

§ 2404. **These Statutes Penal and Strictly Construed.**<sup>5</sup>—These statutes are regarded not as giving *liquidated damages*, but as awarding a *penalty*.<sup>6</sup> They are, therefore, under a well-known rule of statutory construction, which rule is believed to be untenable in principle and to involve a judicial attempt at the repealing of penal statutes,—to be *strictly construed*; and it would seem that, in this effort of strict construction, the judges have, in some cases, defeated the essential purpose of the legislature. They have held, for instance, that a statutory obligation to transmit dispatches with impartiality and good faith does not give a right of action for a failure to transmit

government, and by § 14 they are to be open to the public. Stat. 26 & 27 Vict., ch. 112, amended by 29 & 30 Vict., ch. 3, regulates the exercise of powers under special acts for the construction and maintenance of telegraphs. A party collected messages for a telegraph company, and received a commission from the company on the messages collected. It was held that the commission could not be considered as a violation of a provision in the charter of the company "for the sending and receiving of messages by all persons alike without favor or preference, and subject to such equitable charges and reasonable regulations as may from time to time be made by the company." *Reuter v. Electric Telegraph Co.*, 6 El. & Bl. 341; s. c. 2 Jur. (N. S.) 1245; 26 L. J. (Q. B.) 46. A statute of Oklahoma (Okla. Stat., § 543), imposing a penalty of fifty dollars on telegraph companies for breaches of duty, applies only to the failure to receive and transmit messages in the order presented: *Butner v. Western Union Tel. Co.* (Okla.), 4 Inters. Com. Rep. 770; 48 Am. & Eng. Corp. Cas. 376; 37 Pac. Rep. 1087.

<sup>3</sup> Burns' Rev. Stat. Ind., §§ 5511, 5512, 5529.

<sup>4</sup> See the reasoning of Bigelow, C. J., in *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226, 231; also that of Lacy, J., in *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; s. c. 46 Am. Rep. 715.

<sup>5</sup> This section is cited in §§ 2490, 2498.

<sup>6</sup> *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; s. c. 48 Am. Rep. 692; *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526; *Western Union Tel. Co. v. Adams*, 87 Ind. 598; s. c. 44 Am. Rep. 776; *Western Union Tel. Co. v. Gougar*, 84 Ind. 176; *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; s. c. 41 Am. Rep. 558; *Western Union Tel. Co. v. Axtell*, 69 Ind. 199; *Western Union Tel. Co. v. Lindley*, 62 Ind. 371; *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495; *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; s. c. 9 Am. Rep. 744; *Western Union Tel. Co. v. Ward*, 23 Ind. 377. See a learned note on such statutes by Mr. Desty, 3 L. R. A. 224; also *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599, 605.



through mere negligence;<sup>7</sup> nor for mere negligence in transmission where there was a *bona fide* effort to transmit,<sup>8</sup> as where the wires would not work properly.<sup>8a</sup> Other courts, refining still further, hold that such a statute applies only to a failure or refusal to receive and *transmit*, and not to a failure through negligence or otherwise, to *deliver* the message to the addressee.<sup>9</sup>

§ 2405. Further of these Statutes.—Another court has held that a statutory obligation,<sup>10</sup> under a penalty, to “transmit and deliver with impartiality and good faith and *with due diligence*,” does not give a penalty for inaccuracy in sending or transcribing, but that the “due

<sup>7</sup> That this is the construction of the Indiana statute, see Thomp. on Elect., § 159 and note; also Western Union Tel. Co. v. Steele, 108 Ind. 163; s. c. 9 N. E. Rep. 78; 6 West. Rep. 410; Western Union Tel. Co. v. Swain, 109 Ind. 405; s. c. 9 N. E. Rep. 927; 7 West. Rep. 531; Western Union Tel. Co. v. Jones, 116 Ind. 361; s. c. 18 N. E. Rep. 529. This act repeals by implication § 4176 of Ind. Rev. Stat. 1881 (Western Union Tel. Co. v. Brown, 108 Ind. 538; Western Union Tel. Co. v. Steele, 108 Ind. 163); but it does not repeal § 5514 of Burns' Rev. Stat. Ind., which requires telegraph companies to deliver, by messenger, all dispatches to the persons to whom they are addressed, “provided such persons \* \* \* reside within one mile of the telegraphic station, or within the city or town in which such station is.” Reese v. Western Union Tel. Co., 123 Ind. 294; s. c. 24 N. E. Rep. 163. The office of this repealed statute is well illustrated by a case where the defendant had two telegraph offices in a town, about eighty yards apart, one on a direct line to B, the other on a line over which a message to B. required several repetitions. The plaintiff presented a message for B. at the latter office, which was refused, on the ground that the other office had the direct line; but an offer was made to send it immediately to the other office. This offer the plaintiff refused, and took the message himself to the other office, whence it was promptly sent. It was held that defendant's refusal did not entitle plaintiff to recover a penalty imposed for failure to transmit a message: Ind. Rev. Stat. 1881, § 4176; Western Union Tel. Co. v. Wilson,

108 Ind. 308; s. c. 9 N. E. Rep. 172; 6 West. Rep. 547. Under How. Mich. Ann. St., § 3706, imposing a penalty on telegraph companies for failure to transmit messages with impartiality and in good faith, they are not liable to the penalty where the message is mislaid and forgotten through the negligence of their agent: Weaver v. Grand Rapids & C. R. Co., 107 Mich. 300; s. c. 65 N. W. Rep. 225. Nor for the unintentional omission of a word in telephoning the message to the party addressed, where the message was duly transmitted to the office of the company where the receiving party resided and promptly delivered by telephone: Wiselman v. Western Union Tel. Co., 62 N. Y. Supp. 491.

<sup>8</sup> Frauenthal v. Western Union Tel. Co., 50 Ark. 78; s. c. 6 S. W. Rep. 236; 21 Am. & Eng. Corp. Cas. 70.

<sup>8a</sup> Western Union Tel. Co. v. Davis, 95 Ga. 522; s. c. 22 S. E. Rep. 642.

<sup>9</sup> Connell v. Western Union Tel. Co., 108 Mo. 459; s. c. 18 S. W. Rep. 833. To the same effect see Dudley v. Western Union Tel. Co., 54 Mo. App. 391; Brooks v. Western Union Tel. Co., 56 Ark. 224; s. c. 19 S. W. Rep. 572; Smith v. Western Union Tel. Co., 57 Mo. App. 259. A telegraph company is liable for the penalty provided by Mo. Rev. Stat. 1889, § 2725, for neglect or refusal of the company to transmit, promptly and in good faith, a message offered it, if it fails to transmit such message; and it is not necessary that such failure should be due to impartiality or bad faith: Wood v. Western Union Tel. Co., 59 Mo. App. 236; Burnett v. Western Union Tel. Co., 39 Mo. App. 599.

<sup>10</sup> Ga. Acts 1887, p. 111.



diligence" of the statute has reference to the time within which the transmission and delivery must be accomplished.<sup>11</sup> Nor, in the opinion of another court, does a statutory obligation, under a penalty, to transmit messages "with impartiality and good faith" extend so far as to allow an action for the penalty for the act of the servants of the telegraph company in disclosing the contents of the message to third persons,—there being another statute punishing such misconduct.<sup>12</sup> The statutory penalty will be imposed where the company fails to deliver a message to the addressee, who calls at the office for it three hours after its transmission, although the addressee is a non-resident.<sup>13</sup> And the company will be liable to the penalty for failure to deliver a message to the address of a non-resident within the State, where it is its custom to deliver messages to non-residents, and it has previously delivered messages to the same address.<sup>14</sup> And it has been held that in addition to the statutory penalty, the company will be liable to the plaintiff for the travelling expenses of a servant whom he had notified by telegram not to come, and who did come owing to the failure of the company to deliver the message, whereby the plaintiff became liable for such expenses.<sup>15</sup>

#### § 2406. Application of these Statutes to Interstate Messages.—

Some of the State courts have taken the view that statutes like those already considered, imposing penalties for the failure to *transmit* messages with impartiality and good faith, apply equally to *domestic* and to *interstate* messages,<sup>16</sup> proceeding upon the ground that the offense, which consists primarily in the refusal to transmit, is completed within the domestic State. One of them has gone so far as to hold that such a statute is valid even in respect of messages sent to a point in another State, and even where the act of negligence or misconduct which prevented its delivery occurred in another State,<sup>17</sup> while at the same time holding that such a statute does not apply in the case of a message sent from another State to a place within the domestic

<sup>11</sup> *Western Union Tel. Co. v. Rountree*, 92 Ga. 611; s. c. 18 S. E. Rep. 979.

<sup>12</sup> *Western Union Tel. Co. v. Bierhaus*, 8 Ind. App. 563; s. c. 36 N. E. Rep. 161.

<sup>13</sup> *Western Union Tel. Co. v. Mansfield*, 93 Ga. 349; s. c. 20 S. E. Rep. 650.

<sup>14</sup> *Western Union Tel. Co. v. Edwards*, 96 Ga. 757; s. c. 22 S. E. Rep. 326.

<sup>15</sup> *Western Union Tel. Co. v. Mc-*

*Cormick* (Miss.), 27 South. Rep. 606.

<sup>16</sup> *Dudley v. Western Union Tel. Co.*, 54 Mo. App. 391.

<sup>17</sup> *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; s. c. 48 Am. Rep. 692; reaffirming *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181; *Western Union Tel. Co. v. Lindley*, 62 Ind. 371; *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526. See also *Western Union Tel. Co. v. Fenton*, 52 Ind. 1.



State.<sup>18</sup> But the Supreme Court of the United States, whose decision on this question is conclusive upon the State courts, it being a Federal question, holds that communication by telegraph is *commerce*; that lines of telegraph crossing the boundaries between different States of the Union are instruments of *interstate commerce*, and that, as such, they can neither be regulated nor taxed by a single State.<sup>19</sup>

§ 2407. **Application of these Statutes to Sunday Messages.**—Under the operation of statutes<sup>20</sup> prohibiting the doing of work and labor on Sunday, except in cases of necessity or charity, no recovery can be had for a penalty denounced by statutes such as those under consideration, for failing to transmit an ordinary dispatch not relating to a work of necessity or charity, delivered to a telegraph company on Sunday, although it may have accepted the fee and thereby assumed the duty of performing the service.<sup>21</sup> What is a work of necessity or charity, with reference to the transmission of telegraphic dispatches, is

<sup>18</sup> *Rogers v. Western Union Tel. Co.*, 122 Ind. 395; s. c. 24 N. E. Rep. 157; *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526; *Western Union Tel. Co. v. Reed*, 96 Ind. 195.

<sup>19</sup> *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; s. c. 2 Interstate Com. Rep. 59; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; reversing s. c. 95 Ind. 12; 48 Am. Rep. 692; and overruling the other Indiana cases above cited. The well known Federal doctrine is that the construction of the clause of the Constitution of the United States (Const. U. S., art. 1, § 8, cl. 3) which confers upon Congress the power to regulate commerce between the several States, is that, where Congress does not act in the exercise of the power, its non-action is tantamount to a declaration that, in the given particular, interstate commerce shall be free: *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Brown v. Houston*, 114 U. S. 622; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Wabash & c. R. Co. v. Illinois*, 118 U. S. 557; *Walling v. Michigan*, 116 U. S. 446; *Corson v. Maryland*, 120 U. S. 502; *Case of the State Freight Tax*, 15 Wall. (U. S.) 232; *Cooley v. Port Wardens*, 12 How. (U. S.) 299; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Hall*

*v. De Cuir*, 95 U. S. 485, 497; *Railroad Co. v. Husen*, 95 U. S. 465. Compare *Mugler v. Kansas*, 123 U. S. 663; *Butchers' Union v. Crescent City Co.*, 111 U. S. 746; *Yick Wo v. Hopkins*, 118 U. S. 356; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 669.

<sup>20</sup> Such as Rev. Stat. Mo. 1879, § 1578.

<sup>21</sup> *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; s. c. 41 Am. Rep. 558; *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 191; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; s. c. 20 N. E. Rep. 222; 21 Am. & Eng. Corp. Cas. 88; 3 L. R. A. 224. Under a statute of Missouri (Rev. Stat. Mo. 1889, §§ 3852, 3853), the general Sunday law is no defense to the telegraph company, unless it shows that its offices were opened on Sunday for the purpose of transmitting messages of necessity or charity only: *Bassett v. Western Union Tel. Co.*, 48 Mo. App. 566. The fact that the company receives and retains the fee is not such a ratification as enables the sender to maintain an action for the penalty given by the statute: *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; s. c. 41 Am. Rep. 558; citing to the general doctrine *Perkins v. Jones*, 26 Ind. 499. Compare *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14; s. c. 54 N. E. Rep. 775.



a question of difficulty. The mere transmission of such dispatches is not a work of necessity as matter of law; but whether it is so or not depends upon the facts of each case, and is said to be rather a question of fact than of law.<sup>22</sup> Messages relating to ordinary business do not obviously relate to works of necessity.<sup>23</sup> Therefore, a message reading, "Bring \$40 if you want record," does not, on its face, import that it relates to a work of necessity, and the failure to transmit it for delivery on Sunday does not render the telegraph company amenable to a statutory penalty;<sup>24</sup> and the same is obviously true of such a message as "Come up in the morning—bring all."<sup>25</sup> In an action for a statutory penalty for failing to transmit a message delivered to the telegraph company on Sunday, the burden of showing that it related to a work of necessity is obviously on the plaintiff.<sup>26</sup> The necessity intended by such a statute is not confined to a *physical necessity*, but it may equally consist of what may be termed a *moral* or *social necessity*,—as where an absent husband sends a dispatch to allay the anxiety of his wife and children;<sup>27</sup> or where a young gentleman starting out to pay a visit to a young lady in a distant city, telegraphed the fact to her.<sup>28</sup> Nor is the necessity or charity intended by such a statute any the less a necessity because it may have been created by the ante-

<sup>22</sup> *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; s. c. 41 Am. Rep. 558, opinion by Elliott, C. J.

<sup>23</sup> *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 191; *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14; s. c. 54 N. E. Rep. 775. In this case it appeared that the plaintiff's husband paid the agent of the telegraph company fifty cents for transmitting the message. The question was whether the failure to deliver the message, which resulted in the failure of the friend of the plaintiff to meet her, was the proximate cause of the illness of the plaintiff, so as to entitle her to recover damages for such illness. The court answered this question in the negative: *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14; s. c. 54 N. E. Rep. 775.

<sup>24</sup> *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; s. c. 20 N. E. Rep. 222; 21 Am. & Eng. Corp. Cas. 88; 3 L. R. A. 224.

<sup>25</sup> *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 191. Circumstances held insufficient to show a work of necessity in regard to getting a bill of exceptions signed: *Western Union*

*Tel. Co. v. Yopst*, 118 Ind. 248; s. c. 20 N. E. Rep. 222. The transportation of horses on Sunday, in a State prohibiting such transportation, by a shipper, if such transportation is necessary, is not a defense to an action against a telegraph company for delay in transmitting a telegram, by reason of which the horses were injured: *Taylor v. Western Union Tel. Co.*, 95 Iowa 740; s. c. 64 N. W. Rep. 660.

<sup>26</sup> *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; s. c. 20 N. E. Rep. 222; *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14; s. c. 54 N. E. Rep. 775.

<sup>27</sup> *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599, 614. But it is held, on the other hand, that a message which stated that the sender would arrive in the city where the addressee resided, over a certain road, at a certain time, does not show, on its face, a reasonable necessity for its transmission on Sunday: *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14; s. c. 54 N. E. Rep. 775.

<sup>28</sup> *Bassett v. Western Union Tel. Co.*, 48 Mo. App. 566.



cedent *negligence* of the person sending the dispatch.<sup>29</sup> On the question what is to be deemed a work of "*charity*" for the purposes under discussion, it has been justly held that the word, as employed in a Sunday statute, relates to something more than mere *almsgiving*; and the conclusion was that a telegraphic message by a husband, designed to allay the anxiety of his wife and children as to his whereabouts and safety, was a work of charity.<sup>30</sup> In an action to recover for the failure promptly to transmit a telegram, where the contract was made on Sunday, the reasonable necessity for sending the message on Sunday may appear from the contents of the message, or the necessity, and a notice thereof to the company, may be shown by the averment and proof of extrinsic facts.<sup>31</sup>

§ 2408. **Other Holdings with Reference to such Statutes.**—No action of any nature can be maintained against a telegraph company for a refusal to transmit a message *libelous* on its face, for its transmission would be a publication making the company liable in damages;<sup>32</sup> nor for refusing to transmit a message in furtherance of an unlawful undertaking, such as the keeping of that species of gambling house known as a "*bucket shop*;"<sup>33</sup> nor for refusing to transmit a message expressed in indecent, obscene, or filthy language.<sup>34</sup> But it has been held no defense to an action for a statutory penalty for failure to deliver a message which it has received for transmission, and for which it has accepted payment, that the message related to a *sale of futures* and was an illegal transaction.<sup>35</sup> Payment by the telegraph company of the expense incurred by the person injured by its non-delivery of a telegram, has been held no bar to an action for a statutory penalty, unless received in full settlement, or by way of accord and satisfaction.<sup>36</sup> If the statute gives the action for the pen-

<sup>29</sup> *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 595, 614; reaffirmed in *Bassett v. Western Union Tel. Co.*, 48 Mo. App. 566.

<sup>30</sup> *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599, 613.

<sup>31</sup> *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14; s. c. 54 N. E. Rep. 775.

<sup>32</sup> *Archambault v. Great North Western Tel. Co.* (Quebec Court App. 1888), 11 Montr. Leg. News 368; s. c. 14 Queb. L. R. 8.

<sup>33</sup> *Smith v. Western Union Tel. Co.*, 84 Ky. 664; s. c. 28 S. W. Rep. 483. See *ante*, § 2392.

<sup>34</sup> *Smith v. Western Union Tel. Co.*, 84 Ky. 664; s. c. 28 S. W. Rep. 483.

But the following was held not to be such: "Send me four girls on the first train to Francisville to tend fair:" *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495.

<sup>35</sup> *Gray v. Western Union Tel. Co.*, 87 Ga. 350; s. c. 13 S. E. Rep. 562; 14 L. R. A. 95; 87 Ga. 350; 44 Alb. L. J. 332; 10 Rafi & Corp. L. J. 325; 35 Am. & Eng. Corp. Cas. 47. But there is a contrary holding in *Western Union Tel. Co. v. Harper*, 15 Tex. Civ. App. 37; s. c. 39 S. W. Rep. 599. See *ante*, § 2392.

<sup>36</sup> *Western Union Tel. Co. v. Taylor*, 84 Ga. 408; s. c. 11 S. E. Rep. 396; 8 L. R. A. 189; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 430.



alty to the *person injured*, it may be brought by the addressee.<sup>37</sup> The fact that no pecuniary damage is sustained does not prevent the addressee from being *injured*, within the meaning of such a statute, so as to sustain such an action.<sup>38</sup> Statutes exist denouncing penalties against telegraph companies for refusing to transmit dispatches delivered to them by other *connecting telegraph companies*. Under such a statute, a telegraph company has been held liable for delay in delivering a message received from another line;<sup>39</sup> and for refusing a dispatch delivered to it by a competing line, whose line did not extend to the point of final delivery.<sup>40</sup>

§ 2409. **Still Further of such Statutes.**—Statutes have been enacted imposing a penalty for a failure to deliver messages to the person to whom they are addressed, who at the time resides within a stated distance of the telegraph office, or within the town or city in which the office is.<sup>41</sup> The telegraph company does not incur this penalty by failing to deliver a message to a *transient* visitor to a town or city, who requests any message to be sent to him, but gives no definite address;<sup>42</sup> nor because of an error of its operator in substituting for the surname of the sender the surname of another person, in transferring the message from the instrument to paper before final delivery;<sup>43</sup> nor for failure to deliver a message to the addressee, where such failure is due to the fact that the message gives erroneously his street and

<sup>37</sup> *Western Union Tel. Co. v. Allen*, 66 Miss. 549; s. c. 6 South. Rep. 461.

<sup>38</sup> *Western Union Tel. Co. v. Allen*, 66 Miss. 549; s. c. 6 South. Rep. 461. That the addressee can maintain the action under the language of Virginia Code, § 1292,—see *Western Union Tel. Co. v. Tyler*, 90 Va. 297; s. c. 4 Inters. Com. Rep. 481; 18 S. E. Rep. 280. That the action under Rev. Stat. Ohio, §§ 3462, 3463, is in the sender, and that the sender is the person whose name is signed to the dispatch,—see *Kester v. Western Union Tel. Co.*, 8 Ohio C. C. 236. That the addressee can not waive the right of the sender to a statutory penalty for non-delivery,—see *Brashears v. Western Union Tel. Co.*, 45 Mo. App. 433. That the Ga. Act of Nov. 12, 1889 (Ga. Acts 1888-89, p. 175), applies only to such telegraph companies as construct their lines after the passage of the act, and does not repeal the Georgia act of Oct. 22, 1887 (Ga. Acts 1886-87, p. 111),

prescribing penalties for violations of its provisions as to sending messages,—see *Western Union Tel. Co. v. Cooledge*, 86 Ga. 104; s. c. 12 S. E. Rep. 264.

<sup>39</sup> *Conyers v. Postal Tel. Co.*, 92 Ga. 619; s. c. 19 S. E. Rep. 254.

<sup>40</sup> *United States Tel. Co. v. Western Union Tel. Co.*, 56 Barb. (N. Y.) 46 (under a statute set out in *Thomp. Elect.*, § 174). Necessity of written notice of default to the company under Indiana statute: *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; s. c. 30 N. E. Rep. 222; 21 Am. & Eng. Corp. Cas. 88; 3 L. R. A. 224.

<sup>41</sup> Ga. Acts 1887, p. 112.

<sup>42</sup> *Moore v. Western Union Tel. Co.*, 87 Ga. 613; s. c. 13 S. E. Rep. 639; *Western Union Tel. Co. v. Murphey*, 96 Ga. 768; *Western Union Tel. Co. v. McDaniel*, 103 Ind. 294; *Deslottes v. Baltimore & C. Tel. Co.*, 40 La. An. 183.

<sup>43</sup> *Wolf v. Western Union Tel. Co.*, 94 Ga. 434; s. c. 19 S. E. Rep. 717.



number, and where the initials of his given name, as contained in the message, are not in the city directory, although his full name in the directory corresponds with the one given in the message, the other initial not appearing in the directory;<sup>44</sup> nor for want of diligence in forwarding a message sent "collect," since the statute predicates the liability on the payment or tender of the usual charge.<sup>45</sup> The right to recover a penalty denounced by a statute for failing to transmit messages "with impartiality and good faith and in the order of time in which they are received,"—does not arise in consequence of a failure on the part of the company to make good an engagement made in good faith by its receiving agent, to transmit a message to a designated place at which it has no office.<sup>46</sup> If the addressee resides beyond the free delivery limits of the company, the fact that the sender failed to pay the extra charge required by the rules of the company for delivery in such cases, will be no defense to an action for the penalty, in the absence of a knowledge of the regulation on the part of the sender.<sup>47</sup>

<sup>44</sup> *Western Union Tel. Co. v. Patrick*, 92 Ga. 607; s. c. 18 S. E. Rep. 980. See also *Western Union Tel. Co. v. Rountree*, 92 Ga. 611. But it has been held that the sender of a telegram to a given person at a specified place, "care of some hotel," is not guilty of such negligence in failing to give a more specific address, as will relieve the company from trying to find him, as it would be its duty to ascertain whether he was stopping at some hotel, had it been simply addressed to the city: *Western Union Tel. Co. v. Birchfield*, 15 Tex. Civ. App. 426; s. c. 39 S. W. Rep. 1002. On the other hand, it has been said that the sender of a message to "Mrs. La Fontaine, Fond du Lac," a city of 12,000 inhabitants, without more definite address, such as the street and number, especially when his attention is called to it by the operator, is guilty of such negligence as will exonerate the company from liability for fail-

ure to deliver the message: *Western Union Tel. Co. v. McDaniel*, 103 Ind. 294.

<sup>45</sup> *Langley v. Western Union Tel. Co.*, 88 Ga. 777; 15 S. E. Rep. 291. See also *Western Union Tel. Co. v. Mossler*, 95 Ind. 29.

<sup>46</sup> *Peterson v. Western Union Tel. Co.*, 10 Ind. App. 227; s. c. 37 N. E. Rep. 810.

<sup>47</sup> *Brashears v. Western Union Tel. Co.*, 45 Mo. App. 433. Under a statute of Georgia (Ga. Acts 1887, p. 112), imposing, in one section, a penalty for *non-transmission*, and, in another section, a penalty for *non-delivery*, provided the sendee lives within a mile of the receiving station, the company is not relieved from the penalty imposed by the first section, by reason of the fact that the addressee lives more than a mile away: *Horn v. Western Union Tel. Co.*, 88 Ga. 538; s. c. 15 S. E. Rep. 16.



## CHAPTER LXXXII.

REGULATIONS AND STIPULATIONS IN MESSAGE BLANKS LIMITING  
LIABILITY.

ART. I. Generally, §§ 2411-2420.

ART. II. As to Repeating the Message, §§ 2422-2427.

ART. III. As to the Time for Presenting any Claim for Damages,  
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## ARTICLE I. GENERALLY.

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2418. Circumstances under which assent to such stipulations not presumed.

2419. Exceptional views upon this subject.

2420. Effect of messages not written upon the company's blanks.

**§ 2411. Extent to which such Companies can Limit their Liability by Rules, Regulations, and Stipulations in Message Blanks, etc.<sup>1</sup>—**

While it would be difficult to sift from the decisions of the American courts a uniform rule upon this subject, those decisions may possibly be grouped in support of the following propositions: 1. That a telegraph company may establish reasonable rules and regulations, and impose upon its customers reasonable stipulations in its message blanks, to the end of exonerating itself from those risks of mistake or delay which naturally attend the service and which can not be avoided in all cases.<sup>2</sup> 2. That in view of the *public nature* of the employment of such

<sup>1</sup> This section is cited in §§ 2414, 2415, 2423.<sup>2</sup> *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 246; s. c. 96 Am.Dec. 519, per Alvey, J.; *Anderson v. Western Union Tel. Co.*, 84 Tex. 17; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256.



companies,<sup>3</sup> this right is not unlimited, but is subject to the restriction that such rules, regulations, or stipulations must be reasonable.<sup>4</sup> It follows that a rule, regulation, or stipulation which covers all possible delinquencies, mistakes, delays, or neglects in transmitting or delivering or in not delivering, a message, from whatever cause arising, is not a reasonable regulation, and is not binding upon the sender or the addressee.<sup>5</sup> 3. That such rules, regulations, and stipulations will be set aside and disregarded by the judicial courts when they contravene the Constitution or laws of the United States, or the Constitution, the laws, or the public policy of the State by whose laws their validity is determined.<sup>6</sup> 4. That no rule, regulation, or stipulation is valid, the operation of which is to relieve the company from liability for the gross negligence, willful misconduct, or bad faith of its agents or servants.<sup>7</sup> 5. On the other hand, that such companies can, by rules, regulations, or stipulations on their message blanks, exonerate themselves from any liability not arising from gross negligence or willful

<sup>3</sup> *Ante*, § 2392.

<sup>4</sup> These views may be gathered from the following among other cases: *Western Union Tel. Co. v. Graham*, 1 Colo. 230; s. c. 9 Am. Rep. 136; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; s. c. 9 Am. Rep. 744; *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Western Union Tel. Co. v. Adams*, 87 Ind. 598; s. c. 44 Am. Rep. 744; *Western Union Tel. Co. v. Young*, 93 Ind. 118; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; s. c. Allen Tel. Cas. 306; *Atlantic & C. Tel. Co. v. Western Union Tel. Co.*, 4 Daly (N. Y.) 527; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; s. c. 1 Am. Rep. 387; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; s. c. 46 Am. Rep. 715; *Heiman v. Western Union Tel. Co.*, 57 Wis. 562; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; s. c. 17 Am. Rep. 69; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; s. c. Allen Tel. Cas. 345; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; s. c. 18 Am. Rep. 485; *Breese v. United States Tel. Co.*, 48 N. Y. 132; s. c. 8 Am. Rep. 526; *Allen Tel. Cas.* 663; *Young v. Western Union Tel. Co.*, 65 N. Y. 163; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238; *Aiken v. Telegraph Co.*, 5 S. C. 358; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; s. c. 44 Am. Rep. 614; *Baxter*

*v. Dominion Tel. Co.*, 37 Up. Can. (Q. B.) 470; *True v. International Tel. Co.*, 60 Me. 9; s. c. 11 Am. Rep. 156.

<sup>5</sup> *True v. International Tel. Co.*, 60 Me. 9, 18; s. c. 11 Am. Rep. 156.

<sup>6</sup> Cases in the second preceding note.

<sup>7</sup> *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 248; s. c. 96 Am. Dec. 519; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Western Union Tel. Co. v. Graham*, 1 Colo. 230; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *True v. International Tel. Co.*, 60 Me. 9, 17; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; *Sweatland v. Illinois & C. Tel. Co.*, 27 Iowa 433; s. c. 1 Am. Rep. 285; *Manville v. Western Union Tel. Co.*, 37 Iowa 214; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; *Breese v. United States Tel. Co.*, 48 N. Y. 132; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238; *American Union Tel. Co. v. Daugherty*, 89 Ala. 191; s. c. 7 South. Rep. 660; *Will v. Postal Tel. & C. Co.*, 3 App. Div. (N. Y.) 22; s. c. 73 N. Y. St. Rep. 552; 37 N. Y. Supp. 933; *Dixon v. Western Union Tel. Co.*, 3 App. Div. (N. Y.) 60; s. c. 38 N. Y. Supp. 1056.



misconduct,<sup>8</sup> or for fraud,<sup>9</sup> or any conduct inconsistent with good faith.<sup>10</sup> 6. Disregarding the untenable distinction between simple negligence and gross negligence,<sup>11</sup> that such companies will not be allowed on grounds of public policy, to impose upon persons soliciting their services, rules, regulations, or stipulations which have the effect of relieving themselves from liability for negligence.<sup>12</sup>

<sup>8</sup> *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; s. c. 9 Am. Rep. 744; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232; s. c. 96 Am. Dec. 519; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *Breese v. United States Tel. Co.*, 48 N. Y. 132; s. c. 8 Am. Rep. 526; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; s. c. 18 Am. Rep. 485; *Wann v. Western Union Tel. Co.*, 37 Mo. 472; *Western Union Tel. Co. v. Neill*, 57 Tex. 283; s. c. 44 Am. Rep. 589 ("except when caused by the misconduct, fraud or want of due care"); *Womack v. Western Union Tel. Co.*, 58 Tex. 176; s. c. 44 Am. Rep. 614; *White v. Western Union Tel. Co.*, 5 McCrary (U. S.) 103; s. c. 14 Fed. Rep. 710; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433 ("gross negligence"). In the subsequent case of *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; s. c. 49 Am. Rep. 480, the court denied the proposition that the company could, by a regulation of its own, protect itself against every degree of negligence, except "gross negligence or fraud," and held that there was no error in refusing an instruction which embodied this proposition. In Kansas it has been said, speaking with reference to the condition in the blanks of the Western Union Telegraph Company in regard to repeating messages, that a telegraph company can not, by such a stipulation, exonerate itself from liability for errors arising from gross negligence: *Western Union Tel. Co. v. Crall*, 38 Kan. 679; s. c. 5 Am. St. Rep. 795; *Western Union Tel. Co. v. Howell*, 38 Kan. 685. In North Carolina the view was once taken that a telegraph company may limit its liability for ordinary negligence in sending unrepeatable messages, to the amount paid for the transmission of the message; but it can not exempt itself where there has been gross negligence: *Pegram v. Western Union Tel. Co.*, 97 N. C. 57; s. c. 2 S. E. Rep. 256; *Cannon*

*v. Western Union Tel. Co.*, 100 N. C. 300. But these decisions, in so far as they hold that a telegraph company can, by stipulation, limit its liability for any degree of negligence, were expressly overruled by *Brown v. Postal Tel. Co.*, 111 N. C. 187, where it was held that public policy forbids that telegraph companies should be protected from liability for damage by reason of any degree of negligence; and this decision was followed by *Sherrill v. Western Union Tel. Co.*, 116 N. C. 655; s. c. 21 S. E. Rep. 429. For illustrations of what will be deemed gross negligence within the rule of the text, see *Thomp. Elect.*, § 187; *Western Union Tel. Co. v. Goodbar* (Miss.), s. c. 7 South. Rep. 214. It has been held that the failure of a temporary operator to connect his instrument with the line for a few hours is not such "gross negligence" as will make the company liable for the consequent delay of an unrepeatable message, where there is a stipulation against such liability: *Birkett v. Western Union Tel. Co.*, 103 Mich. 361; s. c. 61 N. W. Rep. 645.

<sup>9</sup> *Candee v. Western Union Tel. Co.*, 34 Wis. 471; s. c. 17 Am. Rep. 452; *Western Union Tel. Co. v. Neill*, 57 Tex. 283; s. c. 44 Am. Rep. 589.

<sup>10</sup> *United States Tel. Co. v. Gildersleeve*, 29 Md. 232; s. c. 96 Am. Dec. 519.

<sup>11</sup> *Ante*, § 2395. Compare Vol. I, §§ 20, 21.

<sup>12</sup> *Western Union Tel. Co. v. Short*, 53 Ark. 434; s. c. 14 S. W. Rep. 649; 9 L. R. A. 744; 9 Rail. & Corp. L. J. 11; *Garrett v. Western Union Tel. Co.*, 83 Iowa 257; s. c. 49 N. W. Rep. 88; 10 Rail. & Corp. L. J. 115; *Brown v. Postal Tel. Co.*, 111 N. C. 187; s. c. 16 S. E. Rep. 179; 17 L. R. A. 648; 39 Am. & Eng. Corp. Cas. 583 (where the distinction between ordinary and gross negligence is repudiated); *Sherrill v. Western Union Tel. Co.*, 116 N. C. 155; s. c. 21 S. E. Rep. 429; *Wertz v. Western*



§ 2412. **Reason of the Rule which Avoids Regulations and Stipulations against Liability for Negligence.**—The reason which supports this doctrine is twofold: 1. That such companies are under a public duty of exercising diligence and good faith in behalf of those who solicit their services. 2. That, aside from any question of public policy or duty, they necessarily assume, by contract with the sender of every message, the duty of exercising diligence in performing the service undertaken; although they do not, as already stated,<sup>13</sup> in the absence of an express contract to that effect, become absolute insurers of the correct and speedy performance of the service; that it would hence be repugnant to the primary agreement in the contract to allow them to stipulate in the same breath that they shall not be liable for not doing what they have contracted to do, and what they have received the consideration for doing; that, in the case of a contract thus contradictory and repugnant, the courts will, under the operation of the principle *ut res valeat quam pereat*, so deal with the contract as to give effect to its primary object and purpose, rejecting that which is repugnant and which operates to destroy the contract itself. The question of the *reasonableness* of such rules, regulations, and stipulations, like the question of the reasonableness of *corporate by-laws*,<sup>14</sup> will generally be a question of law to be decided by the court, and not to be submitted to a jury.<sup>15</sup> If a stipulation on a message blank is reasonable, under the foregoing principles, *evidence of a usage* in a local office of the company is inadmissible to vary the terms of the contract.<sup>16</sup>

§ 2413. **What Regulations and Stipulations have been Held Valid.**—Such companies may stipulate against responsibility for mistakes occasioned by uncontrollable causes, such as atmospheric electricity or other climatic influences, provided the mistakes could not have been guarded against by the exercise of ordinary care and skill on

Union Tel. Co., 8 Utah 499; s. c. 33 Pac. Rep. 136; Western Union Tel. Co. v. Beals, 56 Neb. 415; s. c. 76 N. W. Rep. 903. Liability to the addressee of a message, for negligence, can not be avoided by the company by showing that, printed on the back of the blank on which the message was written, was a stipulation that the company was "the agent of the sender without liability." Western Union Tel. Co. v. Seals (Tex. Civ. App.), 45 S. W. Rep. 964.

<sup>13</sup> *Ante*, § 2393.

<sup>14</sup> 1 Thomp. Corp., §§ 937, 1022.

<sup>15</sup> In nearly all the cases previous-

ly cited in this chapter, the reasonableness or unreasonableness of the rule, regulation or stipulation was declared as matter of law. So, also, in the following cases: Stamey v. Western Union Tel. Co., 92 Ga. 613; s. c. 18 S. E. Rep. 1008; 44 Am. & Eng. Corp. Cas. 461; Shepard v. Gold & C. Tel. Co., 38 Hun (N. Y.) 338; Smith v. Gold & C. Tel. Co., 42 Hun (N. Y.) 454; s. c. 6 N. Y. St. Rep. 110. For the facts and holdings in the last two cases, see Thomp. Elect., § 200.

<sup>16</sup> Grinnell v. Western Union Tel. Co., 113 Mass. 299, 306; s. c. 18 Am. Rep. 485.



the part of their operating agents, they being provided with proper instruments;<sup>17</sup> though in such case there may be an inquiry whether the company was not guilty of negligence in attempting to transmit the message before such temporary disturbing causes had passed away;<sup>18</sup> and, manifestly, there may be room for inquiry as to whether it has exercised due care and skill in the construction and reparation of its line, and especially in the insulation of its wires. A regulation requiring the sender of a message, which calls for an answer, to deposit enough money to pay for an answer of ten words, has been held reasonable.<sup>19</sup> The same is true of a regulation, printed on the message blanks of the company, prescribing what are called "*free delivery limits*," that is to say, the limits within which messages will be delivered free, and requiring a deposit to cover the cost of delivery, if the message is to be delivered to a person residing outside of those limits; and it has been held that if the addressee lives outside the prescribed limits, the sender, if he does not know of the regulation, must make an inquiry as to the fact; and make the required deposit; and that his illiteracy is no excuse for his failure to do so.<sup>20</sup> The company is under no obligation to deliver a message in the country and beyond its free delivery limits, until the charges for delivering the same have been guaranteed.<sup>21</sup> But it has been held that where the company accepts a message for delivery outside of its free delivery limits without demanding extra compensation for its delivery, it can not avoid liability for delay in delivering the same because such extra compensation has not been paid.<sup>22</sup> Where it was the custom of the company that the receiving office should notify the sending office of charges for special delivery, so that payment or guaranty of it might be secured of the sender, such custom constituted a part of the contract, and whether the company was guilty of negligence in failing to give such notice was a question for the jury.<sup>23</sup> A failure of the company to notify the agent at the sending station of its failure to deliver a message because it can not find the addressee, can not be

<sup>17</sup> *Sweatland v. Illinois & C. Tel. Co.*, 27 Iowa 433; s. c. 1 Am. Rep. 285; *White v. Western Union Tel. Co.*, 14 Fed. Rep. 710.

<sup>18</sup> *Western Union Tel. Co. v. Cohen*, 73 Ga. 522.

<sup>19</sup> *Western Union Tel. Co. v. McGuire*, 104 Ind. 130; s. c. 54 Am. Rep. 296; *Hewlett v. Western Union Tel. Co.*, 28 Fed. Rep. 181.

<sup>20</sup> *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c. 7 South. Rep. 419; 30 Am. & Eng. Corp. Cas. 615.

<sup>21</sup> *Western Union Tel. Co. v. Mathews*, 21 Ky. L. Rep. 1045; s. c. 55 S. W. Rep. 427. To the same effect, see *Western Union Tel. Co. v. Redinger*, 22 Tex. Civ. App. 362; s. c. 54 S. W. Rep. 417.

<sup>22</sup> *Western Union Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435; s. c. 47 S. W. Rep. 676.

<sup>23</sup> *Evans v. Western Union Tel. Co.* (Tex. Civ. App.), 56 S. W. Rep. 609.



excused by showing that the sender lived beyond the free delivery limits, where he has telephone connection with the telegraph office.<sup>24</sup> Nor can the company avoid its liability for the non-delivery of a telegram on the ground that the addressee lived beyond the free delivery limits, where it has been the custom of the company to send messages without extra charge to the people of the town in which the addressee lived, and it had given no notice to the sender of a change in such method.<sup>25</sup>

§ 2414. **What Regulations and Stipulations have been Held Unreasonable.**<sup>26</sup>—The principle already stated;<sup>27</sup> that such rules, regulations, or stipulations are void when contrary to the statute law of the State by whose laws the liability is to be determined, carries with it the conclusion that they will not be allowed to operate so as to relieve the company from any *penalty* imposed upon it by a valid and operative statute;<sup>28</sup> since legislation designed to regulate this species of public service and to protect the public against the extortion and oppression of the corporations engaged in it, would be wholly nugatory, if it could be set aside by the regulations of such corporations, or by the stipulations which they might impose upon those obliged to resort to them for their services.<sup>29</sup> A stipulation on a message blank limiting the liability of the company to the cost of transmitting the message,<sup>30</sup> or to ten times the amount paid for its transmission,<sup>31</sup> or even to fifty times such amount,<sup>32</sup> has been held void as against public pol-

<sup>24</sup> *Hendricks v. Western Union Tel. Co.*, 126 N. C. 304; s. c. 35 S. E. Rep. 543.

<sup>25</sup> *Western Union Tel. Co. v. Womack*, 9 Tex. Civ. App. 607; s. c. 29 S. W. Rep. 932.

<sup>26</sup> This section is cited in § 2415.

<sup>27</sup> *Ante*, § 2411, subsec. 3.

<sup>28</sup> *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; s. c. 9 Am. Rep. 744; *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Western Union Tel. Co. v. Adams*, 87 Ind. 598; s. c. 44 Am. Rep. 76; *Western Union Tel. Co. v. Young*, 93 Ind. 118. See also *United States Tel. Co. v. Western Union Tel. Co.*, 56 Barb. (N. Y.) 46; *Western Union Tel. Co. v. James*, 162 U. S. 650; s. c. 40 L. ed. 1105; 16 Sup. Ct. Rep. 934.

<sup>29</sup> A good illustration of the rule of the text is found in a case holding that if the governing statute imposes a penalty of \$100 for a given default, it is no defense on the part of the company that there was a stipulation upon the message blank limiting the amount of recovery to the amount paid for transmitting the message: *Western Union Tel. Co.*

*v. Buchanan*, 35 Ind. 429; s. c. 9 Am. Rep. 744; *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Western Union Tel. Co. v. Adams*, 87 Ind. 598; s. c. 44 Am. Rep. 76; *Western Union Tel. Co. v. Young*, 93 Ind. 118. See also *United States Tel. Co. v. Western Union Tel. Co.*, 56 Barb. (N. Y.) 46.

<sup>30</sup> *Wertz v. Western Union Tel. Co.*, 8 Utah 499; s. c. 33 Pac. Rep. 136; *Western Union Tel. Co. v. Short*, 53 Ark 434; s. c. 14 S. W. Rep. 649; 9 L. R. A. 744; 9 Rail. & Corp. L. J. 11; *True v. International Tel. Co.*, 60 Me. 9; s. c. 11 Am. Rep. 156; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461; s. c. 17 Atl. Rep. 736. See, *contra*, *Bennett v. Telegraph Co.*, 2 N. Y. Supp. 365; s. c. 18 N. Y. St. Rep. 229.

<sup>31</sup> *Fowler v. Western Union Tel. Co.*, 80 Me. 381; s. c. 6 Am. St. Rep. 211; 15 Atl. Rep. 29; 38 Alb. L. J. 276; 16 Wash. L. Rep. 591; 4 Rail. & Corp. L. J. 46.

<sup>32</sup> *Brown v. Postal Tel. Cable Co.*, 111 N. C. 187; s. c. 17 L. R. A. 648; 39 Am. & Eng. Corp. Cas. 583; 16 S. E. Rep. 179.



icy. Any stipulation whose object is to relieve the company from its duty to exercise that degree of care and skill which a prudent man would exercise in his own affairs, is held to be contrary to public policy and void;<sup>33</sup> and there is a similar holding as to a stipulation that whenever a message is sent to the office by one of the company's messengers, the latter is deemed to be the agent of the sender.<sup>34</sup> A stipulation limiting liability for delay in delivery of a message is invalid when the company accepts the message for transmission with the knowledge that its wires are down.<sup>35</sup>

§ 2415. **Stipulations on Blanks for Night Messages.**—Stipulations on the blanks employed for *night messages* which telegraph companies transmit during a period when their wires are not burdened, at half the usual rates, to the effect that they shall not be liable for a failure of their undertaking beyond a given amount, generally ten times the amount paid for the service, have, for like reasons, been held void, in so far as they attempt to exonerate the company from the consequence of the negligence or misconduct of its servants;<sup>36</sup> though there are cases, conforming to a doctrine already stated,<sup>37</sup> which hold such stipulations valid and effectual, so far as to relieve the company from all liability beyond the stipulated sum, except for gross negligence or fraud;<sup>38</sup> or, as was said in one case, except for miscarriages shown to have been occasioned by the misconduct, fraud, or want of due care.<sup>39</sup>

§ 2416. **Further of such Rules, Regulations, and Stipulations.**—It was held, on more or less doubtful grounds, by the late District Court

<sup>33</sup> *Western Union Tel. Co. v. Eubank*, 100 Ky. 591; s. c. 38 L. R. A. 711; 18 Ky. L. Rep. 995; 38 S. W. Rep. 1068.

<sup>34</sup> *Will v. Postal Tel. Cable Co.*, 3 App. Div. (N. Y.) 22; s. c. 73 N. Y. St. Rep. 552; 37 N. Y. Supp. 933.

<sup>35</sup> *Pacific Postal Tel. Co. v. Fleischer*, 66 Fed. Rep. 899; s. c. 29 U. S. App. 227.

<sup>36</sup> *True v. International Tel. Co.*, 60 Me. 9; s. c. 11 Am. Rep. 156; *Allen Tel. Cas.* 530; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; s. c. 16 Am. Rep. 437; *Fowler v. Western Union Tel. Co.*, 80 Me. 381; s. c. 6 Am. St. Rep. 211; 15 Atl. Rep. 29; *Harkness v. Western Union Tel. Co.*, 73 Iowa 190; *Hubbard v. Western Union Tel. Co.*, 33 Wis. 558; s. c. 14 Am. Rep. 775; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; s. c. 17

Am. Rep. 452; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433.

<sup>37</sup> *Ante*, § 2411. But compare *ante*, § 2414.

<sup>38</sup> *Schwartz v. Atlantic & C. Tel. Co.*, 18 Hun (N. Y.) 157; *Aiken v. Telegraph Co.*, 5 S. C. 358; *Jones v. Western Union Tel. Co.*, 18 Fed. Rep. 717.

<sup>39</sup> *Western Union Tel. Co. v. Neill*, 57 Tex. 283; s. c. 44 Am. Rep. 589. But it has been held, with regard to messages sent on "*night blanks*" containing the stipulation that they were not for delivery until morning, that the carrier need not deliver them during the night, and that he is not liable for a failure to do so: *Western Union Tel. Co. v. McCoy* (Tex. Civ. App.), 31 S. W. Rep. 210 (no off. rep.); *Western Union Tel. Co. v. Van Cleave* (Ky.), 54 S. W. Rep. 827.



of New York City, that a telegraph company can not, during a period when its power of serving the public is suspended by a general strike of its operators, refuse to receive for transmission messages unless stamped with the words "Accepted subject to delay."<sup>40</sup> A stipulation on a message blank that the company will not be liable for delays arising from unavoidable interruptions of the working of its lines, does not embrace a temporary though exclusive use of its wire in sending out railway train orders, and does not exonerate the company from damages for a delay thus occasioned.<sup>41</sup> A regulation printed on the back of a message blank to the effect that the company will not be responsible until messages are presented and accepted at one of its transmitting offices, and that if a message is sent to such an office by one of the company's messengers, he shall be deemed to act as the sender's agent for that purpose, and not as the agent of the company, has been held reasonable and binding both on the sender and the addressee.<sup>42</sup> The wrongful refusal of a message tendered to a telegraph company except upon unlawful conditions, is not waived or cured by the fact that the message is subsequently offered and sent on the same conditions.<sup>43</sup>

§ 2417. **Proof of Knowledge of such Rules, Regulations, or Stipulations.**<sup>44</sup>—The weight of judicial authority is to the effect that if a rule, regulation, or stipulation of such a company, limiting its liability, be a reasonable one, under principles already considered, and such a one as the company may lawfully make, and is printed in plain type on its message blanks in such a manner as to call the attention of the customer to it,<sup>45</sup> either on the front or on the *back side* of such blank,<sup>46</sup> or, according to one view, displayed in conspicuous type on the

<sup>40</sup> *Marvin v. Western Union Tel. Co.* (Dist. Ct. New York City), 15 Chicago Legal News 416.

<sup>41</sup> *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406; s. c. 16 S. W. Rep. 25.

<sup>42</sup> *Stamey v. Western Union Tel. Co.*, 92 Ga. 613; s. c. 44 Am. & Eng. Corp. Cas. 461; 18 S. E. Rep. 1008.

<sup>43</sup> *Kirby v. Western Union Tel. Co.*, 4 S. D. 105; s. c. 55 N. W. Rep. 759. An action to recover a penalty, under an Alabama statute, for delay in delivering a telegram, is unaffected by a stipulation against liability for mistakes in its transmission, contained in the contract under which it is sent: *Western Union Tel. Co. v. James*, 162 U. S. 650; s. c. 40 L. ed. 1105; 16 Sup. Ct. Rep. 934.

<sup>44</sup> This section is cited in §§ 2420, 2430.

<sup>45</sup> *Hill v. Western Union Tel. Co.*, 85 Ga. 425; s. c. 11 S. E. Rep. 874; 30 Am. & Eng. Corp. Cas. 590; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Young v. Western Union Tel. Co.*, 65 N. Y. 163; *Breese v. Western Union Tel. Co.*, 48 N. Y. 132, 139; s. c. 31 How. Pr. (N. Y.) 86; *Belger v. Dinsmore*, 51 N. Y. 166, 173; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71. Compare *Grace v. Adams*, 100 Mass. 505.

<sup>46</sup> If the stipulation is printed on the *back* of the message blank, but there is on its face, in plain print, a statement that it is sent subject to the conditions printed on the back, and asking the party sending



wall in the company's office,<sup>47</sup> he will be *conclusively presumed* to have known it, and to have assented thereto, and there will be an *estoppel* against him from denying such assent;<sup>48</sup> and the fact that it is printed in *small type* will not change the rule if there is large type directing his attention to it.<sup>49</sup> The general theory of the courts is that the act of the sender of the message, in writing it upon a blank containing such stipulations, creates a *contract* between him and the company, and that he sends the message subject to so many of those stipulations as are reasonable and lawful.<sup>50</sup> The theory is that, by furnishing message blanks containing particular stipulations, the company makes a proposition to the customer for a contract to send his message upon those terms, and that, by writing his message thereon and delivering it to the agent of the company, he accepts the proposition, which, in theory of law, makes a contract binding upon both parties. The rule is of special application to customers who are in the habit of sending messages upon blanks of the company containing such stipulations.<sup>51</sup> The fact that the sender gets the operator to write out the message for him does not change the rule, for in such a case he makes the operator his own agent, and the knowledge of the agent is the knowledge of the principal.<sup>52</sup>

**§ 2418. Circumstances under which Assent to such Stipulations not Presumed.**<sup>53</sup>—This doctrine has been well qualified by the intima-

the message to read those conditions, he will be bound thereby, whether he read them or not: *Stamey v. Western Union Tel. Co.*, 92 Ga. 613; s. c. 44 Am. & Eng. Corp. Cas. 461; 18 S. E. Rep. 1008. Especially where the message blank which was used was one of a package of such blanks which the sender kept in his office, and where he does not state in his testimony that he had not read it: *Primrose v. Western Union Tel. Co.*, 154 U. S. 1; s. c. 38 L. ed. 883; 14 Sup. Ct. Rep. 1698.

<sup>47</sup> *Birney v. New York & C. Tel. Co.*, 18 Md. 341.

<sup>48</sup> *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; s. c. 18 Am. Rep. 485; *Breese v. United States Tel. Co.*, 48 N. Y. 132; s. c. 8 Am. Rep. 526; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; s. c. 44 Am. Rep. 614; *Belger v. Dinsmore*, 51 N. Y. 166.

<sup>49</sup> *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; s. c. 1 Am. Rep. 387.

<sup>50</sup> *Primrose v. Western Union Tel. Co.*, 154 U. S. 1; s. c. 38 L. ed. 883; 14 Sup. Ct. Rep. 1698; *Western Union Tel. Co. v. Carew*, 15 Mich.

525; s. c. *Allen Tel. Cas.* 345; 2 *Thomp. Neg.*, 1st ed., 829; *Hill v. Western Union Tel. Co.* (Ga.), 11 S. E. Rep. 874.

<sup>51</sup> *Primrose v. Western Union Tel. Co.*, 154 U. S. 1; s. c. 38 L. ed. 883; 14 Sup. Ct. Rep. 1698; *Breese v. United States Tel. Co.*, 48 N. Y. 132; affirming s. c. 45 Barb. (N. Y.) 274; 31 *How. Pr.* (N. Y.) 86; *Bennett v. Western Union Tel. Co.*, 18 N. Y. St. Rep. 777; s. c. 2 N. Y. Supp. 365; *Webbe v. Western Union Tel. Co.*, 64 Ill. App. 331.

<sup>52</sup> *Western Union Tel. Co. v. Edsall*, 63 Tex. 668; *Western Union Tel. Co. v. Foster*, 64 Tex. 220. But it has been held that the sender does not make the operator his own agent by getting him to write out the message, so as to charge the sender with the operator's knowledge of the company's *rules and regulations* either as to office hours or as to free delivery limits: *Western Union Tel. Co. v. Neel*, 86 Tex. 386; s. c. 25 S. W. Rep. 661.

<sup>53</sup> This section is cited in §§ 2419, 2430.



tion that it does not apply where fraud or imposition has been used, preventing the customer from acquiring a knowledge of the stipulations.<sup>54</sup> Other courts have qualified the foregoing statement of doctrine by making the presumption of assent apply only in the absence of proof that the blanks were printed in small type or otherwise, so as to mislead; or where the sender was so illiterate that he could not read them; or where, when they were furnished to him by the agent, he had no opportunity to read them, which the agent knew.<sup>55</sup> Another view is that such stipulations are binding only when the circumstances are such that the assent of the sender of the message to them can be presumed. This was held to be the case where blanks for messages had been for some time in the possession of the sender, a bank president, who had had an abundant opportunity to read them. But it was said that if a blank for a message were delivered to the sender when he wrote the message, and he had no opportunity to read it, and, to the knowledge of the operator, had not read it, there would be no presumption that he had notice of the stipulation printed thereon.<sup>56</sup> So, the sender of a telegram *given orally* to the operator, who accepted the same, was not bound by the conditions printed on the ordinary blank of the company upon which the message was written by the operator, to which he attached the sender's name, where the sender could neither read nor write, and he was not informed of the conditions on the blank.<sup>57</sup> And one who writes a message on a plain slip of paper and delivers it to a telegraph company for transmission, is not bound by printed conditions on a blank on which the message is pasted, although it is a rule of the company that all messages received by it shall be upon one of its printed blanks and subject to the stipulations printed thereon.<sup>58</sup>

§ 2419. **Exceptional Views upon this Subject.**—An exceptional view obtains in Illinois, to the substantial effect that the question

<sup>54</sup> *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

<sup>55</sup> See, for instance, *Earl, C.*, in *Breese v. United States Tel. Co.*, 43 N. Y. 132; s. c. 8 Am. Rep. 526, 531; *Lewis v. Great Western R. Co.*, 5 Hurl. & N. 867; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83, 87; s. c. 1 Am. Rep. 387.

<sup>56</sup> *Curtin v. Western Union Tel. Co.*, 16 Misc. (N. Y.) 347; s. c. 38 N. Y. Supp. 58; rev'g s. c. 36 N. Y. Supp. 111; 72 N. Y. St. Rep. 260.

<sup>57</sup> *Bérubé v. Great North Western Tel. Co.*, Rap. Jud. Quebec 14 C. S. 178.

<sup>58</sup> *Western Union Tel. Co. v. Pruett*

(Tex. Civ. App.), 35 S. W. Rep. 78 (no off. rep.); *Harris v. Western Union Tel. Co.*, 121 Ala. 519; s. c. 25 South. Rep. 910; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; *Anderson v. Western Union Tel. Co.*, 84 Tex. 17. And so it has been held that where it has been the custom of a telegraph company to *receive messages by telephone* and transmit the same, the company will be held liable for their delivery, though the messages are not in writing addressed to nor signed by any one: *Texas Tel. & Co. v. Seiders* (Tex. Civ. App.), 29 S. W. Rep. 258 (no off. rep.).



whether the sender of a message had notice of a condition printed upon the message blank, is a *question of fact for a jury*, under the circumstances of the particular case.<sup>59</sup> On the other hand, there is an exceptional and clearly untenable view that the customer is bound to acquaint himself with and to know the rules and regulations under which the company carries on its business, and that he is consequently bound by them whether he knows them or not.<sup>60</sup> It seems that the most that can be justly said in favor of this proposition is that the customers of a telegraph company are bound by its *reasonable* rules and regulations, whether they have knowledge of them or not, provided they have an opportunity to inform themselves of them.<sup>61</sup> The general rule is that the rules, regulations and by-laws of private corporations are in the nature of *private instruments* established by the corporation for the government of its own officers and agents, and the conduct of its business, and that they do not affect third persons who deal with the corporation, unless their terms are brought home to such persons.<sup>62</sup> Other courts apply this view to the subject under consideration, with the conclusion that the sender of a message is not affected by a stipulation upon a message blank, *where he does not use the blank*.<sup>63</sup> Under this theory, if the conditions are not printed upon the message blank, a knowledge of them must be brought home to the sender by other evidence.<sup>64</sup> There is still another and seemingly just view, that the sender is bound by any reasonable regulation of the company under which it conducts its business, of which he has knowledge, whether printed on its message blanks or not.

<sup>59</sup> Tyler v. Western Union Tel. Co., 60 Ill. 421; s. c. 14 Am. Rep. 38. This is in accordance with the rule held in the same State as to stipulations in bills of lading limiting the liability of common carriers: Adams Express Co. v. Haynes, 42 Ill. 89; Illinois & C. R. Co. v. Frankenberg, 54 Ill. 88. And see, as to stipulations detached and printed on the back, etc., Brown v. Eastern R. Co., 11 Cush. (Mass.) 97. There are decisions by inferior tribunals following the same rule in regard to telegraph companies, such as Baldwin v. United States Tel. Co., 1 Lans. (N. Y.) 125, and Harris v. Western Union Tel. Co., 9 Phila. (Pa.) 88; but the doctrine of the authoritative courts of those States is to the contrary: Breese v. United States Tel. Co., 48 N. Y. 132; s. c. 8 Am. Rep. 526; Allen Tel. Cas. 663; Young v. Western Union Tel. Co., 65 N. Y.

163; Passmore v. Western Union Tel. Co., 78 Pa. St. 238.

<sup>60</sup> Birney v. New York & C. Tel. Co., 18 Md. 341; s. c. 81 Am. Dec. 607; Allen Tel. Cas. 195; reaffirmed in United States Tel. Co. v. Gildersleeve, 29 Md. 232; s. c. 96 Am. Dec. 519; Allen Tel. Cas. 403.

<sup>61</sup> Western Union Tel. Co. v. Neel, 86 Tex. 368; Western Union Tel. Co. v. McMillan (Tex. Civ. App.), 30 S. W. Rep. 298 (no off. rep.); Dixon v. Western Union Tel. Co., 3 App. Div. (N. Y.) 60; s. c. 38 N. Y. Supp. 1056.

<sup>62</sup> 1 Thomp. Corp., § 942.

<sup>63</sup> Beasley v. Western Union Tel. Co., 39 Fed. Rep. 181; Pearsall v. Western Union Tel. Co., 44 Hun (N. Y.) 532; s. c. 9 N. Y. St. Rep. 132. See *ante*, § 2418.

<sup>64</sup> De Rutte v. New York & C. Tel. Co., 1 Daly (N. Y.) 547; s. c. 30 How. Pr. (N. Y.) 403.



Where this view obtains, the sender will be bound by any stipulation printed on the message blanks of the company, although he may have sent his message to the company written upon other paper, and although the agent of the company may have received and transmitted it in that condition.<sup>65</sup>

§ 2420. **Effect of Messages not Written upon the Company's Blanks.**<sup>66</sup>—If the theory be adopted that the stipulations upon the message blank are a proposal for a contract to each customer, and that, by writing and tendering his message upon the message blank, the customer assents to such proposals, so as to make a binding contract,<sup>67</sup>—then it would follow, by parity of reasoning, that where the message is tendered and accepted upon a piece of paper other than the company's blank, there is no such contract,—unless the company is allowed to fall back upon the rule that its regulations and the limitations upon which it does business, are binding upon each customer if known to him. The weight of authority is that where the message is handed in to the agent of the company upon a plain piece of paper, the sender, in the absence of other evidence charging him with a knowledge of, or an assent to the conditions on which the company transmits messages, is not bound by the conditions printed upon its message blanks.<sup>68</sup> Even though the company has a regulation prohibiting its agents from receiving messages written otherwise than on its printed blanks, the sender, ignorant of the prohibition, will not be bound thereby, although he may have been in the habit of sending messages on such printed blanks;<sup>69</sup> and if, in such a case, the agent, without the sender's request, copies the message written on ordinary paper upon one of the company's message blanks, the sender will not be bound by the stipulations in the blank.<sup>70</sup> The fact that a message, so written on blank paper, was pinned to one of the regular blanks of the company, does not have the effect of making the stipulations in the blank binding either upon the sender or the

<sup>65</sup> *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; s. c. 9 Am. Rep. 744, 748 (where the message was written on a business card).

<sup>66</sup> This section is cited in §§ 2430, 2445.

<sup>67</sup> *Ante*, § 2417.

<sup>68</sup> *Western Union Tel. Co. v. Hinkle*, 3 Tex. Civ. App. 518; s. c. 22 S. W. Rep. 1004; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *Pearsall v. Western Union Tel.*

*Co.*, 44 Hun (N. Y.) 532; s. c. 9 N. Y. St. Rep. 132.

<sup>69</sup> *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; s. c. 32 Cent. L. J. 342; 43 Alb. L. J. 244; 35 N. Y. St. Rep. 307; 26 N. E. Rep. 534; affirming s. c. 44 Hun (N. Y.) 532; 9 N. Y. St. Rep. 132.

<sup>70</sup> *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181. Compare *Western Union Tel. Co. v. Arwine*, 3 Tex. Civ. App. 156; s. c. 22 S. W. Rep. 105.



addressee, unless it was done with his knowledge.<sup>71</sup> If the agent of the company receives the message thus written on a piece of blank paper, and accepts the fee tendered for sending it, then the company is bound to send it, and can not excuse itself from liability for failing to do so on the ground that the message was not written on its regular message blank.<sup>72</sup> If, on the other hand, the operator of the company, when a message is tendered to him written on a piece of brown paper, refuses to receive it because it is unintelligible, but writes it on one of the regular blanks of the company at the dictation of the sender's messenger,—the sender will be as much bound by the conditions upon the blank as though his message had been originally written thereon.<sup>73</sup> Whether the company, by *orally* receiving and delivering messages relating to oil market quotations, where the exigencies do not give time to write the messages, intends to relieve its patrons from the effect of such a stipulation, has been held a *question of fact for a jury*.<sup>74</sup>

## ARTICLE II. AS TO REPEATING THE MESSAGE.

### SECTION

2422. Validity and effect of stipulations as to repeating messages.

2423. Such stipulations do not relieve the company from responsibility for negligence, misconduct or bad faith.

2424. Exonerate only from liability preventable by repeating.

### SECTION

2425. Receiver of message not bound by stipulation to have it repeated.

2426. But receiver may himself be guilty of negligence in not having it repeated.

2427. Other holdings in regard to stipulations as to repeating.

§ 2422. **Validity and Effect of Stipulations as to Repeating Messages.**<sup>75</sup>—The weight of authority is to the effect that a stipulation on the message blank of such a company to the effect that it will not be responsible for errors in the transmission of messages which are

<sup>71</sup> *Anderson v. Western Union Tel. Co.*, 84 Tex. 17; s. c. 11 Rail. & Corp. L. J. 295; 20 Wash L. Rep. 462; 19 S. W. Rep. 285.

<sup>72</sup> *Western Union Tel. Co. v. Jones*, 69 Miss. 658; s. c. 30 Am. St. Rep. 579; 13 South. Rep. 471.

<sup>73</sup> *Gulf & C. R. Co. v. Geer*, 5 Tex. Civ. App. 349; s. c. 24 S. W. Rep. 86.

<sup>74</sup> *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442; s. c. 5 L. R. A. 515; 24 W. N. C. 497; 18 Atl.

Rep. 441. The sender of a telegram who gave the message orally to the operator, who accepted the same, was not bound by conditions on a blank on which the operator wrote the message and signed the sender's name, the sender being unable to read or write, where the operator did not call the sender's attention to them: *Bérubé v. Great North Western Tel. Co.*, Rap. Jud. Quebec 14 C. S. 178.

<sup>75</sup> This section is cited in § 2397.



not repeated, is a reasonable stipulation within the limits, and subject to the exceptions hereafter stated. 1. The effect of such a message is said to be that it exempts the company from responsibility for risks beyond its control.<sup>76</sup> But for this purpose such a stipulation is valueless; for, as we have already seen,<sup>77</sup> such companies are not insurers, and are therefore not responsible for mistakes, delays or failures arising from circumstances beyond their control. 2. That in case of a mistake in transmission, it operates to *shift the burden of proving negligence by other evidence* than the mere fact of the mistake,<sup>78</sup> as where the error unexplained, consisted in writing "sixty" for "fifty."<sup>79</sup> But as the evidence on which the plaintiff must in all such cases rely, in order to make out his case against the company, in the case of an error of transmission, is the simple failure on its part to deliver the message to the addressee in the same form in which it was delivered to it, in conformity with the maxim *res ipsa loquitur*,<sup>80</sup> and as the plaintiff will, in nearly every such case, be unable to show negligence by other evidence, since he will be unable to

<sup>76</sup> *Western Union Tel. Co. v. Tyler*, 74 Ill. 168; s. c. 24 Am. Rep. 279; *Jarboe v. Western Union Tel. Co.*, 63 Mo. App. 226; s. c. 1 Mo. App. Rep. 769; *Primrose v. Western Union Tel. Co.*, 154 U. S. 1; s. c. 38 L. ed. 883. See also, on this subject, the *editorial notes*, in 1 L. R. A. 583; in 10 L. R. A. 515, and 1 L. R. A. 282. It has been held that a stipulation in a telegraphic message blank limiting the damages to a specified sum unless the message is repeated at an additional cost, is a reasonable one; and that, where there is such a stipulation, a non-delivery of the message in the language in which it was couched when delivered by the sender to the agent of the company, is insufficient to make out a case of negligence against the company: *Cowen Lumber Co. v. Western Union Tel. Co.*, 58 Mo. App. 257. Another court holds that such a stipulation as to repeating is a reasonable one, and discharges the company from every liability except that arising from gross or willful negligence: *Birkett v. Western Union Tel. Co.*, 103 Mich. 361; s. c. 61 N. W. Rep. 645. But it has been held that a stipulation in a telegraphic message blank, that in case of mistake or delay the damages recoverable should be the sum paid for transmitting the dispatch

if it is not repeated, is *not binding upon the addressee* who failed to receive the message, but that he is entitled to recover the special damages provided in *Burns' Rev. Stat. Ind.*, § 5513, in case of negligent transmission of messages: *Western Union Tel. Co. v. Todd*, 22 Ind. App. 701; s. c. 53 N. E. Rep. 194; 1 Rep. 757. To the same effect see *New York & C. Tel. Co. v. Dryburg*, 35 Pa. St. 298; s. c. 78 Am. Dec. 338.

<sup>77</sup> *Ante*, § 2393.

<sup>78</sup> *Sweatland v. Illinois & C. Tel. Co.*, 27 Iowa 433; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; s. c. 44 Am. Rep. 614; *Becker v. Western Union Tel. Co.*, 11 Neb. 87; s. c. 38 Am. Rep. 356. This is also understood to be the logic of the decision in *Gulf & C. R. Co. v. Wilson*, 69 Tex. 739; s. c. 7 S. W. Rep. 653, though what was there decided was that a stipulation exempting the company from liability for *failing to deliver* the message, was void. Substantially the same ruling was made in *South Carolina*, in regard to a stipulation on the blank of a night message, against liability beyond the amount paid by the sender: *Aiken v. Telegraph Co.*, 5 S. Car. 358, 377.

<sup>79</sup> *Becker v. Western Union Tel. Co.*, 11 Neb. 87; s. c. 38 Am. Rep. 356.

<sup>80</sup> *Ante*, § 2394.



get the agents or servants of the company to testify to the fact of their own negligence,—this rule has the substantial effect of making the stipulation exonerate the company from responsibility for its own negligence, which, as we shall see,<sup>81</sup> is contrary to the doctrine of most of the courts. A sounder and juster view is that the effect of such a stipulation upon the burden of proof is, that when an error in transmitting the message is proved, the *onus* is on the company of proving, notwithstanding such a stipulation, and the failure of the sender to have the message repeated, that the error arose from causes beyond its control.<sup>82</sup> 3. According to an authoritative Federal decision, such a stipulation has the effect of relieving the company from liability for a mistake which consists in *substituting one word for another*, where the message consists of an unintelligible *cipher*,—as where the word “bay” was substituted for the word “buy.”<sup>83</sup> 4. That such a stipulation operates to relieve the company from liability for the loss or incorrect transmission of the message after it has been delivered to a *connecting line*;<sup>84</sup> but here the company could relieve itself from such liability by a simple stipulation or notice that it would not be responsible for the default of any connecting line to whom it might be obliged to deliver the message for transmission.

<sup>81</sup> *Post*, § 2423.

<sup>82</sup> *Western Union Tel. Co. v. Tyler*, 74 Ill. 168; s. c. 24 Am. Rep. 279; s. c. on former appeal 60 Ill. 421; 14 Am. Rep. 38; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; s. c. 16 Am. Rep. 437. The subject was thoroughly considered by the Supreme Court of Illinois, in a case twice before it, and the rule announced by the court was, that the usual conditions exempting telegraph companies from liability for errors in unrepeatable messages exempt them only from liability for errors arising from causes beyond their control; and that, the inaccuracy of the message being proved, the *onus* of relieving themselves from the presumption of negligence thereby raised, rests upon the company. As to every thing beyond this, such a contract was said to be against public policy, without consideration, and void: *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; s. c. 74 Ill. 168; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263; *New York & C. Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433, 437. per Warner, J.; *De Rutte v. New York & C. Tel. Co.*, 1 Daly (N. Y.) 547, 559;

*De La Grange v. Southwestern Tel. Co.*, 25 La. An. 383. It has been held in Louisiana that where a message has been delivered to a company which may be designated A., and passed over a wire to a company which may be designated B., and is by B. company communicated to the person to whom it is addressed in a garbled state, and such person brings an action for the resulting damages against B. company, the burden is upon B. company to show, if it can, that the error was the error of A. company, and that the message was by it delivered as it was received from A. company: *De La Grange v. Southwestern Tel. Co.*, 25 La. An. 383. In his work on *Electricity*, at § 222, the author has stated his reasons more at length for the conclusion that the doctrine which ascribes to such a stipulation the power of shifting the burden of proof, is unsound and unjust.

<sup>83</sup> *Primrose v. Western Union Tel. Co.*, 154 U. S. 1; s. c. 38 L. ed. 883; 14 Sup. Ct. Rep. 1098.

<sup>84</sup> *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *De La Grange v. Southwestern Tel. Co.*, 25 La. An. 383.



On the other hand, it has been held that the connecting line can not avail itself of such a stipulation as *against the addressee* of the message.<sup>85</sup>

§ 2423. Such Stipulations do not Relieve the Company from Responsibility for Negligence, Misconduct or Bad Faith.<sup>86</sup>—A doctrine formulated in many of the courts is that the law will not give effect to a stipulation requiring the message to be repeated, when to do so will exonerate the company from responsibility for *gross negligence*, *willful misconduct* or *bad faith*.<sup>87</sup> In view of the fact that modern courts generally discard the distinction between ordinary and gross negligence, the modern and general doctrine is believed to be that such a stipulation is inoperative to exempt the company from liability for the failure to exercise *ordinary care*,<sup>88</sup> although some of the

<sup>85</sup> De La Grange v. Southwestern Tel. Co., 25 La. An. 383. In his work on Electricity, at § 241, the author has given his reasons for the conclusion that stipulations of this kind are a mere trick designed to screen the company from liability. Repeating messages manifestly tends to produce delay, and thereby defeat the purpose for which the public resort to the telegraph. This consideration, and the additional charge for repeating, induce most customers to send their messages without repeating, and the result is that if the courts were to go to the length of some of the courts whose opinions have been elsewhere noted, in upholding the validity of these stipulations, their rulings would be tantamount to exonerating telegraph companies in all cases from responsibility for their negligence, misconduct or fraud, beyond the amount paid for transmitting the message.

<sup>86</sup> This section is cited in § 2422.

<sup>87</sup> Primrose v. Western Union Tel. Co., 154 U. S. 1; s. c. 38 L. ed. 833; 14 Sup. Ct. Rep. 1098; Wilson v. Brett, 11 Mees. & W. 113; cited with approval by Willes, J., in Grill v. General & C. Collier Co., L. R. 1 C. P. 600, 612; Aiken v. Telegraph Co., 5 S. C. 358, 378; Dixon v. Western Union Tel. Co., 3 App. Div. (N. Y.) 60; s. c. 38 N. Y. Supp. 1056; *ante*, § 2411.

<sup>88</sup> Sweatland v. Illinois & C. Tel. Co., 27 Iowa 433, 452; Western Union Tel. Co. v. Short, 53 Ark. 434; s. c. 9 L. R. A. 744; 9 Rail. & Corp. L. J. 11; 14 S. W. Rep. 649; Wertz v.

Western Union Tel. Co., 7 Utah 446; s. c. 10 Rail. & Corp. L. J. 224; 27 Pac. Rep. 172; Western Union Tel. Co. v. Elliott, 7 Tex. Civ. App. 482; s. c. 27 S. W. Rep. 219. Such a stipulation has been held, by a Federal Circuit Court of Appeals, to be void, in so far as it attempts to relieve the company from the failure to exercise the care and diligence imposed by an operative State statute requiring it to use great *care and diligence* in the transmission and delivery of messages: Western Union Tel. Co. v. Cook, 61 Fed. Rep. 624. If, therefore, the company employs an operator who has had but three years' experience and who has been out of the business for thirty years, it will, under the operation of such a State statute, be liable for a mistake due to his negligence, notwithstanding such a stipulation on a message blank: Western Union Tel. Co. v. Cook, 61 Fed. Rep. 624. If such stipulations do not relieve the telegraph company from liability for those errors which could not have been prevented by repeating, nor for any errors which are the result of negligence, then it is difficult to see in what sense they can be operative at all; and accordingly we find a class of decisions which take the simpler view, and without much qualification, that such stipulations are *void as against public policy*: Ayer v. Western Union Tel. Co., 79 Me. 493; s. c. 1 Am. St. Rep. 353; Tyler v. Western Union Tel. Co., 60 Ill. 421; s. c. 14 Am. Rep. 38; Western Union Tel. Co. v. Tyler, 74



courts still keep up the distinction that while it will operate to relieve the company from liability for a mistake happening through *ordinary negligence*, it will not relieve it from a mistake happening through *gross negligence*.<sup>89</sup> Discarding the attenuated distinction

Ill. 168; s. c. 24 Am. Rep. 279; Western Union Tel. Co. v. Blanchard, 68 Ga. 299; s. c. 45 Am. Rep. 480; Western Union Tel. Co. v. Short, 53 Ark. 434; s. c. 9 L. R. A. 744; 9 Rail. & Corp. L. J. 11; 14 S. W. Rep. 649; Western Union Tel. Co. v. Chamblee, 122 Ala. 428; s. c. 25 South. Rep. 232 (stipulation releasing from liability for errors unless message repeated, invalid). But, perhaps, the real meaning of these courts is, the same as that of the courts which state the rule to be that such stipulations are void in so far as they operate to relieve the company from liability for its negligence or other fault. The public duties of telegraph companies being analogous to those of common carriers (*ante*, § 2393), the rule is strictly analogous to the rule of American law,—not English law,—that a common carrier of goods can not impose a contract upon a shipper, exonerating himself from liability for loss or damage caused by the negligence of himself or his servants: *Swindler v. Hilliard*, 2 Rich. L. (S. C.) 286; *United States Exp. Co. v. Backman*, 28 Ohio St. 144, 155; *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *Graham v. Davis*, 4 Ohio St. 362; *Welsh v. Railroad Co.*, 10 Ohio St. 65; *Railroad Co. v. Curran*, 19 Ohio St. 1; *Berry v. Cooper*, 28 Ga. 543; *Farnham v. Camden & C. R. Co.*, 55 Pa. St. 53; *Grogan v. Adams Exp. Co. (Pa.)*, 5 Cent. Rep. 298; *Lamb v. Camden & C. R. Co.*, 46 N. Y. 271; *American Exp. Co. v. Sands*, 55 Pa. St. 140; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *The City of Norwich*, 4 Ben. (U. S.) 271; *Black v. Goodrich Transp. Co.*, 55 Wis. 319; *Chicago & C. R. Co. v. Abels*, 60 Miss. 1017; *Kansas City & C. R. Co. v. Simpson*, 30 Kan. 645; *Moulton v. St. Paul & C. R. Co.*, 31 Minn. 85.

<sup>89</sup> *Primrose v. Western Union Tel. Co.*, 154 U. S. 1; s. c. 38 L. ed. 883; 14 Sup. Ct. Rep. 1098; *Pegram v. Western Union Tel. Co.*, 97 N. C. 57. And the same court has held that he can not even recover the cost of the message, where the terms of the contract exempt the company from

liability, without proof of negligence: *Thompson v. Western Union Tel. Co.*, 106 N. C. 549; s. c. 11 S. E. Rep. 269; 30 Am. & Eng. Corp. Cas. 634. In the more recent case of *Brown v. Postal Tel. Co.*, 111 N. C. 187; s. c. 16 S. E. Rep. 179; 17 L. R. A. 648; 39 Am. & Eng. Corp. Cas. 583,—the Supreme Court of North Carolina, overruling in express terms *Lassiter v. Western Union Tel. Co.*, 89 N. C. 334, brings itself into line with the modern doctrine, by holding that, in respect of the duties of a telegraph company there are, in contemplation of law, no degrees of negligence, and that such a stipulation will not be allowed to operate to relieve the company from liability for negligence, whether in respect of mistakes in transmission or of delay. The Supreme Judicial Court of Massachusetts hold that such a stipulation exonerates the company from *ordinary care, attention and skill* in the transmission of an unrepeatable message, but leaves them liable in case of *fraud or gross negligence*, without stating what errors will come within the latter description: *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; s. c. 17 Am. Rep. 69; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226. In the case last cited it was said, in effect, that, whether the mistake would have been prevented by repeating was a question of fact for a jury; but later the court decided that evidence is not admissible to show that the repetition of the dispatch would have prevented the error: *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 306. Still later, the same court held that such a stipulation avoids liability for an unexplained delay in delivering the message, on the part of the messenger-boy of the company: *Clement v. Western Union Tel. Co.*, 137 Mass. 463; s. c. 24 Am. L. Reg. 328. But this, as we shall see (*post*, § 2424), is contrary to good sense and plain justice; since repeating the message would have no tendency to prevent delay in the company's messenger-boy at the place of final delivery,



between *ordinary* and *gross* negligence, the sound and just doctrine is that a telegraph company can not, by a stipulation requiring messages to be repeated, protect itself from liability for damages caused by its own negligence in failing to deliver a message<sup>90</sup> or in transmitting it erroneously.<sup>91</sup>

§ 2424. **Exonerate only from Liability Preventable by Repeating.**<sup>92</sup>—It is a sound and just view that such a stipulation will not be allowed to operate so as to exonerate the company from liability for any failure which would not have been prevented by repeating the message,<sup>93</sup>—as for a *failure to transmit* the message at all;<sup>94</sup> or

but would of itself have a tendency to delay the delivery of the message. In New York the senseless and unjust conclusion has also been reached that such a stipulation will operate to excuse the company from liability for a non-delivery of the message, although it was transmitted over its wire: *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231; s. c. 16 N. E. Rep. 75. The grossly untenable doctrine has been announced in Kentucky that where there is such a stipulation on the message blank, the sender of the message, who fails to have it repeated, sends it *at his own risk*: *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164; s. c. 71 Am. Dec. 461, 463.

<sup>90</sup> *Western Union Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539; s. c. 32 S. W. Rep. 707; *Mitchell v. Western Union Tel. Co.*, 12 Tex. Civ. App. 262; s. c. 33 S. W. Rep. 1016; *Western Union Tel. Co. v. Reeves*, 27 S. W. Rep. 318; *Western Union Tel. Co. v. Burrow*, 10 Tex. Civ. App. 122; s. c. 30 S. W. Rep. 378; *Western Union Tel. Co. v. Linn*, 87 Tex. 7; *Western Union Tel. Co. v. Eubank*, 100 Ky. 591; s. c. 18 Ky. L. Rep. 995; 36 L. R. A. 711; 38 S. W. Rep. 1068; *Western Union Tel. Co. v. Moore*, 76 Tex. 66; *Western Union Tel. Co. v. Lyman*, 22 S. W. Rep. 658; *Western Union Tel. Co. v. Short*, 53 Ark. 434; s. c. 9 L. R. A. 744; 14 S. W. Rep. 649.

<sup>91</sup> *Reed v. Western Union Tel. Co.*, 135 Mo. 661; s. c. 34 L. R. A. 492; 37 S. W. Rep. 904; *Western Union Tel. Co. v. Crawford*, 110 Ala. 460; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 230; 20 South. Rep. 111; *Brown v. Postal Tel. Co.*, 111 N. C. 191; *Pegram v. Western Union Tel. Co.*, 97 N. C. 57; *Wertz v. Western*

*Union Tel. Co.*, 8 Utah 499; *Western Union Tel. Co. v. Cook*, 61 Fed. Rep. 624 (disapproving *Hart v. Western Union Tel. Co.*, 66 Cal. 579); *Western Union Tel. Co. v. Linn*, 87 Tex. 7; *Western Union Tel. Co. v. Elliott*, 7 Tex. Civ. App. 482. This subject will be found further discussed in the following line of cases: *Fowler v. Western Union Tel. Co.*, 80 Me. 381; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461; s. c. 4 L. R. A. 611; *Gulf & C. R. Co. v. Wilson*, 69 Tex. 739; *Marr v. Western Union Tel. Co.*, 85 Tenn. 529; *Harkness v. Western Union Tel. Co.*, 73 Iowa 190; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; s. c. 4 L. R. A. 660; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732; *Western Union Tel. Co. v. Crall*, 38 Kan. 679; *Thompson v. Western Union Tel. Co.*, 107 N. C. 449.

<sup>92</sup> This section is cited in § 2423.

<sup>93</sup> *Western Union Tel. Co. v. Graham*, 1 Colo. 230; s. c. 9 Am. Rep. 136; 10 Am. L. Reg. (N. Y.) 319; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Birney v. New York & C. Tel. Co.*, 18 Md. 341; s. c. 81 Am. Dec. 607, 612; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226, 238; s. c. Allen Tel. Cas. 306; *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.) 200; *Bell v. Dominion Tel. Co.*, 25 L. Can. Jur. 248; s. c. 3 Montr. Leg. News 406. Compare *Cowen Lumber Co. v. Western Union Tel. Co.*, 58 Mo. App. 257.

<sup>94</sup> *Barrett v. Western Union Tel. Co.*, 42 Mo. App. 542; *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c. 4 South. Rep. 844. Illustrations of this principle will be found in the author's work on *Electricity* at §§ 229 and 230. For cases of exon-



for a *negligent delay* in delivering it;<sup>95</sup> or for a *negligent failure to deliver* it at all.<sup>96</sup> Nor, under this theory, will such a stipulation protect the company from liability for damages arising from its act of *holding the message* until the re-establishment of an interrupted connection over its own line, where it could have been sent by another line.<sup>97</sup> Nor is the failure to repeat a telegraphic message any defense to an action for damages for the delivery of such message as having been sent from a different point from that at which it was received for transmission,—as, for instance, as having been sent from New York, when in fact it was sent from New Orleans.<sup>98</sup>

**§ 2425. Receiver of Message not Bound by Stipulation to have it Repeated.**—If the right of action of the addressee of the message rests in the contract merely, then it obviously rests in the contract made between the company and the sender, and he is obviously bound by the stipulations of that contract as much as the sender would be. If, on the other hand, his right of action rests upon the public obligation which the telegraph company assumes toward him by undertaking to convey the message to him, then it may be that he has a higher right of action than the sender would have, and that he is not bound by

eration under this rule see the same work, §§ 231 and 232. Such a stipulation is void under Neb. Comp. Stat., ch. 89a, § 12, providing that such liability shall not be affected by reason of any clause, condition, or agreement contained in its printed blanks: *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732; s. c. 10 Rail. & Corp. L. J. 377; 49 N. W. Rep. 47. It has been held that the company *waives* such a stipulation, where the sender proposes to have the message repeated, and the agent of the company tells him that it has “gone through all right.” *Western Union Tel. Co. v. Reeves* (Tex. Civ. App.), 27 S. W. Rep. 318.

<sup>95</sup> *Western Union Tel. Co. v. Lyman*, 3 Tex. Civ. App. 460; s. c. 22 S. W. Rep. 656; *Barnes v. Western Union Tel. Co.*, 24 Nev. 125; s. c. 50 Pac. Rep. 438; 3 Am. Neg. Rep. 427; *Western Union Tel. Co. v. Linn*, 87 Tex. 7; s. c. 26 S. W. Rep. 490; rev’g s. c. 23 S. W. Rep. 895; *True v. International Tel. Co.*, 60 Me. 9, 18, per Kent, J.; *Manville v. Western Union Tel. Co.*, 37 Iowa 214; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1, 5; *Baldwin v. United States Tel. Co.*, 54 Barb. (N. Y.) 505; s. c. 1 Lans. 125; 6 Abb. Pr. (N. S.) 195;

reversed on other grounds, 45 N. Y. 744; *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.) 200; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; s. c. 10 S. W. Rep. 734; *Thompson v. Western Union Tel. Co.*, 64 Wis. 531; s. c. 54 Am. Rep. 644; *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; s. c. 12 S. E. Rep. 427. Compare *Thompson v. Western Union Tel. Co.*, 106 N. C. 549; s. c. 30 Am. & Eng. Corp. Cas. 634; 11 S. E. Rep. 269.

<sup>96</sup> *Gulf & C. R. Co. v. Wilson*, 69 Tex. 739; s. c. 7 S. W. Rep. 653; *Western Union Tel. Co. v. Graham*, 1 Colo. 230; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c. 30 Am. & Eng. Corp. Cas. 615; 7 South. Rep. 419; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; s. c. 10 S. W. Rep. 734. *Contra*, *Clement v. Western Union Tel. Co.*, 137 Mass. 463; s. c. 24 Am. L. Reg. 328; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231; s. c. 16 N. E. Rep. 75.

<sup>97</sup> *Fleischner v. Pacific Postal Tel. Co.*, 55 Fed. Rep. 738.

<sup>98</sup> *Western Union Tel. Co. v. Tobin* (Tex. Civ. App.), 56 S. W. Rep. 540; *Western Union Tel. Co. v. Simpson*, 73 Tex. 427; s. c. 11 S. W. Rep. 385.



the stipulation in the message in regard to repeating it. Several courts have accordingly held that such a stipulation can be invoked only against the sender of the message and that it does not affect the rights of the addressee.<sup>99</sup>

§ 2426. But Receiver may Himself be Guilty of Negligence in not having it Repeated.—But it has been held that the receiver of a telegram which, through mistake in transmission, is *ambiguous*, is not, as matter of law, free from negligence where he fails to have the same repeated.<sup>100</sup>

§ 2427. Other Holdings in Regard to Stipulations as to Repeating.—Where the addressee, after receiving a message, went to the operator and requested him to ask the sender whether the message should read “five six” or “five sixty,” this was held to be a good request for a repetition of the message, although not made on one of the printed forms established by the company for making such requests.<sup>101</sup> Such a stipulation has been held to apply to the body of the message only, and not to the name of the sender or place from which it is sent.<sup>102</sup> On a principle already considered,<sup>102a</sup> a stipulation limiting recovery in case of an unrepeatable message to the amount paid for its transmission does not affect the liability of the company, where it has been negligent in regard to the message.<sup>103</sup>

### ARTICLE III. AS TO THE TIME FOR PRESENTING ANY CLAIM FOR DAMAGES.

#### SECTION

2429. Stipulations as to the time and manner of presenting claims for damages.

2430. Assent of the sender to such stipulations.

#### SECTION

2431. What limitations of time reasonable and what not: sixty days deemed reasonable.

2432. Decisions holding a limitation of sixty days unreasonable.

<sup>99</sup> De La Grange v. Southwestern Tel. Co., 25 La. An. 383. Compare Aiken v. Telegraph Co., 5 S. C. 358; Harris v. Western Union Tel. Co., 9 Phila. (Pa.) 88; New York & C. Tel. Co. v. Dryburg, 35 Pa. St. 298, 303; s. c. Allen Tel. Cas. 157; 78 Am. Dec. 338. And it has been held that this is true, although the sender was the agent of the receiver: Hoffman v. Western Union Tel. Co., 12 Lanc. L. Rev. (Pa.) 333.

<sup>100</sup> Manly Man. Co. v. Western Union Tel. Co., 105 Ga. 235; s. c. 31 S. E. Rep. 156; citing Western Union

Tel. Co. v. Neill, 57 Tex. 283; s. c. 44 Am. Rep. 589; Hart v. Direct & Cable Co., 86 N. Y. 633.

<sup>101</sup> Western Union Tel. Co. v. Landis (Pa.), 12 Atl. Rep. 467; s. c. 21 W. N. C. 38.

<sup>102</sup> Western Union Tel. Co. v. Simpson, 73 Tex. 422; s. c. 11 S. W. Rep. 385.

<sup>102a</sup> Ante, § 2411.

<sup>103</sup> Western Union Tel. Co. v. Eubank, 100 Ky. 591; s. c. 36 L. R. A. 711; 18 Ky. L. Rep. 995; 38 S. W. Rep. 1068.



## SECTION

2433. Decisions holding a limitation of thirty days reasonable.
2434. Decisions holding a limitation of thirty days unreasonable and void.
2435. Decisions upholding shorter periods of limitation than thirty days.
2436. Effect of fraudulent concealment of the facts which give the right of action.

## SECTION

2437. How as to the period of ninety days.
2438. Effect of such stipulations when valid.
2439. Commencement of action equivalent to such notice.
2440. Upon what agent such notice served.

§ 2429. **Stipulations as to the Time and Manner of Presenting Claims for Damages.**<sup>104</sup>—It may be stated, as a general principle, that a stipulation in a telegraph message blank that the company will not be liable for damages unless the claim therefor is presented within a certain time after the delivery of the message to the company for transmission, is reasonable, provided the time limited is not too short to enable the sender, in the exercise of ordinary diligence, to ascertain the fact of the mistake, delay, non-delivery, or other default, and the amount of damages thereby occasioned, and to prefer his claim therefor. The obvious reason is that it is not unreasonable that the telegraph company should have notice of such a claim before the evidence upon which it may defend itself against liability in respect of it, has been dissipated by the lapse of time.<sup>105</sup> The rule that a telegraph company can not impose upon its customer a stipulation against the consequences of its own negligence has, of course, no application to a stipulation of this kind.<sup>106</sup> Some courts, on the contrary, deny the validity of such stipulations, on the ground that it is not competent for a telegraph company to impose on its customers a statute of limitations different from that imposed by the law of the State.<sup>107</sup> Such a limitation will be inoperative in the face of a

<sup>104</sup> This section is cited in §§ 2385, 2519.

<sup>105</sup> See the reasoning of Agnew, J., in *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; s. c. 1 Am. Rep. 387, 389. That a corresponding rule in respect of common carriers will be upheld as reasonable, see the well-considered case of *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 264, 272.

<sup>106</sup> *Western Union Tel. Co. v. Dougherty*, 54 Ark. 221; s. c. 11 L. R. A. 102; 15 S. W. Rep. 468.

<sup>107</sup> There are cases holding the contrary: *Francis v. Western Union Tel. Co.*, 58 Minn. 252; s. c. 25 L. R. A.

406; 59 N. W. Rep. 1078; *Mathis v. Western Union Tel. Co.*, 94 Ga. 338; s. c. 21 S. E. Rep. 564; *Western Union Tel. Co. v. Kemp*, 44 Neb. 194; s. c. 62 N. W. Rep. 451. One court went so far as to hold, in effect, that a telegraph company can not legally refuse to accept and transmit an offered message because the person offering it will not sign an agreement that the company shall not be liable for damages in any case, where the claim is not presented in writing within sixty days after the message is filed with the company for transmission: *Kirby v. Western Union Tel. Co.*, 4 S. D. 105; s. c.



local statute<sup>108</sup> (assuming its validity) that telegraph companies can not escape liability by reason of any condition in their printed blanks.<sup>109</sup> So, a stipulation on a message blank limiting the time of presenting claims for damages to sixty days after sending the message is void, under a local statute<sup>110</sup> invalidating any such stipulation which fixes the period for presenting claims for damages at less than ninety days.<sup>111</sup>

§ 2430. **Assent of the Sender to such Stipulations.**—As in the case of other stipulations in telegraphic message blanks, limiting the liability of the company,<sup>111a</sup> so here, with reference to the customary stipulation limiting the time within which any claim for damages may be presented to the company, judicial theory is to the effect that such a stipulation is not binding without the *assent* of the sender of the message,<sup>112</sup> which must be proved, or which may be implied from circumstances. On the one hand, the writing of a message on a blank containing such a stipulation will generally be regarded as implying the assent of the sender of the message thereto;<sup>113</sup> yet where the message was tendered and received *on a separate piece of paper*, and was pinned to the regular message blank of the company without the knowledge of the sender, the stipulation was held not binding upon him.<sup>114</sup>

§ 2431. **What Limitations of Time Reasonable and What Not: Sixty Days Deemed Reasonable.**<sup>115</sup>—With reference to the question what limitations of time for presenting claims for damages are reasonable, the decisions may be perhaps grouped under three heads: 1. Those which hold that the limitation of a particular period is *prima facie* reasonable. 2. Those which hold that the period is so short as to be unreasonable and void, as tending to fraud. 3. Those that hold that the limitation is so short as to be unreasonable, and hence inoperative, with reference to the facts of the particular case. Under the first head a numerous class of decisions *uphold a limitation of*

55 N. W. Rep. 759. But this holding was reversed on rehearing: Kirby v. Western Union Tel. Co., 7 S. D. 623; s. c. 30 L. R. A. 621; 65 N. W. Rep. 37.

<sup>108</sup> Neb. Comp. Stat., ch. 89a, § 12.

<sup>109</sup> Pacific Tel. Co. v. Underwood, 37 Neb. 315; s. c. 55 N. W. Rep. 1057.

<sup>110</sup> Tex. Acts 22d Legis., p. 20, § 2.

<sup>111</sup> Western Union Tel. Co. v. Jobe, 6 Tex. Civ. App. 403; s. c. 25 S. W. Rep. 168; *aff'd* on rehearing in 6 Tex. Civ. App. 409; s. c. 25 S. W. Rep. 1036.

<sup>111a</sup> *Ante*, §§ 2417, 2418.

<sup>112</sup> Western Union Tel. Co. v. Ly-can, 60 Ill. App. 124; Western Union Tel. Co. v. Sanders (Tex. Civ. App.), 26 S. W. Rep. 734 (no off. rep.).

<sup>113</sup> *Ante*, § 2417; Hill v. Western Union Tel. Co., 85 Ga. 425; s. c. 30 Am. & Eng. Corp. Cas. 590; 11 S. E. Rep. 874.

<sup>114</sup> Anderson v. Western Union Tel. Co., 84 Tex. 17; s. c. 11 Rail. & Corp. L. J. 295; 20 Wash. L. Rep. 462; 19 S. W. Rep. 285. See *ante*, § 2420.

<sup>115</sup> This section is cited in § 2434.



*sixty days*,<sup>116</sup> even where the period of limitation is to run from the time when the message is sent and where there has been a total failure to deliver caused by the negligence of the company.<sup>117</sup> Where the ground of action is the failure of the company to transmit the message, and the period of limitation prescribed by the stipulation is sixty days, one court has held that, in order to take the case out of the stipulation, the claimant must at least prove that he was ignorant of

<sup>116</sup> *Hill v. Western Union Tel. Co.*, 85 Ga. 425; s. c. 30 Am. & Eng. Corp. Cas. 590; 11 S. E. Rep. 874; *Western Union Tel. Co. v. Dougherty*, 54 Ark. 221; s. c. 11 L. R. A. 102; 15 S. W. Rep. 468; *Lester v. Western Union Tel. Co.*, 84 Tex. 313; s. c. 19 S. W. Rep. 256; *Smith Frazier Boot & Co. v. Western Union Tel. Co.*, 49 Mo. App. 99; *Clement v. Western Union Tel. Co.*, 77 Miss. 747; s. c. 27 South. Rep. 603; *Western Union Tel. Co. v. Meredith*, 95 Ind. 93; *Western Union Tel. Co. v. Jones*, 95 Ind. 228; s. c. 48 Am. Rep. 713; *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608; *Western Union Tel. Co. v. Phillips* (Tex. Civ. App.), 30 S. W. Rep. 494; *Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192; *Kirby v. Western Union Tel. Co.*, 7 S. D. 623; s. c. 30 L. R. A. 621; *Mathis v. Western Union Tel. Co.*, 94 Ga. 338; *Western Union Tel. Co. v. Kemp*, 44 Neb. 194; *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403, 409; *Conrad v. Western Union Tel. Co.*, 162 Pa. St. 204; *Pacific Tel. Co. v. Underwood*, 37 Neb. 315; *Harris v. Western Union Tel. Co.*, 121 Ala. 519; s. c. 25 South. Rep. 910; *Western Union Tel. Co. v. Beck*, 58 Ill. App. 564; s. c. 27 Chicago Leg. News 335; *Russell v. Western Union Tel. Co.*, 57 Kan. 230; s. c. 45 Pac. Rep. 598; *Webbe v. Western Union Tel. Co.*, 64 Ill. App. 331; *Albers v. Western Union Tel. Co.*, 98 Iowa 51; s. c. 66 N. W. Rep. 1040; 4 Am. & Eng. Corp. Cas. (N. S.) 388; *Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192; *Western Union Tel. Co. v. Mellon*, 96 Tenn. 66; *Young v. Western Union Tel. Co.*, 38 N. Y. Super. 390; s. c. 65 N. Y. 163; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; s. c. 1 Am. Rep. 387; *Western Union Tel. Co. v. Meredith*, 95 Ind. 93; *Western Union Tel. Co. v. Jones*, 95 Ind. 228; s. c. 48 Am. Rep. 713; *Western Union Tel. Co. v.*

*Rains*, 63 Tex. 27; *Hill v. Western Union Tel. Co.* (Ga.), 11 S. E. Rep. 874. Compare *Lewis v. Great Western R. Co.*, 5 Hurl. & N. 867; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 163; *Roach v. New York & C. Ins. Co.*, 30 N. Y. 546; *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 264; *Hart v. Pennsylvania R. Co.*, 112 U. S. 338. Similar provisions in *policies of insurance* in regard to proofs of loss have frequently been held good: *Land Ins. Co. v. Stauffer*, 33 Pa. St. 397; *Trask v. Insurance Co.*, 29 Pa. St. 198. In *Western Union Tel. Co. v. Longwill*, the Supreme Court of New Mexico (5 Gild. 308; s. c. 21 Pac. Rep. 339) expressly held that the sixty-day limit was against public policy and void. The judge, however, relied for his authority upon the case of *Johnston v. Western Union Tel. Co.*, 33 Fed. Rep. 362, and upon the cases of *Western Union Tel. Co. v. Cobbs*, 47 Ark. 344, and *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; s. c. 14 N. E. Rep. 894. None of these cases is in point. In each the suit was for a *statutory penalty*, and the action was maintained upon the ground that that character of action did not come within the terms of the stipulation. But in Kentucky it has been held that a contract limitation of *sixty days* in which a claim must be presented for damages or statutory penalties on account of the default of a telegraph company in respect to the transmission of a message, is *unreasonable, contrary to public policy*, and in violation of Ky. Const., § 196: *Western Union Tel. Co. v. Eubank*, 100 Ky. 591; s. c. 38 S. W. Rep. 1068; 36 L. R. A. 711; 18 Ky. L. Rep. 995; *Davis v. Western Union Tel. Co.*, 21 Ky. L. Rep. 1251; s. c. 54 S. W. Rep. 849.

<sup>117</sup> *Western Union Tel. Co. v. Dougherty*, 54 Ark. 221; s. c. 11 L. R. A. 102; 15 S. W. Rep. 468.



the default of the company until the time had so far elapsed as to render it reasonably impossible for him to present his claim before its expiration.<sup>118</sup>

§ 2432. **Decisions Holding a Limitation of Sixty Days Unreasonable.**—A few decisions are met with which hold that a limitation of sixty days from the date of delivering the message to the company for transmission, is unreasonable, or unreasonable under peculiar conditions of fact,<sup>119</sup> or in the face of some local statute.<sup>120</sup> One court, while conceding that, as to defendant's own lines, a limitation of sixty days would ordinarily be reasonable,—nevertheless held that, with respect to a message sent to a point fifteen thousand miles away, beyond the defendant's lines, the message being one to which a reply by telegraph would not be expected, and in respect of which a reply by mail would not, in the ordinary course of business and of the mails, be received until after the expiration of the limited time, and where the liability of the company was for a failure to transmit the message at all, a stipulation of sixty days was unreasonable and void.<sup>121</sup> In another State, a distinction has been taken, with reference to this question, between actions for *damages* and actions for *statutory penalties*,—holding that, with reference to actions for damages, a limitation of sixty days is not unreasonable,<sup>122</sup> while, with respect to actions for statutory penalties, such a stipulation does not apply at all.<sup>123</sup>

§ 2433. **Decisions Holding a Limitation of Thirty Days Reasonable.**—Other courts have upheld a limitation of thirty days.<sup>124</sup> Thus, it has been held that a limitation of thirty days should receive effect where the damages were known within three days from the sending of the message.<sup>125</sup> It has been said, speaking with reference to a limitation of thirty days, that "no case can be found, however, in which, where there was sufficient time left, after the discovery of the

<sup>118</sup> *Smith Frazier Boot &c. Co. v. Western Union Tel. Co.*, 49 Mo. App. 99.

<sup>119</sup> *Conrad v. Western Union Tel. Co.*, 162 Pa. St. 204; s. c. 29 Atl. Rep. 888.

<sup>120</sup> *Western Union Tel. Co. v. Kemp*, 44 Neb. 194; *Pacific Tel. Co. v. Underwood*, 37 Neb. 315.

<sup>121</sup> *Conrad v. Western Union Tel. Co.*, 162 Pa. St. 204; s. c. 29 Atl. Rep. 888.

<sup>122</sup> *Hill v. Western Union Tel. Co.*, 85 Ga. 425.

<sup>123</sup> *Western Union Tel. Co. v. James*, 90 Ga. 254; *Mathis v. West-*

*ern Union Tel. Co.*, 94 Ga. 338; *Western Union Tel. Co. v. Cooledge*, 86 Ga. 104.

<sup>124</sup> *Cole v. Western Union Tel. Co.*, 33 Minn. 227; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *Western Union Tel. Co. v. Dunfield*, 11 Colo. 335; s. c. 18 Pac. Rep. 34; 21 Am. & Eng. Corp. Cas. 111; *Western Union Tel. Co. v. Culberson*, 79 Tex. 65; *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257.

<sup>125</sup> *Western Union Tel. Co. v. Culberson*, 79 Tex. 65; s. c. 15 S. W. Rep. 219.



loss, for the claim to be presented within the limited period, the plaintiff was absolved from the effect of the limitation by the lateness of his discovery."<sup>126</sup>

**§ 2434. Decisions Holding a Limitation of Thirty Days Unreasonable and Void.**—Decisions are not wanting, however, which hold a limitation of thirty days to be unreasonable and void under the facts of particular cases.<sup>127</sup> It was so held where the damages accruing from the failure of the company to perform the services undertaken, had not matured and could not have been reasonably ascertained within the period of thirty days named in the stipulation.<sup>128</sup> Referring to the second head of a preceding paragraph,<sup>129</sup> a decision is found to the effect that a limitation of thirty days from the date of the receipt of the message by the transmitting company, is unreasonable and void, as tending to fraud.<sup>130</sup> So, where the period of limitation is thirty days from the time when the message is *sent*, and it is never delivered, and the addressee is unaware of the injury thereby done him until the period of limitation has expired, it is justly held that the limitation is unreasonable in its application to the facts of such a case.<sup>131</sup>

**§ 2435. Decisions Upholding Shorter Periods of Limitation than Thirty Days.**—Decisions have been rendered upholding a limitation of twenty days;<sup>132</sup> and the leading English case upholds a limitation of but seven days.<sup>133</sup>

**§ 2436. Effect of Fraudulent Concealment of the Facts which Give the Right of Action.**—The act of the company or of its agent in concealing the ground of liability will have the effect of taking the case out of the stipulated period of limitation.<sup>134</sup> In such a case there is every sound reason for applying the analogy of the rule with reference to the statute of limitations, which is that a fraudulent

<sup>126</sup> *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257, 260.

<sup>127</sup> *Johnston v. Western Union Tel. Co.*, 33 Fed. Rep. 362.

<sup>128</sup> *Herron v. Western Union Tel. Co.*, 90 Iowa 129; s. c. 57 N. W. Rep. 696.

<sup>129</sup> *Ante*, § 2431.

<sup>130</sup> *Southern Express Co. v. Caperton*, 44 Ala. 101.

<sup>131</sup> *Johnston v. Western Union Tel. Co.*, 33 Fed. Rep. 362, 365. For a similar holding with reference to a similar limitation in the printed con-

tract of an *express company*, see *Adams Express Co. v. Regan*, 29 Ind. 21.

<sup>132</sup> *Aiken v. Telegraph Co.*, 5 S. C. 358; *Heiman v. Western Union Tel. Co.*, 57 Wis. 562.

<sup>133</sup> *Lewis v. Great Western R. Co.*, 5 Hurl. & N. 867.

<sup>134</sup> *Gulf & C. R. Co. v. Todd* (Tex. Civ. App.), 19 S. W. Rep. 761; *Western Union Tel. Co. v. Sanders* (Tex. Civ. App.), 26 S. W. Rep. 734. In this last case the act is regarded as a *waiver* of the limitation.



concealment of the cause of action postpones the running of the statute until the cause of action is discovered. But the courts have been so complacent to telegraph companies fraudulently concealing the ground of action of their customer for their double misprision of forcing upon him this stipulation as a condition without which it will not perform its public duty to him, and then taking his money and not performing the public service in his favor for which it was paid by him,—as to hold that the operation of such fraud is not to postpone the period of limitation named in the message blank so that it begins only from the date of the discovery of the fraud, but that it is merely to leave the customer a *reasonable time* after making the discovery within which to present the claim, though this reasonable time may be much less than the full period of time limited by the stipulation.<sup>135</sup> In such a case, the presumption of the law ought to be that the stipulation was forced upon the customer for the purpose of making it a means of fraud upon him; and it should hence be held entirely void, and the only period which should be applied should be the statutory limitation applicable to such an action.

§ 2437. **How as to the Period of Ninety Days.**—We may conclude from the foregoing that, in the absence of a statute prohibiting telegraph companies from imposing upon their customers such a period of limitation, a stipulation that the claim must be presented within ninety days from the delivery of the message to the agent of the company for transmission will be upheld as reasonable.<sup>136</sup>

§ 2438. **Effect of such Stipulations when Valid.**—Undoubtedly the effect of such a stipulation, when upheld, is to cut off any right of action for every species of damages covered by its terms.<sup>137</sup> It is *binding upon the addressee* as well as the sender, where the message relates to the business of both, and is sent in reply to a previous mes-

<sup>135</sup> *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608; s. c. 21 S. W. Rep. 638; *Heiman v. Western Union Tel. Co.*, 57 Wis. 562; *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257.

<sup>136</sup> *Western Union Tel. Co. v. Vanway* (Tex. Civ. App.), 54 S. W. Rep. 414; *Baldwin v. Western Union Tel. Co.* (Tex. Civ. App.), 33 S. W. Rep. 890. Before the Texas act of July 13, 1891, providing that no stipulation for a limitation less than ninety days should be valid, the courts of

that State upheld stipulations for a sixty-day limit: *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403; *Lester v. Western Union Tel. Co.*, 84 Tex. 313. And even a limit of thirty days: *Western Union Tel. Co. v. Culberson*, 79 Tex. 66.

<sup>137</sup> It has been held to bar the right of the *addressee* to the recovery of damages for *mental suffering* on account of the failure of the company to transmit and deliver the message: *Lester v. Western Union Tel. Co.*, 84 Tex. 313; s. c. 19 S. W. Rep. 256.



sage of the addressee;<sup>138</sup> and the view has been taken that the receiver of the message is charged with notice of such a provision by the fact of his reception of the message upon a blank similar to the one upon which it was written by the sender.<sup>139</sup> Some of the courts hold that such a stipulation is applicable to actions for *statutory penalties* as much as to actions for damages;<sup>140</sup> but others hold the contrary in respect of a statutory penalty for a neglect to transmit a message,<sup>141</sup> or for a negligent delay in delivering it.<sup>142</sup> Other courts hold that where the period of limitation is to a stated number of days "after the sending of the message," it applies only to cases *where the message is sent*, and has no application to a case where there is a *total failure to transmit it*.<sup>143</sup> The refusal of the agent of the company to pay damages on the sole ground of there being no liability, has been held a *waiver* of a stipulation requiring written notice of the claim within a limited time;<sup>144</sup> but the promise of the agent to look into the matter, where the claim was made *orally*, has been held, on doubtful grounds, not to constitute such a waiver.<sup>145</sup> On the other hand, a stipulation that such claims must be presented in writing is *waived* where the company acts upon an *oral* presentation of such a claim, and makes a proposition for a settlement, without demanding of the claimant that his claim be submitted in writing.<sup>146</sup>

<sup>138</sup> Western Union Tel. Co. v. James, 90 Ga. 254; s. c. 16 S. E. Rep. 83. A decision of the Indiana court is to the effect that such a stipulation does not bind the addressee, proceeding under another section of the same statute: Western Union Tel. Co. v. McKibben, 114 Ind. 511 (decided under § 5513, Burns' Rev. Stat. Ind., and distinguishing cases decided under §§ 5511, 5512, 5529 of the same statutes).

<sup>139</sup> Manier v. Western Union Tel. Co., 94 Tenn. 442; s. c. 29 S. W. Rep. 732; Findlay v. Western Union Tel. Co., 64 Fed. Rep. 459.

<sup>140</sup> Western Union Tel. Co. v. Jones, 95 Ind. 228; s. c. 48 Am. Rep. 713; Montgomery v. Western Union Tel. Co., 50 Mo. App. 591.

<sup>141</sup> Western Union Tel. Co. v. Coolidge, 86 Ga. 104; s. c. 12 S. E. Rep. 264.

<sup>142</sup> Western Union Tel. Co. v. Cobbs, 47 Ark. 344; s. c. 1 S. W. Rep. 558.

<sup>143</sup> Western Union Tel. Co. v. Yopst, 118 Ind. 248; s. c. 21 Am. & Eng. Corp. Cas. 88; 25 Am. & Eng. Corp. Cas. 514; 3 L. R. A. 224; 20 N. E. Rep. 222. See also Western Union Tel. Co. v. Dunfield, 11 Colo. 335; Bennett v. Western Union Tel. Co.,

18 N. Y. State Rep. 777; s. c. 2 N. Y. Supp. 365; Western Union Tel. Co. v. Michelson, 94 Ga. 436; s. c. 21 S. E. Rep. 169; 5 Inters. Com. Rep. 236; Barrett v. Western Union Tel. Co., 42 Mo. App. 542; Western Union Tel. Co. v. Cooledge, 86 Ga. 104; Albers v. Western Union Tel. Co., 98 Iowa 51; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 288; 66 N. W. Rep. 1040. At least *some effort* must have been made by the company to perform the contract in order to start the running of the period of limitation: Western Union Tel. Co. v. Way, 83 Ala. 542; s. c. 4 South. Rep. 844.

<sup>144</sup> Hill v. Western Union Tel. Co., 85 Ga. 425; s. c. 30 Am. & Eng. Corp. Cas. 590; 11 S. E. Rep. 874.

<sup>145</sup> Massengale v. Western Union Tel. Co., 17 Mo. App. 257.

<sup>146</sup> Western Union Tel. Co. v. Stratemeier, 6 Ind. App. 125; s. c. 32 N. E. Rep. 871. The demand for damages for delay in the delivery of a telegram, which the Texas statute requires to be made within sixty days, must be made within sixty days *after the sending of the message*, if such demand can be made within that time by the exercise of reasonable diligence after learning



§ 2439. **Commencement of Action Equivalent to such Notice.**—Where the stipulation requires a notice of the claim in writing, the commencement of an action is equivalent to such notice.<sup>147</sup>

§ 2440. **Upon what Agent such Notice Served.**—A notice of claim and demand for settlement must, in order to be effectual, be made upon some agent of the company authorized to receive it. The authority of this agent must be such that he is either (1) the proper agent of the company to settle the claim; or (2) the proper agent of the company to communicate notice to the agent who has authority to settle such claims.<sup>148</sup> One court has held that a mere operator is not such an agent.<sup>149</sup> Another court has held that such a claim may well be presented to the agent or manager of the company on duty at the station from which the message was sent, and that such agent is competent to act upon an oral demand and thus waive a stipulation requiring the notice to be in writing.<sup>150</sup> Another court has held that a stipulation in a message blank requiring notice to be given to the company within sixty days, is complied with by notice to its *local agent* who receives and delivers the message, where it is a foreign corporation, and the contract does not disclose the place of business or residence of its officers.<sup>151</sup> Another court has held that the presentation of such a claim to a clerk on duty at the principal office of the company, who takes it down in writing, tells the complainant that the manager is busy, hands it to a person in another room whom he introduces as attorney, is sufficient.<sup>152</sup> The delivery of such a notice to a *messenger boy* has been held an insufficient service of it.<sup>153</sup>

of the sending: *Western Union Tel. Co. v. Phillips* (Tex. Civ. App.), 30 S. W. Rep. 494 (no off. rep.).

<sup>147</sup> *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c. 7 South. Rep. 419; 30 Am. & Eng. Corp. Cas. 615; *Western Union Tel. Co. v. Trumbull*, 1 Ind. App. 121; s. c. 27 N. E. Rep. 313; *Western Union Tel. Co. v. Karr*, 5 Tex. Civ. App. 60; s. c. 24 S. W. Rep. 302; *Western Union Tel. Co. v. Mellon*, 96 Tenn. 66; s. c. 33 S. W. Rep. 725. The *contrary* doctrine is maintained in *Western Union Tel. Co. v. Ferguson* (Tex. Civ. App.), 27 S. W. Rep. 1048 (no off. rep.).

<sup>148</sup> 4 Thomp. Corp., § 5196.

<sup>149</sup> *Young v. Western Union Tel. Co.*, 65 N. Y. 163.

<sup>150</sup> *Hill v. Western Union Tel. Co.*, 85 Ga. 425; s. c. 30 Am. & Eng. Corp. Cas. 590; 11 S. E. Rep. 874.

<sup>151</sup> *Western Union Tel. Co. v. May*, 8 Tex. Civ. App. 176; s. c. 27 S. W. Rep. 760. A letter notifying a telegraph company of a claim for damages for non-delivery of a message couched in terms implying that it is a claim in favor of the corporation, on whose letter head it is written, and signed by the corporation per its manager, can not avail the manager as a notice of his individual claim in pursuance of a rule of the telegraph company requiring a claim for damages or penalties to be presented in writing: *Western Union Tel. Co. v. Beck*, 58 Ill. App. 564.

<sup>152</sup> *Bennett v. Western Union Tel. Co.*, 18 N. Y. St. Rep. 777; s. c. 2 N. Y. Supp. 365.

<sup>153</sup> *Western Union Tel. Co. v. Terrell*, 10 Tex. Civ. App. 60; s. c. 30 S. W. Rep. 70.



# CHAPTER LXXXIII.

## NEGLIGENCE IN DELIVERING MESSAGES.

| SECTION   | SECTION   |
|---|---|
| 2443. Evidence of negligence in cases of non-delivery.  | 2449. Damages for false statements as to delivery.                    |
| 2444. Right to establish free delivery limits.          | 2450. Liability for negligent delay in delivering.                    |
| 2445. Further of free delivery limits.                  | 2451. Reasonable diligence in delivering urgent messages.             |
| 2446. What efforts the company must make to deliver.    | 2452. Question how affected by the hours of closing company's office. |
| 2447. To whom the telegram may or may not be delivered. | 2453. Other questions relating to delay in delivering messages.       |
| 2448. Relevant evidence on this subject.                |   |

§ 2443. **Evidence of Negligence in Cases of Non-delivery.**—The telegraph company must make reasonable efforts to find the addressee and deliver the message to him. The right to recover damages for a failure in this regard is said to rest upon the implied contract arising when the telegraph company receives and undertakes to send the message in the usual course of its business, that it will exercise reasonable dispatch in transmitting the message to its destination.<sup>1</sup> It does not discharge the duty which it undertakes, by attempting to communicate the message to him through a *telephone*, where it is practicable to deliver a written *copy* to him.<sup>2</sup> A failure to deliver the message to the addressee is presumptive evidence of negligence under the maxim *res ipsa loquitur*, already considered.<sup>3</sup>

§ 2444. **Right to Establish Free Delivery Limits.**—The company may establish *reasonable limits* in point of distance from its main office within which it will make *free delivery* of messages there received for final delivery,<sup>4</sup> and it may stipulate on its message blank that it shall not be bound to deliver the message outside of those

<sup>1</sup> Western Union Tel. Co. v. Lyman, 3 Tex. Civ. App. 460; s. c. 22 S. W. Rep. 656.

<sup>2</sup> Brashears v. Western Union Tel. Co., 45 Mo. App. 433.

<sup>3</sup> *Ante*, § 2394; Vol. I, § 15; West-

ern Union Tel. Co. v. Broesche, 72 Tex. 654; s. c. 10 S. W. Rep. 734; Gulf & C. R. Co. v. Wilson, 69 Tex. 739; s. c. 7 S. W. Rep. 653.

<sup>4</sup> Western Union Tel. Co. v. Trotter, 55 Ill. App. 659.



limits except upon the payment of extra compensation. Without the payment or securing of such compensation, it is not bound to make delivery at extra expense to itself, or by a special messenger, to one residing beyond its established delivery limits, the same being reasonable.<sup>5</sup> But the company may, of course, voluntarily agree with the person sending the message, upon the payment or promise of extra compensation, that it will deliver the message outside of its free delivery limits, and it may become liable in damages to him for a breach of this agreement; and it may make such an agreement and become liable for its breach, where the residence of the addressee is *several miles beyond* its free delivery limits.<sup>6</sup> Where it makes such an agreement and receives extra compensation therefor,—or, it may be assumed, accepts a guaranty of extra compensation therefor,—it becomes bound to use reasonable diligence to effect a delivery of the message beyond its free delivery limits, as in other cases.<sup>7</sup> Prepayment of the extra charges required to be made by the rules of the company is not absolutely necessary, but may be *waived* by the company's agent.<sup>8</sup>

§ 2445. **Further of Free Delivery Limits.**—Where a message is received without objection, *written on a blank piece of paper*, so that under a principle already stated,<sup>9</sup> the sender is not deemed to agree

<sup>5</sup> *Western Union Tel. Co. v. Taylor*, 3 Tex. Civ. App. 310; s. c. 22 S. W. Rep. 522; *Anderson v. Western Union Tel. Co.*, 84 Tex. 17; s. c. 11 Rail. & Corp. L. J. 295; 20 Wash. L. Rep. 462; 19 S. W. Rep. 285.

<sup>6</sup> Thus, an agreement by the company to send a message by special messenger to an addressee at a country town outside of the free delivery limits upon the sender guaranteeing the cost of such sending, and stating the importance of the message, requires the company to inquire as to the addressee's residence in the place where it was most likely to be known, and to deliver the message, although addressee's residence was *several miles from the town* to which the message was sent, and between the town and the telegraph office: *Western Union Tel. Co. v. Drake*, 13 Tex. Civ. App. 572; s. c. 36 S. W. Rep. 786. And so it was held that where the agent of a company agreed to deliver a message beyond its free delivery limits, it was guilty of negligence in waiting

a day before delivering it, in order to find a messenger who would look to the addressee for pay without a guaranty from the company: *Western Union Tel. Co. v. O'Keefe* (Tex. Civ. App.), 29 S. W. Rep. 1137; *rev'd* on other grounds in 87 Tex. 423.

<sup>7</sup> *Western Union Tel. Co. v. Teague*, 8 Tex. Civ. App. 444; s. c. 27 S. W. Rep. 958.

<sup>8</sup> *Whittemore v. Western Union Tel. Co.*, 71 Fed. Rep. 651. For instance, a regulation by a telegraph company requiring its agents to secure by deposit the cost of delivering messages beyond the free delivery limits, was not available as a defense for delay in delivering a message, where the sender stated to the company's agent that the sendee resided beyond such limits, and agreed to pay the extra charges, and was told that the message would go through, and that the extra charges might be collected from the addressee: *Western Union Tel. Co. v. O'Keefe* (Tex. Civ. App.), 29 S. W. Rep. 1137 (no off. rep.).

<sup>9</sup> *Ante*, § 2420.



to the special conditions or stipulations on the company's message blanks, the company can not excuse its failure to deliver outside of its free delivery limits, on the ground that its special charges for delivery outside of those limits were not paid, unless it *notifies the sender* of its refusal to deliver for that reason.<sup>10</sup> Where there is such a stipulation, and no deposit is made for the expense of delivery outside of free delivery limits, it devolves upon the plaintiff to prove that the addressee lived within those limits.<sup>11</sup> It has been held that a free delivery clause in a telegraph blank, and a rule of the company establishing a free delivery district, will be *strictly construed* against the company.<sup>12</sup> But there seems to be no propriety in this view. There is obviously nothing in such a regulation as to require an unfriendly construction as against the company; but it ought to be *reasonably construed*, with regard at once for the rights of the public and of the company. The propriety of allowing the company to establish reasonable limits, having reference to the cost of delivering messages after they have been received at the terminal office, beyond which they will not deliver them unless extra compensation is paid or secured, is obvious, and is universally recognized by the courts; and business men are charged with notice that there is always a limit for the free delivery of the telegraphic messages.<sup>13</sup> On the other hand, the company may, by *habitually disregarding in practice* an established free delivery limit, make itself liable for failing to deliver a message promptly beyond such limit, but within the limits of the city in which the terminal office is.<sup>14</sup> A telegraph company can not justify its failure to deliver a message, on the ground that the addressee was beyond its free delivery limits, where the home of the addressee was within such limits and could have been found with due diligence, and where, if the message had been left at her home, it would have been forwarded to her.<sup>15</sup>

<sup>10</sup> *Anderson v. Western Union Tel. Co.*, 84 Tex. 17; s. c. 11 Rail. & Corp. L. J. 295; 20 Wash. L. Rep. 462; 19 S. W. Rep. 285.

<sup>11</sup> *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c. 30 Am. & Eng. Corp. Cas. 615; 7 South. Rep. 419.

<sup>12</sup> *Western Union Tel. Co. v. Moore*, 12 Ind. App. 136; s. c. 39 N. E. Rep. 874.

<sup>13</sup> *Western Union Tel. Co. v. Trotter*, 55 Ill. App. 659.

<sup>14</sup> *Western Union Tel. Co. v. Cain* (Tex. Civ. App.), 40 S. W. Rep. 624 (no off. rep.).

<sup>15</sup> *Western Union Tel. Co. v. Clark*,

14 Tex. Civ. App. 563; s. c. 38 S. W. Rep. 225. Nor was the company relieved from liability for failing to deliver a message on which the charges had been paid, because the addressee resided beyond the free delivery limits, and the increased charge was not paid, where both the sender and the transmitting agent were ignorant of that fact, and the sender was not notified of the non-delivery, although he lived a short distance outside of the free delivery limits of the city from which the message was sent: *Western Union Tel. Co. v. Moore*, 12 Ind. App. 136; s. c. 39 N. E. Rep. 874.



§ 2446. **What Efforts the Company must Make to Deliver.**—Upon the question what efforts the company is required to make in particular cases to find the addressee, it has been held that, where a message is addressed to a person at the *yards of a railway company*, and the messenger of the company is informed that no such person is employed or known at the yards, the company does not discharge its duty by stopping there, but is bound to make further efforts to find him, by consulting the city directory, or inquiring for him at the postoffice, and does not perform its duty by leaving the message at the yards with the assistant yardmaster, who receipts therefor and promises to endeavor to find the addressee.<sup>16</sup> Nor does it discharge its duty by sending back a message of inquiry to the transmitting office, for a better address, where the address which has been given is all that is necessary to enable its servants to find the addressee, with ordinary diligence.<sup>17</sup> If the message is addressed in the care of a third person, and such third person can not be found, the company does not discharge its duty unless it makes reasonable efforts to find the person to whom it is addressed.<sup>18</sup> But it has been held that if the person in whose care the message is addressed is found, and he refuses to receive it, the company is not bound to look farther for the purpose of finding the original addressee.<sup>19</sup> If the company is unable to find the addressee it will discharge its duty by delivering the message to his *wife*, and by informing the sender of that fact.<sup>20</sup> So, a message directed to a person at a given hotel, is well delivered by leaving it with the *hotel clerk*, on the theory of an implied authority on his part to receive messages addressed to the guests of the house.<sup>21</sup>

<sup>16</sup> *Western Union Tel. Co. v. Newhouse*, 6 Ind. App. 422; s. c. 33 N. E. Rep. 800.

<sup>17</sup> *Herron v. Western Union Tel. Co.*, 90 Iowa 129; s. c. 57 N. W. Rep. 696.

<sup>18</sup> *Western Union Tel. Co. v. Houghton*, 82 Tex. 561; s. c. 15 L. R. A. 129; 11 Rail. & Corp. L. J. 112; 17 S. W. Rep. 846. When, therefore, a telegram was addressed in the care of "Mr. Basall," and no such person resided at the place to which it was addressed, and the agent of the company made no effort to deliver it to the person actually addressed, who was well known at the place, it was held that the company was liable to him in damages: *Western Union Tel. Co. v. Houghton*, 82 Tex. 561; s. c. 15 L. R. A. 129; 11 Rail. & Corp. L. J. 112; 17 S. W. Rep. 846.

<sup>19</sup> *Western Union Tel. Co. v. Young*, 77 Tex. 245; s. c. 13 S. W. Rep. 985; *Western Union Tel. Co. v. Thompson*, 10 Tex. Civ. App. 120; s. c. 31 S. W. Rep. 318.

<sup>20</sup> *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119.

<sup>21</sup> *Western Union Tel. Co. v. Trissal*, 98 Ind. 566. There is a decision to the effect that where the message was addressed to "T. W. Pearsall & Co.," and was delivered at the office of that firm in an envelope addressed "T. W. Pearsall," this was *prima facie* evidence of negligence: *Pearsall v. Western Union Tel. Co.*, 44 Hun (N. Y.) 532; s. c. 9 N. Y. St. Rep. 132; s. c. aff'd 124 N. Y. 256. That the plaintiff need not prove that the addressee was at his office ready to receive the message,—see *Pope v. Western Union Tel. Co.*, 9



§ 2447. **To Whom the Telegram may or may not be Delivered.**—A telegraph company is bound to deliver a telegram to the person to whom it is addressed, if it can do so by the exercise of reasonable diligence; and this is true though the message is addressed in care of a third person.<sup>22</sup> Delivery to the person *in whose care* the message is directed is proper and sufficient.<sup>23</sup> On the other hand, it is said that the delivering of a telegram to the *wife* of the addressee is not, as matter of law, obligatory. Nor does it, as matter of law, fulfill the obligation of the telegraph company, but its duty in such respect is a *question of fact for the jury*, in view of the circumstances of the case.<sup>24</sup> On the other hand, it has been well held that where the company is unable to make a personal delivery, it is its duty to deliver the telegram to *the wife, or clerk* at the place of business, or residence of the sendee at the place of destination.<sup>25</sup> Delivery to a *hotel clerk* of a message for a guest of his hotel is *prima facie* sufficient.<sup>26</sup>

Ill. App. 283. It has been held that a telegraph company will be held liable for the non-delivery of a message which it has accepted for transmission, though there is no telegraph office at the place of address: *Western Union Tel. Co. v. Jones*, 69 Miss. 658. A telegraph message was addressed to the plaintiff in care of a manufacturer for whom he worked, notifying him of the death of his sister. The message was given to a boy for delivery, who went to the factory and asked for plaintiff. He was told to look for him. He did not go through the factory, nor did he ask the manufacturer for him, and made but few inquiries, but returned the message to the office. The next day another was received and no effort was made to deliver it, nor was the sender notified of the failure to do so. The plaintiff did not receive the messages for ten days. It was held that plaintiff was entitled to recover damages: *Hendricks v. Western Union Tel. Co.*, 126 N. C. 304; s. c. 35 S. E. Rep. 543. The fact that the addressee of a telegram announcing that there was no chance for the recovery of his mother, received *other news* of her through a letter stating that she was very sick, was held no defense to an action for damages against the telegraph company for failure to deliver the telegram: *Western Union Tel. Co. v. Drake*, 14

Tex. Civ. App. 601; s. c. 38 S. W. Rep. 632. A telegraph company has been held to have used reasonable diligence to discover the addressee of a message and deliver it to him, where the operator and messenger, at the place of delivery, inquired at various places and of numerous persons as to the residence of the addressee, and were unable to find out from any of them: *Western Union Tel. Co. v. Burgess* (Tex. Civ. App.), 43 S. W. Rep. 1033. See a discussion of this subject in an editorial note in 7 L. R. A. 583.

<sup>22</sup> *Western Union Tel. Co. v. Houghton*, 82 Tex. 562; *Western Union Tel. Co. v. Jackson*, 19 Tex. Civ. App. 273; s. c. 46 S. W. Rep. 279.

<sup>23</sup> *Western Union Tel. Co. v. Terrell*, 10 Tex. Civ. App. 60; *Western Union Tel. Co. v. Elliott*, 7 Tex. Civ. App. 482; *Western Union Tel. Co. v. Young*, 77 Tex. 245.

<sup>24</sup> *Western Union Tel. Co. v. Mitchell*, 91 Tex. 454; s. c. 40 L. R. A. 209; 44 N. W. Rep. 274.

<sup>25</sup> *Western Union Tel. Co. v. Woods*, 56 Kan. 737; s. c. 44 Pac. Rep. 989.

<sup>26</sup> *Western Union Tel. Co. v. Trisal*, 98 Ind. 566. There is a questionable decision to the effect that where B. had instructed the telegraph company's agent to send by the 'bus driver, for delivery, any message addressed to him, B., this



§ 2448. **Relevant Evidence on this Subject.**—Any *statements* made by persons to whom the messenger to whom the dispatch is delivered at its destination, for the purpose of finding and delivering it to the addressee, may apply, as to the whereabouts of the latter, have been held admissible in evidence, as bearing on the question of negligence in not finding him.<sup>27</sup> Where a telegraph company sought to excuse non-delivery on the ground that the addressee was an obscure person whom the messenger could not find, specimens of printed cards and letter heads, which he had used in his business as grocer, were regarded as pertinent to the issue, and admissible, especially after he had testified, without objection, that he so used them.<sup>28</sup>

§ 2449. **Damages for False Statements as to Delivery.**—For a telegraph company, through its proper agent, falsely and erroneously to represent to the sender of a telegram that it has been delivered to the addressee, is an actionable wrong for which he may recover any damages which directly accrue to him therefrom.<sup>29</sup>

§ 2450. **Liability for Negligent Delay in Delivering.**—In considering the liability of a telegraph company for delay in delivering messages to the addressee, three considerations should be kept in view: 1. That the telegraph is resorted to by the public to secure the *speediest mode* of communication, and that prompt delivery is hence of the very essence of the undertaking of the company.<sup>30</sup> There-

did not authorize the delivery in that manner, of a message addressed to another person *in care of B.*: *Thompson v. Western Union Tel. Co.*, 10 Tex. Civ. App. 120.

<sup>27</sup> *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c. 10 Am. St. Rep. 772.

<sup>28</sup> *Gulf &c. R. Co. v. Miller (Tex.)*, 7 S. W. Rep. 653.

<sup>29</sup> *Laudie v. Western Union Tel. Co.*, 126 N. C. 431; s. c. 35 S. E. Rep. 810.

<sup>30</sup> *Western Union Tel. Co. v. Andrews*, 78 Tex. 305; s. c. 14 S. W. Rep. 641; *Western Union Tel. Co. v. Kendzora*, 77 Tex. 257; s. c. 13 S. W. Rep. 986; *Harris v. Western Union Tel. Co.*, 121 Ala. 519; s. c. 25 South. Rep. 910. Upon the question *what delay is evidence of negligence* sufficient to charge the company with liability for damages, see *Thomp. Elect.*, § 298; *Harkness v. Western Union Tel. Co.*, 73 Iowa 190; s. c. 5 Am. St. Rep. 672; *Western Union Tel. Co. v. Scircle*, 103

*Ind.* 227; *Mowry v. Western Union Tel. Co.*, 51 Hun (N. Y.) 126; s. c. 20 N. Y. St. Rep. 626; 4 N. Y. Supp. 666; *Young v. Western Union Tel. Co.*, 107 N. C. 370; s. c. 9 L. R. A. 669; 42 Alb. L. J. 518; 11 S. E. Rep. 1044; *Julian v. Western Union Tel. Co.*, 98 Ind. 327. It has been held that a delay of *twenty-four hours*, unless accounted for to the satisfaction of the jury, constitutes gross negligence on the part of a telegraph company: *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; s. c. 12 S. E. Rep. 427. See also *Jones v. Roach (Tex.)*, 54 S. W. Rep. 240. Similarly of a delay of three days: *Western Union Tel. Co. v. Cain*, 14 Ind. App. 115; s. c. 24 N. E. Rep. 655; *Western Union Tel. Co. v. McIlvoy*, 21 Ky. L. Rep. 1393; s. c. 55 S. W. Rep. 428. Or forty-eight hours: *Western Union Tel. Co. v. Russell*, 12 Tex. Civ. App. 82; s. c. 31 S. W. Rep. 698. That indulgence is extended to the company where dispatches are delivered at small stations,—see



fore, a failure promptly to deliver has been said to be such a breach of the undertaking of the company as will authorize the recovery of at least the consideration paid for sending the message.<sup>31</sup> On the other hand, this is all that can be recovered if no other damages actually resulted. Thus, it has been held that, although there may have been negligence on the part of the servants of a telegraph company in delivering a message calling a physician to attend a patient, yet, if it could not have been delivered in time for him to render any assistance, no damages can be recovered.<sup>32</sup> 2. That the fact that these companies act in a public capacity like that of a common carrier,<sup>33</sup> is repugnant to the idea that any preference can be allowed in the transmission of dispatches as between customers standing upon an equal footing,—though this is consistent with the conclusion that messages showing on their face peculiar urgency may be transmitted out of their regular order. 3. That this public duty of promptly transmitting messages delivered to the company for that purpose, and in the order in which they are so delivered to it, is enforced by statute in many American jurisdictions.<sup>34</sup> On the one hand, the telegraph company is not an insurer,<sup>35</sup> and hence can not be held liable for a delay in delivering a telegram, which is unavoidable.<sup>36</sup> On the other hand, it is bound to use reasonable diligence,<sup>37</sup> or what has been called good business diligence, in the discharge of its public duties; and therefore the sender of a telegram has a right to rely upon its being transmitted and delivered without unreasonable delay.<sup>38</sup>

*Behm v. Western Union Tel. Co.*, 8 Biss. (U. S.) 131. Reasonable time allowed where the message must go through a repeating office: *Behm v. Western Union Tel. Co.*, 8 Biss. (U. S.) 131. Delay excusable when produced by change of route of transit in consequence of bad weather: *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181. What excuses have been held insufficient: *Thomp. Elect.*, § 301; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181. The following excuses have been held insufficient: That the place or city where the hospital was located, was, by the sender's mistake, misstated in the message, where the mistake would not have misled the plaintiff: *Western Union Tel. Co. v. Zane*, 6 Tex. Civ. App. 585; s. c. 25 S. W. Rep. 722. That the agents of the company were for a time required to devote their whole attention to the management of the railway trains: *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 409; s. c. 25 S. W. Rep. 1036; *aff'g* on rehear-

ing, 6 Tex. Civ. App. 403; 25 S. W. Rep. 168; following *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406. That the only wire owned by the company was surrendered to the use of a railway train dispatcher, and was used by him for several consecutive hours, there being no evidence of a necessity for such continued use of the wire by the train dispatcher: *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406.

<sup>31</sup> *Western Union Tel. Co. v. Adams*, 75 Tex. 531; s. c. 6 L. R. A. 844; 12 S. W. Rep. 857.

<sup>32</sup> *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c. 1 L. R. A. 728; 9 S. W. Rep. 598.

<sup>33</sup> *Ante*, § 2392.

<sup>34</sup> *Ante*, § 2403, *et seq.*

<sup>35</sup> *Ante*, § 2393.

<sup>36</sup> *Western Union Tel. Co. v. Stiles* (Tex. Civ. App.), 35 S. W. Rep. 76 (no off. rep.).

<sup>37</sup> *Ante*, §§ 2392, 2393.

<sup>38</sup> *Mitchell v. Western Union Tel. Co.*, 12 Tex. Civ. App. 262; s. c. 33 S. W. Rep. 1016.



### § 2451. Reasonable Diligence in Delivering Urgent Messages.—

Undoubtedly the rule of reasonable diligence, which is the measure of duty of such public servants,<sup>39</sup> requires greater promptness in delivering *messages of peculiar urgency*, provided the company is informed of the circumstances creating the urgency, either from the face of the message itself, or by information communicated to its agent.<sup>40</sup> But where the company has no information of the urgency of the message, it will not, of course, be liable for damages for delay, provided it has transmitted and delivered it with reasonable diligence and in the order in which it was received, with reference to other messages.<sup>41</sup> Here, as in other cases, the degree of diligence exacted by the rule under consideration depends upon the exigencies of the case, regardless of any *rules of the company*,<sup>42</sup> since it can not, by rules or by-laws, cast off its public duties, or its common law or statutory liability.<sup>43</sup> Any *disclosure of urgency* is sufficient, within the meaning of this rule, that would put a reasonable or prudent man upon inquiry.<sup>44</sup> For instance, a message summoning a woman to the bedside of a dying person need not disclose on its face the fact that she is the mother of the dying person.<sup>45</sup> Nor need a message in the words: "You had better come and attend to your claim at once," give the names of the debtors against whom the addressee of the message has claims.<sup>46</sup>

**§ 2452. Question how Affected by the Hours of Closing Company's Office.**—Undoubtedly a telegraph company has the right to prescribe reasonable hours during which its offices shall be closed,<sup>47</sup> but is bound to keep its offices open for the accommodation of the public during

<sup>39</sup> *Ante*, §§ 2392, 2393.

<sup>40</sup> *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.) 209; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575; *Brown v. Western Union Tel. Co.*, 6 Utah 219; s. c. 21 Pac. Rep. 988; *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; s. c. 10 S. W. Rep. 752; *Western Union Tel. Co. v. Valentine*, 18 Ill. App. 57.

<sup>41</sup> *Belun v. Western Union Tel. Co.* (U. S. C. Ct. Ind.), 7 Reporter 710; s. c. 8 Cent. L. J. 445; 11 Ch. Leg. N. 276; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; *United States Tel. Co. v. Gildersleve*, 29 Md. 232; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 749.

<sup>42</sup> *Brown v. Western Union Tel. Co.*, 6 Utah 219; s. c. 21 Pac. Rep. 988; *Pegram v. Western Union Tel.*

*Co.*, 97 N. C. 57; s. c. 2 S. E. Rep. 256.

<sup>43</sup> *Ante*, § 2411.

<sup>44</sup> *Lodge v. Simonton*, 2 Penn. & W. (Pa.) 439; s. c. 23 Am. Dec. 36; and note 23 Am. Dec. 47.

<sup>45</sup> *Western Union Tel. Co. v. Feegles*, 75 Tex. 537; s. c. 12 S. W. Rep. 860.

<sup>46</sup> *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; s. c. 10 S. W. Rep. 752.

<sup>47</sup> *Western Union Tel. Co. v. Neel*, 86 Tex. 368; s. c. 25 S. W. Rep. 15; 44 Am. & Eng. Corp. Cas. 441; *Western Union Tel. Co. v. Wingate*, 6 Tex. Civ. App. 324; s. c. 25 S. W. Rep. 439; *Western Union Tel. Co. v. Harding*, 103 Ind. 505 (Howk, J., dissenting); *Davis v. Western Union Tel. Co.*, 46 W. Va. 48; s. c. 32 S. E. Rep. 1026; *Western Union Tel. Co. v. May*, 8 Tex. Civ. App. 176.



reasonable hours,<sup>48</sup> which it may fix with reference to the quantity of business done.<sup>49</sup> And it seems that the question, what are reasonable office hours, is a *question of fact for a jury*.<sup>50</sup> There are holdings to the effect that such a company is not liable for damages for not delivering a message during the time when, under such reasonable rule, its delivering office is closed, although the *sender is not notified* of the hours of closing.<sup>51</sup> It has been reasoned that, in the absence of any different agreement or understanding between the parties in a particular case, such a regulation becomes, by implication, a part of the contract under which the message is sent.<sup>52</sup> On the other hand, it is reasoned that the rule works both ways, and that, as between the customer and the company, such a regulation so far affects the liability of the latter, as to make it liable in damages for failing to deliver a message during its established office hours, if it can reasonably do so.<sup>53</sup> The foregoing cases proceed upon the assumption that the customer is without recourse for any delay resulting from the closure of the office of the company during its established hours, although he may not know what those hours really are; and one case goes to the

<sup>48</sup> *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; s. c. 10 S. W. Rep. 734 (holding that the fact that the terminal office is closed when a message is received there is no excuse for failing to deliver it promptly.)

<sup>49</sup> *Western Union Tel. Co. v. Van Cleave* (Ky.), 54 S. W. Rep. 827; *Western Union Tel. Co. v. Crider*, 21 Ky. L. Rep. 1336; s. c. 54 S. W. Rep. 963.

<sup>50</sup> *Western Union Tel. Co. v. Neel*, 86 Tex. 368; s. c. 25 S. W. Rep. 15; 44 Am. & Eng. Corp. Cas. 441; *Western Union Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394; s. c. 25 S. W. Rep. 439. But there is a holding that whether a rule of the company closing its office for the night delivery of messages is reasonable is for the court: *Western Union Tel. Co. v. Crider*, 21 Ky. L. Rep. 1336; s. c. 54 S. W. Rep. 963. It would seem that office hours from 7 A. M. to 7 P. M. are to be deemed reasonable: *Western Union Tel. Co. v. Neel*, 86 Tex. 368; *Western Union Tel. Co. v. Neel* (Tex. Civ. App.), 25 S. W. Rep. 661; *Western Union Tel. Co. v. Steinbergen*, 21 Ky. L. Rep. 1289; s. c. 54 S. W. Rep. 829; *Western Union Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394; s. c. 25 S. W. Rep. 439;

*Western Union Tel. Co. v. Harding*, 103 Ind. 505 (Howk, J., dissenting); *Western Union Tel. Co. v. Van Cleave* (Ky.), 54 S. W. Rep. 827. In one case the message reached the delivery office at 9:25 P. M., and was delivered at 10 A. M. the next morning. It was held that the company was not liable: *Western Union Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394; s. c. 25 S. W. Rep. 439. Compare *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119. It follows from the doctrine of the text, that a *verbal agreement* between the sender of the message and the company acting through its agent, that the company will not be required to deliver the message during the hours of closure, will be a good defense by the company to an action for damages for delay: *Western Union Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394; s. c. 25 S. W. Rep. 439.

<sup>51</sup> *Western Union Tel. Co. v. Neel*, 86 Tex. 368; s. c. 44 Am. & Eng. Corp. Cas. 441; 25 S. W. Rep. 15.

<sup>52</sup> *Western Union Tel. Co. v. Neel*, (Tex. Civ. App.), 25 S. W. Rep. 661.

<sup>53</sup> *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 409; s. c. 25 S. W. Rep. 1036; *aff'g* on rehearing 6 Tex. Civ. App. 403; 25 S. W. Rep. 168.



untenable length of holding that the employes in a telegraph office are not required to know the hour at which another office of the same company closes.<sup>54</sup> It is submitted that, in any well regulated telegraphic system, the hours for the closure of all the different offices will be fixed, and that a schedule of such hours will be furnished to every agent in the system, so that he can inform customers, upon request, as to what those hours are in respect of any given station. But a telegraph company which has established reasonable office hours during the day time in which to transact its business at a particular point, is not obliged to do business at night at that point, because it receives, at another place, during the night, a telegram for delivery at the former place.<sup>55</sup>

§ 2453. **Other Questions Relating to Delay in Delivering Messages.**—If the failure of the company to deliver a message is harmful only through the operation of some *intervening cause*, such as the dishonesty of a third person, the loss of the message is not the *proximate cause* of the injury, and the company is not liable.<sup>56</sup> Whether the plaintiff has been injured in a substantial sense by the delay will generally be a question of fact for the jury.<sup>57</sup>

<sup>54</sup> *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119.

<sup>55</sup> *Robinson v. Western Union Tel. Co.* (Tex. Civ. App.), 43 S. W. Rep. 1053 (no off. rep.). To the same effect, see *Western Union Tel. Co. v. Johnson*, 21 Ky. L. Rep. 1391; s. c. 55 S. W. Rep. 427. The agent of a telegraph company accepting a message after office hours and promising the sender to try and get it through, does not bind the company to transmit the message without reference to established office hours: *Western Union Tel. Co. v. Gibson* (Tex. Civ. App.), 53 S. W. Rep. 712 (no off. rep.). Evidence that the company's agents did not observe a rule closing its office for the night delivery of messages, is competent as tending to show that no such rule existed; but the fact that messages were delivered at night in a few instances not in conformity with the rule, does not prove its non-existence: *Western Union Tel. Co. v. Crider*, 21 Ky. L. Rep. 1336; s. c. 54 S. W. Rep. 963. A telegraph company whose agent received a message and undertook to deliver it while

acting within the scope of his agency, but not within the hours fixed for the active discharge of his duties, is not relieved from its obligation to deliver the message because it was received to be delivered out of office hours: *McPeck v. Western Union Tel. Co.*, 107 Iowa 356; s. c. 43 L. R. A. 214; 5 Am. Neg. Rep. 314; 78 N. W. Rep. 63. But, on the other hand, where a message was delivered to the defendant's agent for transmission about 4 o'clock in the afternoon, and it was not delivered until 9 o'clock the next morning, it was held that the company was negligent, conceding that the office at the place where the message was delivered for transmission could properly close a little after 6 o'clock in the evening: *Western Union Tel. Co. v. Fisher*, 21 Ky. L. Rep. 1293; s. c. 54 S. W. Rep. 830.

<sup>56</sup> *First Nat. Bank v. Western Union Tel. Co.*, 30 Ohio St. 555.

<sup>57</sup> For illustration, see *Thomp. Elect.*, § 302; *Brown v. Western Union Tel. Co.*, 6 Utah 219; s. c. 21 Pac. Rep. 988; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.



## CHAPTER LXXXIV.

### DAMAGES RECOVERABLE FROM TELEGRAPH COMPANIES.

ART. I. Proximate and Remote Damages, §§ 2455-2467.

ART. II. Notice of the Nature and Importance of the Message,  
§§ 2469-2474.

ART. III. Damages for Injuries to the Feelings, §§ 2476-2485.

### ARTICLE I. PROXIMATE AND REMOTE DAMAGES.

#### SECTION

2455. Rule in *Hadley v. Baxendale*: damages in contemplation of the parties.

2456. Rule of damages on the theory that the telegraph company has been guilty of a tort.

2457. Only direct or proximate damages recoverable.

2458. What damages deemed too remote, contingent, or problematical.

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#### SECTION

2462. Further as to loss of profits where message orders affirmative action.

2463. Loss of profits in other cases of delays in delivering messages.

2464. Damages arising from mistakes in quoting prices.

2465. Damages arising from delay of messages accepting offers of sale.

2466. Further of such damages.

2467. Other holdings on the question of damages.

§ 2455. Rule in *Hadley v. Baxendale*: Damages in Contemplation of the Parties.<sup>1</sup>—In America, judicial authority is generally, though not universally, agreed that the rule of damages to be applied in actions against telegraph companies for failing to deliver messages correctly and without unreasonable delay, is that formulated in the leading case of *Hadley v. Baxendale*,<sup>2</sup> in the following language: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, that is, according

<sup>1</sup> This section is cited in § 2477.

<sup>2</sup> 9 Exch. 341, 354; s. c. 26 Eng. Law & Eq. 398.



to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."<sup>3</sup> It is a necessary part of the rule that if there are special circumstances, or circumstances giving rise to special or peculiar damages in case of the failure of the undertaking of the telegraph company, those circumstances must be *communicated* to it, either by the language of the message itself, or by a notice to its receiving agent.<sup>4</sup> Consequently, there can be no recovery beyond the fee paid for the service, for a loss arising from special or peculiar circumstances not communicated to the company at the time when the dispatch is delivered to it for transmission, or before it has assumed the undertaking, or before the time has elapsed within which it has become impossible for it to perform the undertaking so as to avoid loss.<sup>5</sup> The decisions proceed upon the tacit assumption that the agent appointed by the company to receive messages for transmission, is its agent to receive notification of the importance of messages, within the meaning of the rule under consideration.<sup>6</sup>

<sup>3</sup> The following, among many other cases, where the action was against telegraph companies for errors or defaults in the transmission of messages, affirm the leading proposition of the above case, that such damages are recoverable as may fairly be supposed to be in the contemplation of the parties as likely to flow from a breach of the undertaking: *McColl v. Western Union Tel. Co.*, 44 N. Y. Super. 487; s. c. 7 Abb. N. C. (N. Y.) 151; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; s. c. 17 Am. Rep. 452; *First Nat. Bank v. Western Union Tel. Co.*, 30 Ohio St. 555; s. c. 27 Am. Rep. 485; *Western Union Tel. Co. v. Graham*, 1 Colo. 230; s. c. 9 Am. Rep. 136; *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554; *Hughes v. Western Union Tel. Co.*, 79 Mo. App. 133; s. c. 2 Mo. App. Rep. 405; *Houston & C. Tel. Co. v. Davidson*, 15 Tex. Civ. App. 334; s. c. 39 S. W. Rep. 605. Explanations of the rule have been made by American judges in several cases. *Seldon, J.*, qualified it by the addition that such damages "*must be certain*, both in their nature and in respect to the cause from which they proceed." *Griffin v. Colver*, 16 N. Y. 489; s. c. 69 Am. Dec. 718. *Earl, C. J.*, added the same qualification: *Leonard v. New York & C.*

*Tel. Co.*, 41 N. Y. 544; s. c. 1 Am. Rep. 446, 452. See also the explanation of *Allen, J.*, in another case in the same court: *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; s. c. 6 Am. Rep. 165, 169.

<sup>4</sup> This principle is clearly expressed in *Hadley v. Baxendale*, 9 Exch. 341; s. c. 26 Eng. Law & Eq. 398.

<sup>5</sup> *McColl v. Western Union Tel. Co.*, 44 N. Y. Super. 487. That a loss arising from uncommunicated special circumstances is not an element of damage for failure to transmit a telegram,—see *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c. 4 South. Rep. 844. See further, as illustrating the principle, *Horne v. Midland R. Co.*, L. R. 7 C. P. 583, commented on in *Wood's Mayne on Damages*, § 34.

<sup>6</sup> *Thomp. Elect.*, § 315. In a more extensive work by the present author on the liability of telegraph companies, he reached, after an attentive consideration of the cases bearing upon this subject, the following conclusions:—1. In all cases where actual damages—that is, damages beyond those stipulated against in the message—are recoverable, the company will be liable for all damages which are the direct result of any affirmative action which the



§ 2456. **Rule of Damages on the Theory that the Telegraph Company has been Guilty of a Tort.**—The rule of *Hadley v. Baxendale*, stated in the preceding section, proceeds upon the theory of a mere breach of contract; but there is something more in the failure of a telegraph company correctly and seasonably to transmit and deliver a message which it has assumed to transmit and deliver: it is a violation by it of a *public duty*; and consequently it may be sued not merely for the breach of a contract, but for the commission of a *tort*. Upon the conception that it is guilty of a tort, and where the action proceeds upon that theory, the analogy of other actions for damages resulting from negligence would seem to suggest that the inquiry would be whether the injury which resulted from the negligence of the telegraph company was proximate or remote. We have seen that *proximate cause is probable cause*,<sup>7</sup> and that a man negligently failing in the performance of a duty is generally held liable for those consequences of his negligent act or omission, which, in the usual course of events and according to human experience, are likely to ensue, and consequently which he ought to have foreseen and anticipated as the result of his misconduct. Upon the conception of the telegraph company being liable as for a tort, the rule with respect to the damages for which it is liable would be formulated somewhat in this way, and not necessarily in the language in which it is formulated in *Hadley v. Baxendale*.<sup>8</sup> One court, denying the application of the rule of *Hadley v. Baxendale* in this relation, holds that damages in an action against a telegraph company sounding in tort, for its failure to promptly deliver a message, are not limited to those which might reasonably have been within the contemplation of the parties, but recovery may be had for all the injurious results which flow therefrom by ordinary natural sequence, without the interposition of any

person addressed was induced to take by the erroneous transmission of the message, provided that, from the terms of the message itself, or from information communicated to the defendant at or before the time it was delivered to the defendant, or otherwise, the company was apprised that the character of the communication was such as might lead to such action. 2. Where the message on its face was designed to *prevent* certain contemplated action, and the company was, from its terms or otherwise, formally apprised that such was its purpose, yet, in consequence of the default of the company in failing to transmit it correctly, or in failing to deliver it

within a reasonable time, such contemplated action was not prevented, the company will be liable for the resulting damages. 3. But that the company will not be liable in any case for damages from the gain of advantages or profits or the prevention of disadvantages or losses, which *might or might not* have taken place, according to uncertain contingencies, if the dispatch had been correctly transmitted, on the one hand, or seasonably delivered on the other: *Thomp. Elect.*, § 316.

<sup>7</sup> Vol. I, § 50, *et seq.*

<sup>8</sup> See, for example, *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; s. c. 7 S. W. Rep. 715.



other negligent act or overpowering force.<sup>9</sup> It is true that there may not, in many cases, be any practical difference in the result in the application of the two rules.<sup>10</sup> Under either rule, no damages can be recovered for a result which was not produced by the negligence of the telegraph company.<sup>11</sup>

§ 2457. Only Direct or Proximate Damages Recoverable.<sup>12</sup>—The language employed in *Hadley v. Baxendale*,<sup>13</sup> as quoted in a preceding section, is one of the familiar forms of expressing the well-known theory as to *proximate and remote cause* when applied to the question of damages resulting from breaches of contract. Many courts employ a shorter expression of the rule of that case, by saying that the damages must be the natural and direct or proximate consequences of the default complained of.<sup>14</sup> The rule does not, therefore, apply where the damages are in part the result of an *intervening efficient cause* which the parties could not be supposed to have contemplated. Thus, it does not apply where the damage arises from the *intervening fraud of a third person*, who takes advantage of a mistake in transmitting a message,—as where the message asks for \$500, and, by the mistake of the company, is made to ask for \$5,000, and the addressee absconds with it. Here the proximate cause of the damage is deemed

\* *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 362; s. c. 78 N. W. Rep. 63; 43 L. R. A. 214; 5 Am. Neg. Rep. 314.

<sup>10</sup> One court has seemingly advanced the view that there is not, by holding that the measure of damages in an action sounding in tort for negligence in the performance of a duty based on contract, unattended by circumstances showing evil intent, oppression, or wanton disregard of another's rights, is practically the same as if the action were for breach of the contract under the same circumstances: *Ferro v. Western Union Tel. Co.*, 9 App. D. C. 455; s. c. 35 L. R. A. 548; 24 Wash. L. Rep. 790. Compare *Webster v. Woolford*, 81 Md. 329.

<sup>11</sup> For example, it was held that no recovery could be had by the addressee of a telegram announcing the serious illness of her father, for mental suffering while she was kept in suspense as to whether he was living or not, because of the negligent delay in delivering a telegram, where she could not have arrived in time for the funeral if the telegram had been promptly delivered, al-

though she might have arrived a day earlier than she did: *Western Union Tel. Co. v. Edmondson*, 91 Tex. 206; s. c. 42 S. W. Rep. 549; rev'g 40 S. W. Rep. 622. So, it was held that the sender of a telegram announcing to his brother the serious illness of their mother, and requesting the brother to go with him to see her, can not recover for *mental suffering* because of his failure to reach his mother before her death, where his brother failed to meet him because of failure to deliver the telegram, if he could have reached her before, had he not voluntarily stopped over in his journey: *Western Union Tel. Co. v. Birchfield*, 14 Tex. Civ. App. 664; s. c. 38 S. W. Rep. 635.

<sup>12</sup> This section is cited in §§ 2501, 2503.

<sup>13</sup> 9 Exch. 341; s. c. 26 Eng. Law & Eq. 398.

<sup>14</sup> The expression is constantly met with in judicial opinions on this subject, that the sender of a telegram is entitled to such damages as are the *natural and proximate* consequence of the company's negligence: *Pegram v. Western*



to be the criminal act of the addressee, and not the mistake which gave the opportunity for the act.<sup>15</sup>

§ 2458. **What Damages Deemed too Remote, Contingent, or Problematical.**<sup>16</sup>—The damages arising from the non-delivery of a message *asking for information*, falls within the category of remote, contingent, or problematical damages, within the meaning of the rule under consideration; since the parties seeking the information might or might not have acted upon it, if the message had been answered and the information had been correctly given.<sup>17</sup> The damages have been held too remote, contingent, problematical, and hence not recoverable, in the following cases:—Where, owing to the delay of a telegraph company in delivering a dispatch, a barge did not reach a lot of staves in time to prevent their being *lost by a flood*,<sup>18</sup> where there was delay in delivering a telegram, announcing the death of a person, without giving the company *notice* of his relationship to the person addressed, in consequence of which the person, a brother of the deceased, failed to attend the funeral;<sup>19</sup> where the plaintiff, by reason of the non-delivery of the message, was obliged to take a *rough vehicle* instead of the *family carriage*, in consequence of which he received sundry *bruises*,<sup>20</sup> where the message ordered a saw, and a mill lay idle for want of it, the message not showing for whom it was intended, and the agent not being apprised that a saw-mill

Union Tel. Co., 100 N. C. 28; Western Union Tel. Co. v. Edsall, 74 Tex. 329; s. c. 12 S. W. Rep. 41; Western Union Tel. Co. v. Broesche, 72 Tex. 654; s. c. 10 S. W. Rep. 734; Gulf & C. R. Co. v. Wilson, 69 Tex. 739; s. c. 7 S. W. Rep. 653 (such actual damages as the jury may find from all the facts and circumstances); Parks v. Alta California Tel. Co., 13 Cal. 422; s. c. 73 Am. Dec. 589; Western Union Tel. Co. v. Woods, 56 Kan. 737; s. c. 44 Pac. Rep. 989.

<sup>15</sup> Lowery v. Western Union Tel. Co., 60 N. Y. 198. The rule is stronger where, under a peculiar state of circumstances, the failure to deliver a message gives an opportunity to a third person to *commit a crime* upon the addressee of the message; since such intervening crime could not be deemed to have been in the contemplation of the parties: First Nat. Bank v. Western Union Tel. Co., 30 Ohio St. 555; s. c. 27 Am. Rep. 491. See Thomp. Elect., § 320, where this case is fully explained.

But where the message was from a son to his mother informing her that he was sick, and requesting her to come immediately; and, notwithstanding the delay in the delivery of the message to her, she would have arrived but for the default of the railroad company whose train she took,—it was held that the default of the latter company was no defense on the part of the telegraph company: Loper v. Western Union Tel. Co., 70 Tex. 689; s. c. 8 S. W. Rep. 600.

<sup>16</sup> This section is cited in § 2514.

<sup>17</sup> See, for an apt illustration, Baldwin v. United States Tel. Co., 45 N. Y. 744; s. c. 6 Am. Rep. 165, 172; Thomp. Elect., § 321.

<sup>18</sup> Bodkin v. Western Union Tel. Co., 31 Fed. Rep. 134.

<sup>19</sup> Western Union Tel. Co. v. Brown, 71 Tex. 723; s. c. 2 L. R. A. 766; 10 S. W. Rep. 32.

<sup>20</sup> McAllen v. Western Union Tel. Co., 70 Tex. 243; s. c. 7 S. W. Rep. 715.



was lying idle on that account;<sup>21</sup> where the message requested the addressee to meet the sender at a stated time and place, and, through its non-delivery, the sender was subjected to the expense of hiring a conveyance, to the loss of his time, to the exposure of his health, etc.;<sup>22</sup> where the message announced to the plaintiff the last illness of his father, and by its non-delivery the plaintiff lost a note which his father would have given him, had the plaintiff been able to see him before his death.<sup>23</sup> If the damages arise in part, or are enhanced by the embarrassed financial condition of the sender of the message, they are not recoverable from the company, for the reason that they are too remote; and consequently *evidence* of such financial condition will not be admissible.<sup>24</sup> Items of expense to which the plaintiff may have been put, in order to be allowable as damages, must be shown to have been the direct consequence of the failure of the defendant to transmit the message seasonably.<sup>25</sup> It is hardly necessary to add that the sender of a message can not recover from the company expenses alleged to have been occasioned by a negligent delay in delivering it, when it was not reasonably necessary to incur such expenses.<sup>26</sup> The damages were deemed too remote, where a telephone message directed the addressee to *be present at a trial and testify* and, in consequence of the message not being delivered, he failed to be present, and (as was claimed) the suit was lost for want of his testimony.<sup>27</sup>

§ 2459. **Right to Recover Fee Paid for Sending Message.**—But in all these, as in other cases, the sender of the message is, of course,

<sup>21</sup> Elliott v. Western Union Tel. Co., 75 Tex. 18; s. c. 12 S. W. Rep. 954.

<sup>22</sup> Western Union Tel. Co. v. Smith, 76 Tex. 253; s. c. 13 S. W. Rep. 169.

<sup>23</sup> Chapman v. Western Union Tel. Co., 90 Ky. 265; s. c. 12 Ky. L. Rep. 265; 13 S. W. Rep. 880; 30 Am. & Eng. Corp. Cas. 626.

<sup>24</sup> Western Union Tel. Co. v. Way, 83 Ala. 542; s. c. 4 South. Rep. 844.

<sup>25</sup> Cutts v. Western Union Tel. Co., 71 Wis. 46; s. c. 36 N. W. Rep. 627. In a case which does not seem to have been well decided, it appeared that the plaintiff left home during his wife's illness on business. A message was sent him that she was *much better*, but as received by him read that she was *no better*. Upon the receipt of this, he returned home. It was held that he could not recover travelling expenses as

a part of his damages: Western Union Tel. Co. v. Patton (Tex. Civ. App.), 55 S. W. Rep. 973. The son of the plaintiff sent a telegram to him, informing him of the serious illness of his child; but, in consequence of the negligent failure of the telegraph company to deliver the message promptly, there was no response to the message prior to the death of the child, which fact produced an *estrangement* between the plaintiff and his wife. It was held that this estrangement was not the proximate result of the negligence of the company, and that it was consequently not liable in damages to the plaintiff: McBride v. Sunset Tel. Co., 96 Fed. Rep. 81.

<sup>26</sup> Giddens v. Western Union Tel. Co., 111 Ga. 824; s. c. 35 S. E. Rep. 638.

<sup>27</sup> Martin v. Sunset Telephone & Co., 18 Wash. 260; s. c. 51 Pac. Rep. 376.



entitled to *recover the fee paid by him* to the company; because the company undertakes for such fee to produce a certain result, and does not, like a doctor or a lawyer, undertake to attempt, by the use of reasonable skill and diligence, to produce a certain result.<sup>28</sup>

§ 2460. **What Damages not too Remote.**—Under the rule of the preceding sections, a person under a recognizance as a *witness* in a cause pending in a distant place, may recover his *travelling expenses* in going to and returning from such place to attend the trial, where he would have been saved from making the journey by the delivery of a telegraphic message apprising him of its *postponement*; but in such a case he is not entitled to recover such *collateral damages* as he may have sustained through the necessity of shutting down his mill, the idleness of his teams, etc., during his absence.<sup>29</sup> So, where a *party to a suit* pending at a distant place telegraphed to his attorney there to hold it until a day stated, and asked for a reply, but got no reply, in consequence of his message not being sent at all; whereupon, assuming that a postponement could not be procured, he went to the place of trial with his counsel,—it was held that he was entitled to recover the *expenses* of himself and counsel in making the journey and also the *fee* which he was obliged to pay his counsel for going there a second time.<sup>30</sup> Damages sustained by a professional man through the *loss of a fee* in consequence of the non-delivery of a message,—as in case of a message summoning a doctor to a visit, are recoverable under this rule; and the measure of such damages is the difference between the fee thus lost and what he would have earned during the time he would have consumed in making the visit.<sup>31</sup> The rule was held to be the same where, through the negligence of the telegraph company in not delivering a message, the plaintiff *failed to obtain a salaried position* which had been tendered to him; and the measure of his damages was held to be the difference between the amount of such salary and the amount actually earned by him during the period of the tendered employment.<sup>32</sup> The same rule of damages was

<sup>28</sup> Kennon v. Western Union Tel. Co., 126 N. C. 232; s. c. 35 S. E. Rep. 468; Taliferro v. Western Union Tel. Co., 21 Ky. L. Rep. 1290; s. c. 54 S. W. Rep. 825 (no off. rep.). This obvious conclusion is disputed by a case in North Carolina: Thompson v. Western Union Tel. Co., 106 N. C. 549; s. c. 11 S. E. Rep. 269; 30 Am. & Eng. Corp. Cas. 634. Compare Vol. I, § 5.

<sup>29</sup> Western Union Tel. Co. v. Short, 53 Ark. 434; s. c. 9 L. R. A. 744; 9 Rail. & Corp. L. J. 11; 14 S. W. Rep. 649.

<sup>30</sup> Sprague v. Western Union Tel. Co., 6 Daly (N. Y.) 200; s. c. affirmed on this opinion, 67 N. Y. 590.

<sup>31</sup> Western Union Tel. Co. v. Longwill, 5 Gild. (N. M.) 308; s. c. 21 Pac. Rep. 339.

<sup>32</sup> Western Union Tel. Co. v. Valentine, 18 Ill. App. 57. But where, in consequence of such a default of the telegraph company, the plaintiff lost merely the *chance to work* by the day for a period of time not stipulated, it was held that he could recover nominal damages only: Mer-



applied *under a statute* making telegraph companies liable for special damages resulting from their negligence in delivering dispatches,<sup>33</sup> where, by reason of the failure to deliver a message, the addressee lost a stated employment as a steamboat pilot, although the sender did not act as his agent in sending it, and although there was no privity of contract between him and the telegraph company.<sup>34</sup> Where a telegram directs the *attachment of property* of a debtor, and, by reason of its non-delivery, the plaintiff loses the opportunity to save his debt by attachment, he may recover of the telegraph company the *amount of his debt* with interest, provided the company was apprised of the nature of the dispatch, either by its language<sup>35</sup> or otherwise;<sup>36</sup> and in such a case it seems that he is not bound to exhaust his *remedy at law* against his debtor, by the recovery of a judgment and an execution returned *nulla bona*, before bringing his action against the telegraph company.<sup>37</sup> Where a banker made an assignment, and his assignee telegraphed the fact to the cashier of a branch house, but the telegraph operator at the point of delivery *fraudulently withheld the message* until such time as he and others could draw their money out of the branch bank,—it was held that the company was liable in an action by the assignee for the sums so withdrawn, but not for any withdrawn after the delivery of the message.<sup>38</sup>

§ 2461. **Loss of Profits where Message Orders or Prohibits Affirmative Action.**<sup>39</sup>—The general doctrine of the courts is that where a message is delivered to a telegraph company for transmission, which, on its face, orders affirmative action by the addressee,—as where it orders a purchase or sale of property,—and it is not correctly delivered, or is not delivered at all, or not delivered within a reasonable time, the sender of the message, or the addressee where it is sent for his benefit,—may maintain an action for damages, and may recover

rill v. Western Union Tel. Co., 78 Me. 97.

<sup>33</sup> 1 Gav. & Hord Ind. Stat., p. 611, § 2; Burns' Rev. Stat. Ind., § 5513.

<sup>34</sup> Western Union Tel. Co. v. Fenton, 52 Ind. 1. See also Western Union Tel. Co. v. McKibben, 114 Ind. 511; s. c. 14 N. E. Rep. 894; Kemp v. Western Union Tel. Co., 28 Neb. 661; s. c. 44 N. W. Rep. 1064; Thomp. Elect., §§ 327, 328. Where the negligent failure of the company to transmit a message containing an acceptance of an offer of employment, prevented the consummation of the contract of employment, the party injured might recover the actual damages sustained:

Baldwin v. Western Union Tel. Co., 93 Ga. 692; s. c. 44 Am. St. Rep. 194; 48 Am. & Eng. Corp. Cas. 408; 21 S. E. Rep. 212.

<sup>35</sup> Parks v. Alta California Tel. Co., 13 Cal. 422; s. c. 73 Am. Dec. 589.

<sup>36</sup> Bryant v. American Tel. Co., 1 Daly (N. Y.) 575. A like rule of damages was declared and applied on similar facts in Western Union Tel. Co. v. Sheffield, 71 Tex. 570; s. c. 10 Am. St. Rep. 790; 10 S. W. Rep. 752.

<sup>37</sup> Bryant v. American Tel. Co., 1 Daly (N. Y.) 575.

<sup>38</sup> Stiles v. Western Union Tel. Co. (Ariz.), 15 Pac. Rep. 712.

<sup>39</sup> This section is cited in § 2470.



the *loss of the profits* which would have accrued to him if the message had been correctly sent, and if the transaction therein directed had been carried out.<sup>40</sup> For example, if the telegram directed the agent of the sender to *purchase cattle*, the telegraph company is liable for the loss which resulted to the sender from a permanent rise in the price of cattle pending the delay in delivering the message.<sup>41</sup> So, where a merchant had *sold goods to arrive*, and then ordered them by telegraph, and the company negligently failed to transmit the message, it was held that the sender was entitled to recover the loss of the profits which would have accrued to him in the transaction, such damages not being too remote.<sup>42</sup> Contrary to this, where a person

<sup>40</sup> *Manville v. Western Union Tel. Co.*, 37 Iowa 214; s. c. 18 Am. Rep. 8; *Western Union Tel. Co. v. Du Bois*, 128 Ill. 248; s. c. 21 N. E. Rep. 4; *Rittenhouse v. Independent Line*, 44 N. Y. 263; s. c. 4 Am. Rep. 673; affirming s. c. 1 Daly (N. Y.) 474; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; s. c. 45 Am. Rep. 480; *Washington & C. Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; s. c. 93 Am. Dec. 751 (the court distinguishes *Landberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 550); *True v. International Tel. Co.*, 60 Me. 9; s. c. 11 Am. Rep. 156 (Appleton, C. J., dissenting). See also *Mowry v. Western Union Tel. Co.*, 51 Hun (N. Y.) 126; s. c. 4 N. Y. Supp. 666; *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c. 4 South. Rep. 844; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; s. c. 26 N. E. Rep. 534; 9 Rail. & Corp. L. J. 266; 35 N. Y. St. Rep. 307; aff'g s. c. 44 Hun (N. Y.) 532; 9 N. Y. St. Rep. 132; *Brewster v. Western Union Tel. Co.*, 65 Ark. 537; s. c. 47 S. W. Rep. 560 (citing *Squire v. Western Union Tel. Co.*, 98 Mass. 232; s. c. 93 Am. Dec. 157; *True v. International Tel. Co.*, 60 Me. 9; s. c. 11 Am. Rep. 156; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 538); *Walden v. Western Union Tel. Co.*, 105 Ga. 275; s. c. 31 S. E. Rep. 172; *Western Union Tel. Co. v. Carver*, 15 Tex. Civ. App. 547; s. c. 39 S. W. Rep. 1021. Where one's agent has settled a claim for less than its face value, under apparent authority conferred by a telegram from his principal, in which such authority is conveyed through a mistake in transmitting the telegram,

the principal may recover from the company for the loss resulting therefrom, without attempting to rescind the settlement with the debtor: *Hastbrouck v. Western Union Tel. Co.*, 107 Iowa 160; s. c. 77 N. W. Rep. 1034. To the same effect, see *Reed v. Western Union Tel. Co.*, 135 Mo. 661; s. c. 37 S. W. Rep. 904. A telegraph company was held liable for the negligent alteration of a telegram, whereby the sender lost the benefit of a *conditional promise* by the agents of the beneficiaries in a deed of trust, to waive a default authorizing a sale of the land under a power, where he finally lost the land, even though the agents had no authority to make the promise; since the principal might have *rati-fied* the condition if it had been performed: *Western Union Tel. Co. v. Hearne* (Tex. Civ. App.), 40 S. W. Rep. 50 (no off. rep.). But where the telegraph company had no knowledge of an agreement that a carload of horses was to be shipped to a particular place, in the absence of instructions to the contrary, its failure to deliver a message directing the car to be shipped to a different place, did not render it liable for the damages resulting from the car being sent to the former place: *Evans v. Western Union Tel. Co.*, 102 Iowa 219; s. c. 71 N. W. Rep. 219. For other illustrations, see *Thomp. Elect.*, §§ 336, 337, 338, 339.

<sup>41</sup> *Western Union Tel. Co. v. Carver*, 15 Tex. Civ. App. 547; s. c. 39 S. W. Rep. 1021.

<sup>42</sup> *Walden v. Western Union Tel. Co.*, 105 Ga. 275; s. c. 31 S. E. Rep. 172.



sent to a firm of brokers a telegram ordering a sale of stock which he did not own, but which he intended to purchase and supply if required to do so, or else "ring out the deal" in the customary way of stock gambling,—he could not recover, as his damages, the amount of fall in the price of the stock between the day on which his telegram should have been delivered, and the day on which it actually was delivered; but his damages were limited to the price paid for sending the message.<sup>43</sup>

§ 2462. Further as to Loss of Profits where Message Orders Affirmative Action.<sup>44</sup>—Different considerations will, in different cases, enter into the assessment of damages; but always keeping within the rule that the damages must have been the direct or proximate consequence of the mistake, or other default of the company, and such as might have been reasonably anticipated by the parties to the contract as a consequence of such mistake or default. Where the mistake resulted in ordering an excessive quantity of flowers, the florist was entitled to recover the loss and expense incurred in cutting and procuring them.<sup>45</sup> Where it resulted in ordering an excessive shipment of goods, the measure of damages was held to be the cost of the freight upon the shipment to the place of destination and back, and the depreciation in value of the goods during the period covered by their shipment and reshipment.<sup>46</sup> Where it resulted in the shipment of *casks* instead of *sacks* of salt, and there was no market at the place of delivery for salt in casks, and the goods were sold at a loss, the measure of damages was the difference between the market value of the salt at the place of shipment and the market value at the place to which it was shipped, together with the cost of transportation from the former to the latter place.<sup>46a</sup> Where the message directed the purchase of a certain stock, and was erroneously transmitted so as to direct the purchase of a different stock, and the addressee, acting upon the message, purchased such stock, which, on the discovery of the error, he immediately resold, and in the meantime the stock which he was directed to purchase rose in

<sup>43</sup> *Cahn v. Western Union Tel. Co.*, 46 Fed. Rep. 40. The measure of damages for failure to deliver a telegram directing the sendee *not to purchase hogs* on a specified day, as directed by a previous telegram, but to wait until the following day, is the difference in the price of the hogs on the two days: *North Packing & Co. v. Western Union Tel. Co.*, 70 Ill. App. 275.

<sup>44</sup> This section is cited in § 2470.

<sup>45</sup> *New York & C. Tel. Co. v. Dryburg*, 35 Pa. St. 298; affirming s. c. *sub nom.* *Dryburg v. Telegraph Co.*, 3 Phila. (Pa.) 408.

<sup>46</sup> *Bowen v. Lake Erie Tel. Co.*, 1 Am. L. Reg. 685.

<sup>46a</sup> *Leonard v. New York & C. Tel. Co.*, 41 N. Y. 544; s. c. 1 Am. Rep. 446, Grover, J., dissenting.



value, the measure of the damages was the difference between the value of the latter stock at the time when the misleading dispatch was received and at the time when the error was discovered, and when he in fact made the purchase of it.<sup>47</sup> The measure of damages for failure promptly to deliver a telegram ordering the purchase of shares of stock, where the liability is not limited by special contract, is the difference between the market value of the shares when the dispatch should have been delivered and the sum paid for them in the market on receipt of the message.<sup>48</sup> Where goods ordered by telegraph are *sent to the wrong place*, in consequence of an error in repeating the dispatch, the measure of damages is not the full value of the goods at the place to which they should have been sent, but there must be a deduction for their value at the place to which they were actually sent.<sup>49</sup>

§ 2463. **Loss of Profits in Other Cases of Delays in Delivering Messages.**<sup>50</sup>—It has been held that the measure of damages against a telegraph company for failure to deliver a message regarding the state of the market at a certain point, whereby a livestock shipper is induced to send his stock to a market point more distant than that first intended, and sells at a lower price than would have been obtainable in the nearer market, is the difference in prices at the two market points, with the difference in freight added.<sup>51</sup> Where the owner of a car load of mules, by reason of the failure of a tele-

<sup>47</sup> *Rittenhouse v. Independent Line*, 44 N. Y. 263; s. c. 4 Am. Rep. 673; affirm'g s. c. 1 Daly (N. Y.) 474. Another court has held that if, through the negligence of a telegraph company, a message directing the purchase of 1,000 shares of specified stock for the sender, is so misstent as to read 100 shares, and if, in consequence of such mistake, only one hundred shares are bought, and there is a rise in the market value of such stocks, both before and after the sender received notice of the mistake, the sender can recover of the company, as damages, only the difference in the cost of nine hundred shares of the specified stock at the time the one hundred shares were purchased, and their cost at such time, after notice of the mistake, as he could, with due diligence, have secured their purchase: *Marr v. Western Union Tel. Co.*, 85 Tenn. 529.

<sup>48</sup> *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; s. c. 26 N. E. Rep. 534; 9 Rail. & Corp. L. J. 266;

32 Cent. L. J. 342; 43 Alb. L. J. 244; 35 N. Y. St. Rep. 307; aff'g s. c. 44 Hun (N. Y.) 532; 9 N. Y. St. Rep. 132.

<sup>49</sup> *Western Union Tel. Co. v. Reid*, 83 Ga. 401; s. c. 10 S. E. Rep. 919. For other instances where the damages were assessed according to the *loss of profits*, see *True v. International Tel. Co.*, 60 Me. 9; s. c. 11 Am. Rep. 156; *Manville v. Western Union Tel. Co.*, 37 Iowa 214; s. c. 18 Am. Rep. 8. See also *Mowry v. Western Union Tel. Co.*, 51 Hun (N. Y.) 126; s. c. 4 N. Y. Supp. 666; *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c. 4 South. Rep. 844. If profits would accrue on one part of the contract, and losses on the other part, the plaintiff can only recover the difference: *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c. 4 South. Rep. 844.

<sup>50</sup> This section is cited in § 2470.

<sup>51</sup> *Western Union Tel. Co. v. Collins*, 45 Kan. 88; s. c. 25 Pac. Rep. 187; 10 L. R. A. 515.



graph company seasonably to deliver a message, lost an opportunity to sell them at \$100 per head, and was forced to keep them for three months at a considerable expense, before he was able to sell them, when they brought only \$77.51 per head, he was held entitled to recover from the company the difference between the price at which he had the opportunity to sell them, and that for which he did sell them, together with the cost of keeping them in the interval.<sup>52</sup>

**§ 2464. Damages Arising from Mistakes in Quoting Prices.<sup>53</sup>—**

Where, in an apparent answer to a telegram, a letter, or other inquiry, a person delivers to a telegraph company for transmission a message quoting the market price of a certain commodity, the company may fairly and reasonably conclude that the message may induce the addressee to order a purchase of the commodity, if the price is deemed favorable. The serious damage which may flow to the person addressed from a failure to transmit the message with entire accuracy is therefore an obvious suggestion.<sup>54</sup> If, through a mistake in transmitting it, the addressee buys or sells to his loss, the telegraph company must, as a general rule, make good his loss.<sup>55</sup> The rule is the same where the message is not sent in reply to an inquiry, but where the plaintiff has an arrangement with a correspondent at a distant market to notify him, the plaintiff, by tele-

<sup>52</sup> Wallingford v. Western Union Tel. Co., 53 S. C. 410; s. c. 31 S. E. Rep. 275 (citing Western Union Tel. Co. v. James, 90 Ga. 254; s. c. 16 S. E. Rep. 83; Squire v. Western Union Tel. Co., 98 Mass. 232; s. c. 93 Am. Dec. 157; Manville v. Western Union Tel. Co., 37 Iowa 214; s. c. 18 Am. Rep. 8; True v. International Tel. Co., 60 Me. 9; s. c. 11 Am. Rep. 156). Compare Western Union Tel. Co. v. Eubank, 100 Ky. 591; s. c. 36 L. R. A. 711; 18 Ky. L. Rep. 995; 38 S. W. Rep. 1068. It has been held that failure of a telegraph company to deliver a message announcing the sale of a herd of cattle renders it liable for the cost of regathering the cattle, and for the value of such as died, as the proximate result of being turned loose and regathered, where its agent was informed that, unless the telegram was delivered at once, the herd would be turned loose: Western Union Tel. Co. v. Pruett (Tex. Civ. App.), 35 S. W. Rep. 78 (no off. rep.).

<sup>53</sup> This section is cited in §§ 2470, 2514.

<sup>54</sup> Turner v. Hawkeye Tel. Co., 41 Iowa 458; s. c. 20 Am. Rep. 605. See also Leonard v. New York & C. Tel. Co., 41 N. Y. 544. For illustrations of this principle, see Thomp. Elect., § 341; Western Union Tel. Co. v. Richman (Pa. St.), 8 Atl. Rep. 171; s. c. 6 Cent. Rep. 565; Western Union Tel. Co. v. Du Bois, 128 Ill. 248; s. c. 21 N. E. Rep. 4; Pepper v. Western Union Tel. Co., 87 Tenn. 554; s. c. 40 Alb. L. J. 45; 22 Ohio L. J. 115; 4 L. R. A. 660; 11 S. W. Rep. 783; Western Union Tel. Co. v. Landis (Pa.), 12 Atl. Rep. 467; s. c. 21 Am. & Eng. Corp. Cas. 206. See also Western Union Tel. Co. v. Harris, 17 Ill. App. 347; Western Union Tel. Co. v. Collins, 45 Kan. 88; s. c. 25 Pac. Rep. 187. Circumstances under which the company was not liable, the dispatch having been sent by a *mere volunteer*: Frazier v. Western Union Tel. Co., 84 Ala. 487; s. c. 4 South. Rep. 831.

<sup>55</sup> Western Union Tel. Co. v. Hart, 62 Ill. App. 120; Hollis v. Western Union Tel. Co., 91 Ga. 801; s. c. 18 S. E. Rep. 287.



graph in case of any change in prices. Here, if a change in prices takes place, and the correspondent telegraphs notice of it, and the message is not delivered, in consequence of which the addressee acts upon the assumption that prices continue the same, and on that assumption buys or sells, the telegraph company must make good his loss.<sup>56</sup> As elsewhere stated,<sup>57</sup> the person damaged by the incorrect transmittal of a message quoting the price of a commodity in which he deals, is bound to do what he reasonably can to prevent an expansion of his damages. If, therefore, he ships his produce to a distant market on the faith of an erroneously transmitted telegraphic quotation of the prices at such market, and, in consequence of trying to act as his own broker and sell the produce himself, gets less than the market price for the time being, the measure of damages which he is entitled to recover from the telegraph company will be the difference between the price which was quoted to him by the erroneous message, and the price which he would have obtained if he had employed a competent agent to effect the sales of his produce after its arrival.<sup>58</sup>

<sup>56</sup> *Garrett v. Western Union Tel. Co.*, 83 Iowa 257; s. c. 10 Rail. & Corp. L. J. 115; 49 N. W. Rep. 88; distinguishing *Western Union Tel. Co. v. Hall*, 124 U. S. 444; s. c. 8 Sup. Ct. Rep. 577. There is an untenable decision to the effect that a telegraph company is not liable for a mistake in transmitting a message relating to the price of a designated stock, by reason of which message the addressee is induced to sell the stock, where he gets the market value therefor, although, if the telegram had been properly transmitted he would not have sold, and although he subsequently purchased other shares at an advanced rate. The case proceeds upon the weak idea that the plaintiff was not damaged, in theory of law, because he sold his stock "at the market value," that being what to the law appears to be the exact equivalent of that which he sold,—a wild notion which would cut off every action for damages against a telegraph company where, through its mistake, its customer has been led into buying or selling shares or other property, provided that he buys or sells at its market value. The court also refused to indulge in a speculation as to what might or might not have happened if the telegram had been correctly trans-

mitted. It was sufficient, in the view of the court, that it did not induce him to buy, and that he sold the shares at their market value: *Hughes v. Western Union Tel. Co.*, 114 N. C. 70; s. c. 19 S. E. Rep. 100. Compare *Levy v. Western Union Tel. Co.*, 35 Mo. App. 170; and *Pennington v. Western Union Tel. Co.*, 67 Iowa 631; s. c. 56 Am. Rep. 637.

<sup>57</sup> Vol. I, § 201.

<sup>58</sup> *Hollis v. Western Union Tel. Co.*, 91 Ga. 801; s. c. 18 S. E. Rep. 287. But it is said that the sender of a telegram directing his broker to buy cotton on the market at a certain price, which, owing to a mistake in transmission, is understated in the message as handed to the broker, and the broker buys in the absence of knowledge of the mistake is under no obligation to recoup his loss by purchasing cotton the next day, after a rise in the market price: *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428; s. c. 25 South. Rep. 232. On the other hand, the sender of a telegram directing his brokers to purchase a certain number of bales of cotton for future delivery, could not recover from the company for an error in transmitting the telegram whereby the number of bales was increased, when he might have prevented loss by selling the excess,



§ 2465. **Damages Arising from Delay of Messages Accepting Offers of Sale.**<sup>50</sup>—The measure of damages for delay in delivering a message, accepting an offer to sell *goods* at a certain price, in consequence of which the *bargain is lost*, is the additional sum which the plaintiff, the sender of the message, would have been compelled to pay at the same place in order to obtain the same quality of similar goods.<sup>60</sup> The rule is, no doubt, the same where the telegram which is not delivered, accepts an offer for the sale of *land*,—the measure for such damages in such case being the difference between the price at which the property was offered and its actual value at the time when the telegram accepting the offer should have been delivered. Roundly stated, the measure of damages for a breach of contract by a telegraph company to transmit seasonably and correctly a message which, if duly transmitted and delivered, would have completed a contract for the sale of property of any kind, is the *profits* which the plaintiff would have acquired had the contract of sale been perfected.<sup>61</sup> So, if a proposition for a definite contract has been sent by telegraph, under the expectation that an answer will be returned, and an answer of acceptance is delivered to the telegraph company, but is not transmitted by it, the party who has delivered it to the company has an action against it for the resulting damages,—the measure being the *loss of profits* on the contract which he has failed

if he had acted promptly after receiving a telegram from the broker notifying him of the purchase: *Western Union Tel. Co. v. Harper*, 15 Tex. Civ. App. 37; s. c. 39 S. W. Rep. 599.

<sup>60</sup> This section is cited in § 2470.

<sup>61</sup> *Squire v. Western Union Tel. Co.*, 98 Mass. 232; s. c. 93 Am. Dec. 157. This case is cited and approved as to the rule of damages in *True v. International Tel. Co.*, 60 Me. 9, 26; s. c. 11 Am. Rep. 156, and also in *Leonard v. New York & C. Tel. Co.*, 41 N. Y. 544, 568; s. c. 1 Am. Rep. 446. It is commented upon approvingly, and distinguished as to the question of damages, in *Beaupré v. Pacific & C. Tel. Co.*, 21 Minn. 158; in *Graham v. Western Union Tel. Co.*, 10 Am. L. Reg. (N. S.) 329; in *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 750, and in *Kiley v. Western Union Tel. Co.*, 39 Hun (N. Y.) 158, 163. There are holdings to the effect that, *if no contract would be completed* by the telegram, which the plaintiff could enforce, he can not recover substantial damages for the negligence of the

company in the transmission of his message: *Kinghorne v. Montreal Tel. Co.*, 18 Up. Can. (Q. B.) 60; *Beaupré v. Pacific & C. Tel. Co.*, 21 Minn. 155. But see *Western Union Tel. Co. v. Hopkins*, 49 Ind. 227. But cases cited in this and the preceding sections show that this can not be affirmed as an universal principle.

<sup>61</sup> *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c. 4 South. Rep. 844. Where a sale had been made of *cattle for future delivery*, at the option of the purchaser, the purchaser sent a dispatch notifying the seller that he would take the stock in the morning of the next day, in accordance with a custom among stock-dealers to take and weigh cattle at early daylight. Owing to the failure of the telegraph company promptly to deliver the dispatch, whereby the weighing of the cattle was delayed, and their weight decreased, it was held that the company was liable to the seller for such *loss of weight*: *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; s. c. 21 Am. & Eng. Corp. Cas. 72; 15 N. E. Rep. 845; 13 West. Rep. 405.



to close through the default of the company.<sup>62</sup> But this rule has been held not to apply where the object of the sender of the message was simply to *purchase and then resell* on a rising market,—in other words, where a mere *speculation*, and not an *ordinary mercantile transaction*, was intended.<sup>63</sup> In such a case the causal connection between the default of the telegraph company and the resulting damages is deemed to be too remote and contingent: there are too many “ifs” in the way,—too many subsequent things which might or might not have happened.

§ 2466. **Further of such Damages.**—While there is more or less doubt as to the propriety, in the application of this rule, of a distinction between “*speculating*” and “*merchandising*,”—the object in both cases being to buy and then to resell at a profit, or at least to sell at a profit,—yet the best decisions of the best courts agree that the *loss of profits* on intended transactions, where the profits might or might not have been realized, according to indeterminate contingencies, is not recoverable.<sup>64</sup> The line of distinction, therefore, is that the damages recoverable for such a default of a telegraph company include the profits which the plaintiff *certainly* would have realized but for the default, but do not include *speculative* or *contingent profits* such as he might or might not have acquired, according to more or less doubtful circumstances, including his own motives and volition,<sup>65</sup>—such, for instance, as what the plaintiff would have earned by betting at a trotting race.<sup>66</sup> The word “*certainly*,” as here used, is not intended to be understood in an absolute sense, but rather as denoting a high degree of *moral probability*; and, in the view of many decisions, it might be accurate to substitute the word “*probably*” for the word “*certainly*.” But it is a sound implication from the rule under consideration that where the dispatch merely *conveys information* to the plaintiff, and is not delivered to him, damages are not recoverable by him on evidence of what he *would have done*, as a reasonable man, in order to protect himself from certain changes in the market, in case he had received the information.<sup>67</sup> In short, numerous decisions of the best courts under various states of fact have

<sup>62</sup> Western Union Tel. Co. v. Bowen, 84 Tex. 476; s. c. 19 S. W. Rep. 554.

<sup>63</sup> Western Union Tel. Co. v. Hall, 124 U. S. 444; s. c. 8 Sup. Ct. Rep. 577.

<sup>64</sup> See Thomp. Elect., § 346, where the author has discussed this at more length

<sup>65</sup> Griffin v. Colver, 16 N. Y. 489; s. c. 16 Am. Dec. 718. See the learned note on loss of profits as damages, 16 Am. Dec. 725.

<sup>66</sup> Western Union Tel. Co. v. Crall, 39 Kan. 580; s. c. 18 Pac. Rep. 719.

<sup>67</sup> Western Union Tel. Co. v. Graham, 1 Colo. 230; s. c. 9 Am. Rep. 136.



excluded from consideration, in estimating the damages recoverable in such cases, the profits which the plaintiff might or *would have made* had the dispatch been correctly and seasonably transmitted to him, and had he thereafter taken a given course of action, which he might or might not have taken, according to his motives and circumstances.<sup>68</sup> There is also judicial authority for the proposition that where, in an action against a telegraph company for a failure to transmit a message, it is sought to recover damages for losses of profits which, it is alleged, would have been made upon a contract which the message was designed to complete, it must appear that the delivery of such message to the party to whom it was directed would have *effected a valid and binding contract*.<sup>69</sup> It should be added that where the contract which the telegraphic message, if properly and seasonably transmitted and delivered, would have completed, is an *illegal contract* in the sense of being opposed to the public policy of the State or to its statute law, and hence not enforceable in its courts, it can not be made the basis of a recovery of damages against the telegraph company, based upon a loss of profits which would have accrued thereunder.<sup>70</sup>

<sup>68</sup> *Western Union Tel. Co. v. Graham*, 1 Colo. 230; s. c. 9 Am. Rep. 136; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; *Lane v. Montreal Tel. Co.*, 7 Upper Canada C. P. 23. See also *Breeze v. United States Tel. Co.*, 45 Barb. 275; s. c. affirmed 48 N. Y. 132; 8 Am. Rep. 526; *Hubbard v. Western Union Tel. Co.*, 33 Wis. 558; s. c. 14 Am. Rep. 775; *McColl v. Western Union Tel. Co.*, 44 N. Y. Super. 487; s. c. 7 Abb. N. C. 151; *Beaupre v. Pacific & C. Tel. Co.*, 21 Minn. 155; *Kinghorne v. Montreal Tel. Co.*, 18 Upper Canada Q. B. 60; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530; *Clay v. Western Union Tel. Co.*, 81 Ga. 285; s. c. 6 S. E. Rep. 813; also *Thomp. Elect.*, §§ 348, 349 and 350, where these and some other decisions are explained in detail. Compare *Williams v. Reynolds*, 18 Eng. Com. Law 493; s. c. 13 Weekly Rep. 940; *Shepard v. Milwaukee Gas-Light Co.*, 15 Wis. 318; *Richardson v. Chynoweth*, 26 Wis. 656; *Havermyer v. Cunningham*, 35 Barb. (N. Y.) 515; *Hamilton v. Ganyard*, 34 Barb. (N. Y.) 204,—cases following and applying, in various states of facts, the rule of *Hadley v. Baxendale*, 9 Exch. 341.

<sup>69</sup> *Beaupre v. Pacific & C. Tel. Co.*,

21 Minn. 155; *Kinghorne v. Montreal Tel. Co.*, 18 Upper Canada Q. B. 60. See *Thomp. Elect.*, § 352, where the facts of these cases are set out.

<sup>70</sup> *Cothran v. Western Union Tel. Co.*, 83 Ga. 25; s. c. 9 S. E. Rep. 836; 25 Am. & Eng. Corp. Cas. 533; overruling *Telegraph Co. v. Blanchard*, 68 Ga. 299. It has been held that the sender of a telegram notifying the addressee of the confirmation of a sale effected by previous telegrams, containing an offer to sell and an acceptance of the offer, can not hold the telegraph company liable for the loss of the sale, because of the negligent delay in delivering the telegram, even if the confirmation was essential to bind the addressee, where, after the telegram had been sent, he received a telegram from the addressee, asking if the latter's offer was accepted, and calling for an immediate reply, whereas none was sent for over an hour: *Western Union Tel. Co. v. Davis* (Tex. Civ. App.), 35 S. W. Rep. 189 (no off. rep.). But that the failure of a telegraph company to deliver a telegram announcing that a third person "thinks he can trade," renders it liable for the damages resulting to such person in



§ 2467. **Other Holdings on the Question of Damages.**—If the plaintiff claims damages predicated upon the loss of a job of work, and it appears that he earned something during the time the job would have lasted, he must show what he earned; since he may have earned as much or more than the amount which he would have earned under the job which he lost.<sup>71</sup> If the plaintiff sues for the loss of service of his wife, consequent upon her death through the failure to deliver a message summoning a physician, he must, of course, prove that she would not have died if the message had been promptly delivered.<sup>72</sup> Where the plaintiff claims to have been damaged by a telegraphic misquotation of prices, and he predicates his right to a recovery upon the fact that, through a mistake in transmitting a message to him, quoting prices, he neglected to buy and was obliged to buy thereafter upon a rising market,—he must, in order to recover, prove the difference between the market, as quoted in the dispatch if it had been correctly transmitted, and the market upon which he actually bought.<sup>73</sup> If the sender of a telegram presents his claim to the company for “\$50 actual damage and \$5,000 exemplary damage,” this does not estop him from recovering more than \$50 as actual damage, though he recovers nothing by way of exemplary damage.<sup>74</sup> If a mistake in transmitting a telegram has had the result of depriving the plaintiff of *title to his land*, he may maintain an action against the telegraph company, although he has not in fact been *evicted*.<sup>75</sup> It has been decided in the case about to be cited and in many others, that the plaintiff’s own assertion or estimate as to the amount of damages he has sustained, will not be sufficient to enable him to support a recovery of more than nominal damages,—or, in a case of the kind under consideration; yet if the defendant makes no objection to this

relation to the trade, although the nature of it is not specified: *Western Union Tel. Co. v. Morrison* (Tex. Civ. App.), 33 S. W. Rep. 1025 (no off. rep.).

<sup>71</sup> *Western Union Tel. Co. v. Longwill*, 5 N. M. 308; s. c. 21 Pac. Rep. 339.

<sup>72</sup> *Western Union Tel. Co. v. Kendzora*, 77 Tex. 257; s. c. 13 S. W. Rep. 986.

<sup>73</sup> *Pennington v. Western Union Tel. Co.*, 67 Iowa 631; s. c. 56 Am. Rep. 367.

<sup>74</sup> *Western Union Tel. Co. v. Morris*, 77 Tex. 173; s. c. 13 S. W. Rep. 888.

<sup>75</sup> *Western Union Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67; s. c. 26 S. W. Rep. 478. A telegraph company has been held liable in damages to a father for failure to deliver a telegram sent by him, summoning medical attendance for his sick child, where, by reason of such failure, the latter died without medical attendance, where the defendant’s agent was fully aware of the situation and the failure was not excused: *Western Union Tel. Co. v. Russell*, 12 Tex. Civ. App. 82; s. c. 33 S. W. Rep. 708.



mode of proving the damages, a verdict for substantial damages will not be set aside for that reason.<sup>76</sup>

## ARTICLE II. NOTICE OF THE NATURE AND IMPORTANCE OF THE MESSAGE.

| SECTION  | SECTION   |
|--|---|
| 2469. Notice to the telegraph company of the nature and importance of the message. | 2472. Rule in case of cipher or unintelligible messages.        |
| 2470. Notice of nature and importance conveyed by the message itself.              | 2473. What language sufficiently intelligible within this rule. |
| 2471. Further of messages which convey notice of their nature and importance.      | 2474. Ordinary commercial abbreviations permitted by this rule. |

§ 2469. Notice to the Telegraph Company of the Nature and Importance of the Message.<sup>77</sup>—The rule in *Hadley v. Bazendale*<sup>78</sup> allows the recovery of such damages as may be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. This necessarily implies that the telegraph company will not be liable for damages arising from special circumstances of which it was not apprised, or of which it had not sufficient information to put a reasonable man on inquiry. It carries with it the conclusion that, in order to charge the company with damages beyond the price paid for sending the message, it must have notice or reasonable intimation of facts sufficient to convey to it the suggestion that such damages are likely to arise as the result of its default in carrying out its undertaking.<sup>79</sup> Corporations, from their

<sup>76</sup> *Western Union Tel. Co. v. Littlejohn*, 72 Miss. 1025; s. c. 18 South. Rep. 418. It has been held that the measure of damages for failure to deliver, as written, a telegraph message *notifying a witness* of the day the case is set for trial, and delivering one in place of it, naming a day so much earlier that, upon arriving at the place of trial, he returns home to await the arrival of the true date,—is his *expenses* in going to and returning from the place of trial and the value of the time lost. Losses resulting from the stoppage of his business, such as salaries of men, cost of keeping teams, and the value of their services, and anticipated profits, can not be recovered, unless the company was notified that

such losses would follow a failure to correctly deliver the message: *Western Union Tel. Co. v. Short*, 53 Ark. 434; s. c. 14 S. W. Rep. 649.

<sup>77</sup> This section is cited in § 2500.

<sup>78</sup> 9 Exch. 341; s. c. 26 Eng. Law & Eq. 398.

<sup>79</sup> The rule has been said to be that a telegraph company is not liable for special damages which are not the only and proximate result of its failure to transmit and deliver a message, unless it is alleged and proved that it *knew*, when it received the message, that such damage might result from a failure to deliver it: *Western Union Tel. Co. v. Lively* (Tex. Civ. App.), s. c. 15 S. W. Rep. 197. In Mississippi, a telegraph company is not liable for



very nature, can act only through the agency of natural persons or of other corporations, they in turn acting through the like agencies. The general rule is that the agent of a corporation, intrusted by it with the management of its business in a given particular, is its agent to receive notice from its customers in respect of everything connected with his department of its business; and that notice to the agent in respect of such matters is notice to the corporation.<sup>80</sup> Under the operation of this principle, the agent of a telegraph company, appointed to receive and transmit messages for its customers, is its agent for the purpose of receiving notice of any special facts attaching importance to particular messages and conveying suggestions of damages which will happen to the customer from the failure correctly and seasonably to transmit and deliver them. It is also a principle, though not uniformly recognized and applied,<sup>81</sup> that knowledge in the breast of an agent upon which it is his duty to act in the discharge of his duty to his principal, is the knowledge of the principal; in other words, that the possession of such knowledge by the agent affects the principal with notice of the fact thus known to exist. In view of these principles, it may be concluded that a telegraph company will be affected with notice of circumstances attaching peculiar importance to a message delivered to it for transmittal, or of circumstances tending to the conclusion that special or peculiar damages will accrue to the owner or to the addressee through its default in its undertaking to transmit and deliver it seasonably, through either one of the three following circumstances: 1. Where the language of the message is of itself sufficient to apprise its agent of its nature and importance and of the damages likely to flow from the failure seasonably to transmit and deliver it.<sup>82</sup> 2. Where, although the message may not contain on its face a suggestion of such facts, the sender personally notifies the agent of the company of them.<sup>83</sup> 3.

the amount of *attorney's fees* which would have been earned but for its failure to forward and deliver a message, in the absence of information to it, in the message or otherwise, that such loss would probably result: *Western Union Tel. Co. v. Clifton*, 68 Miss. 307; s. c. 8 South. Rep. 746. In Missouri, it has been held that damages from the loss of a sale because of the non-consent of a lienor can not be recovered for failure to deliver a telegram to such lienor reading: "If possible, come to S. in the morning," where no information was given the company, other than that disclosed by the message itself, of its importance or

purpose: *Melson v. Western Union Tel. Co.*, 72 Mo. App. 111.

<sup>80</sup> 4 *Thomp. Corp.*, § 5191, *et seq.*

<sup>81</sup> See 4 *Thomp. Corp.*, § 5196, *et seq.*

<sup>82</sup> *Post*, § 2470; *Western Union Tel. Co. v. Wofford* (Tex. Civ. App.), 42 S. W. Rep. 119 (no off. rep.).

<sup>83</sup> *Ward v. Western Union Tel. Co.* (Tex. Civ. App.), 51 S. W. Rep. 259; *Western Union Tel. Co. v. Edsall*, 74 Tex. 329; s. c. 12 S. W. Rep. 41; *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.) 200; *Mackay v. Western Union Tel. Co.*, 16 Nev. 222, 228. Compare *Hart v. Direct &c. Tel. Co.*, 86 N. Y. 633 (message an unintelligible jargon, not conveying notice



Where the agent of the company has knowledge of such facts, otherwise acquired, and especially if he has acquired such knowledge in the course of his agency, as through other messages between the same parties which have passed through his hands.<sup>84</sup> It must be constantly borne in mind that the rule under consideration does not require that the company should be informed of details and circumstances, but is satisfied where the information conveyed to it is sufficient to put it upon inquiry.<sup>85</sup> Under this rule it is held that such a company is chargeable with notice of the meaning and importance of a message, where, from previous transactions, or its habit of sending messages couched in similar language, it might by reasonable diligence have understood it.<sup>86</sup> A reasonable deduction from the rule is that *general information*, disclosed by the language of the message, of the subject to which it relates, is sufficient to charge the company with liability for actual damages; and that it is not necessary that the company should be able to foresee the exact amount of pecuniary loss which its negligence would be likely to cause. When, therefore, enough appears in the message to show that it is a commercial or business transaction, it is sufficient to charge the company with the damages resulting from its negligent transmission, although the operator may not be able to understand its meaning as to quantity, quality, price, etc., as the sender and the party to whom it is sent understand it.<sup>87</sup>

of anything). When notice of the main fact is given, the company is charged with notice of every incidental fact which can be ascertained by the minutest inquiry: *Western Union Tel. Co. v. Edsall*, 74 Tex. 329.

<sup>84</sup> *Erie Tel. & Co. v. Grimes*, 82 Tex. 89; s. c. 17 S. W. Rep. 831; *Postal Telegraph Cable Co. v. Lathrop*, 131 Ill. 575; s. c. 7 L. R. A. 474; 30 Cent. L. J. 412; 23 N. E. Rep. 583.

<sup>85</sup> *Western Union Tel. Co. v. Edsall*, 74 Tex. 329; s. c. 12 S. W. Rep. 41; *Rittenhouse v. Independent Line*, 44 N. Y. 263; s. c. 4 Am. Rep. 673; affirming s. c. 1 Daly (N. Y.) 474.

<sup>86</sup> *Postal Telegraph Cable Co. v. Lathrop*, 131 Ill. 575; s. c. 23 N. E. Rep. 583; 7 L. R. A. 474; 30 Cent. L. J. 12.

<sup>87</sup> *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; s. c. 10 Am. St. Rep. 790. So, damages sought to be recovered from a telegraph company for the *death of a valuable horse*, alleged to have been due to the defendant's delay in the delivery of a message, are within the contemplation of the contract and not too re-

mote, where both the receiving and sending parties knew, from the nature of the dispatch, that promptness was required: *Hendershott v. Western Union Tel. Co.*, 106 Iowa 529; s. c. 76 N. W. Rep. 828. But it is held that a telegraph company is not liable for failure to deliver, or for delay in delivering, a message announcing that the *step-father* of the addressee is dying, unless it was notified of the tender and affectionate relation existing between them: *Western Union Tel. Co. v. Garrett* (Tex. Civ. App.), 34 S. W. Rep. 649 (no off. rep.). Nor for failing to send promptly a message, announcing the death of addressee's *brother-in-law*, unless it had similar notice: *Western Union Tel. Co. v. Coffin*, 88 Tex. 94; s. c. 30 S. W. Rep. 896. Nor will delay in delivery, caused by a mistake in changing a day message into a night message, entitle the sender to recover resulting damages, unless the company had notice of the matter to which it related, the message being in cipher: *Houston & Co. Tel. Co. v. Davidson*, 15 Tex. Civ. App. 334; s. c. 39 S. W. Rep. 605.



§ 2470. **Notice of Nature and Importance Conveyed by the Message Itself.**<sup>88</sup>—The cases where the telegraph company is affected with notice of the nature and importance of the matter to which the message relates, and of the damages likely to flow from its default in transmitting and delivering it, are generally those of messages conveying information as to the state of the market;<sup>89</sup> making other inquiries as to matters of obvious importance, calling for information on which, it is to be assumed, the sender of the message intends to act or to refrain from acting;<sup>90</sup> containing definite proposals for contracts, or acceptances of such proposals;<sup>91</sup> containing specific directions to agents about matters of obvious importance;<sup>92</sup> and conveying information of the sickness or death of persons who are presumed to be near relatives;—in all of which cases the dispatch must, of course, be couched in intelligible language, and *must not be in cipher*. Numerous illustrations of these different classes of cases have already been given, leaving for special consideration only those messages which relate to sickness or death; and the importance of this last class of cases lies in a rule of damage now adopted by a few of the American courts, under which there may be a recovery against a telegraph company for its default in transmitting and delivering a message conveying information of the last illness or the death of a near relative, on the ground of *injury to the feelings*, either of the sender or the addressee, in consequence of having been prevented from attending the last hours of the deceased, or being present at the funeral.<sup>93</sup> In Texas, where this rule of damages was first applied, the doctrine now is that in such a case a telegraph company is chargeable with notice of *any relationship* existing between the parties named in a telegram conveying information of sickness or death, without the fact of

<sup>88</sup> This section is cited in § 2469.

<sup>89</sup> *Ante*, §§ 2463, 2464.

<sup>90</sup> Under this head it has been held that a telegram relating to a contemplated sale of cattle, as follows: "How many beeves and bulls have you? Don't go away; will get them off. Answer,"—advises the operator, on its face, that it relates to a matter of business, in which loss will probably result if the message is not promptly delivered, it being unnecessary to acquaint him with the terms of the contract and the parties thereto: *Western Union Tel. Co. v. Williford*, 2 Tex. Civ. App. 574; s. c. 22 S. W. Rep. 244. To the same effect, see *Western Union Tel. Co. v. Carver*, 15 Tex. Civ. App. 547; s. c. 39 S. W. Rep. 1021.

<sup>91</sup> *Ante*, § 2465. See also *Postal Tel. Co. v. Lathrop*, 33 Ill. App. 400; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; *Western Union Tel. Co. v. Harris*, 19 Ill. App. 347; *Rittenhouse v. Independent Line*, 44 N. Y. 263.

<sup>92</sup> *Ante*, §§ 2461, 2462.

<sup>93</sup> *Post*, § 2476, *et seq.*; *Western Union Tel. Co. v. Waller* (Tex. Civ. App.), 47 S. W. Rep. 396; s. c. 1 J. A. 41; *Western Union Tel. Co. v. Wilson* (Tex. Civ. App.), 51 S. W. Rep. 521; *Western Union Tel. Co. v. Edmondson*, 91 Tex. 206; *Western Union Tel. Co. v. Carter*, 85 Tex. 580; *Loper v. Western Union Tel. Co.*, 70 Tex. 690.



that relationship being explained. The reasonable conclusion is that the company is bound to infer that they are near relatives from the subject matter of the message and the usual brevity employed in messages sent by telegraph.<sup>94</sup> In North Carolina, a married woman may recover damages for *mental anguish* caused by the non-delivery of a telegram relating to the *burial of her child*, although her name was not signed to the message, or the company notified that it was sent by her direction or for her benefit.<sup>95</sup>

"Western Union Tel. Co. v. Carter, 85 Tex. 580; s. c. 22 S. W. Rep. 961; rev'g s. c. 20 S. W. Rep. 834 (overruling Western Union Tel. Co. v. Brown, 71 Tex. 723); Western Union Tel. Co. v. Sweetman, 19 Tex. Civ. App. 435; s. c. 47 S. W. Rep. 676; 1 J. A. 55; Davis v. Western Union Tel. Co., 21 Ky. L. Rep. 1251; s. c. 54 S. W. Rep. 849; Western Union Tel. Co. v. Coffin, 88 Tex. 94; Western Union Tel. Co. v. Carter, 88 Tex. 580; Western Union Tel. Co. v. Linn, 87 Tex. 7; Western Union Tel. Co. v. Adams, 75 Tex. 531; Western Union Tel. Co. v. Feegles, 75 Tex. 537; Western Union Tel. Co. v. Moore, 76 Tex. 66; Potts v. Western Union Tel. Co., 82 Tex. 545; Western Union Tel. Co. v. Jones, 81 Tex. 271; Western Union Tel. Co. v. McLeod (Tex. Civ. App.), 22 S. W. Rep. 988. Thus, a message announcing the death or the serious illness of a person named therein, charges the telegraph company with notice that such person is, in all probability, a near relative of the addressee. If it announces a death, it charges the company with notice of the fact that, in all probability, the addressee would, if he should receive it, set out at once to attend the funeral, or to care for the remains. If the word "answer" is added to the message it is notice to the company that the probable purpose is to enable the sender to learn whether the message has been delivered, and whether the addressee will be able to arrive in time to attend the funeral or to direct it: Western Union Tel. Co. v. Carter, 88 Tex. 580. Under this rule, it was held that the following messages were sufficient to impart notice to the company of their nature and importance: "Grace is very low. Can

you come and bring Maud?" Western Union Tel. Co. v. Linn, 87 Tex. 7; s. c. 26 S. W. Rep. 490; aff'g s. c. 23 S. W. Rep. 895. So of a message addressed to physicians, "Come to my place at once:" Western Union Tel. Co. v. Russell, 12 Tex. Civ. App. 82; s. c. 31 S. W. Rep. 698. Similarly, see Western Union Tel. Co. v. Porter (Tex. Civ. App.), 26 S. W. Rep. 866. It was so held of a message stating that a person named was dangerously ill and that recovery was doubtful: Western Union Tel. Co. v. Eskridge, 7 Ind. App. 208; s. c. 33 N. E. Rep. 238; Reese v. Western Union Tel. Co., 123 Ind. 294, 300. But a telegram reading "Your Pa wants Hodge. Get here as soon as possible," signed by another than the one from whom it was sent, was held too indefinite to apprise the telegraph company that it was intended to convey information of the illness of a near relative, and a desire that the addressee should bring a certain physician: Western Union Tel. Co. v. Fore (Tex. Civ. App.), s. c. 26 S. W. Rep. 783.

"<sup>95</sup>Laudie v. Western Union Tel. Co., 124 N. C. 528; s. c. 32 S. E. Rep. 886. In the same State damages for mental anguish caused by negligent failure to deliver promptly a telegram stating that a *person has been killed*, may be recovered, although the message is sent by an agent without disclosing who sent it, or the relations of the sender with the addressee: Cashion v. Western Union Tel. Co., 124 N. C. 459; s. c. 45 L. R. A. 160; 32 S. E. Rep. 746 (citing Reese v. Western Union Tel. Co., 123 Ind. 294; s. c. 7 L. R. A. 583; distinguishing Hadley v. Baxendale, 9 Exch. 341).



§ 2471. **Further of Messages which Convey Notice of their Nature and Importance.**—Nor is it at all necessary to the operation of this rule that the telegraph company should be notified, by the contents of the message or otherwise, *what particular action* is expected in regard to its subject matter.<sup>96</sup> Without regard to the subject of the message, in no case is it necessary that the company should have *notice of details and particulars*. It is sufficient that it is apprised of the general nature and importance of the message, to enable it to understand in a general way the damages which may ensue from a failure to deliver it promptly and correctly. In other words, it is sufficient that it be *put upon inquiry*, so that it can have the details if it sees fit to ask for them;<sup>97</sup> or, at least, that the language of the message fairly apprises the company of the consequences likely to ensue from its non-delivery.<sup>98</sup> On the other hand, the operation of the rule is such that

<sup>96</sup> *Western Union Tel. Co. v. Ward* (Tex. Civ. App.), 19 S. W. Rep. 898; *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 409; s. c. 25 S. W. Rep. 1038; affirming on rehearing 6 Tex. Civ. App. 403; s. c. 25 S. W. Rep. 168.

<sup>97</sup> When, therefore, the plaintiff, a contractor, having a contract for the erection of a building, informed the defendant's telegraph operator, at the plaintiff's place of business, that he was going to Chicago to buy materials, and that he would telegraph back to his brother as to sending him specifications; and the plaintiff went to Chicago for the purpose stated, and on his way thither did telegraph back to his brother for specifications; but, in consequence of a long delay in delivering the message, the specifications were not sent; by reason of which the plaintiff was obliged to buy the materials on a higher market,—it was held that he might recover damages from the defendant; that, on the question of damages, evidence of contracts made by him in Chicago, with details of prices, etc., showing the rise in prices to which he had been subjected, was relevant. But it was also held that it was incumbent upon him to show that he had sustained damage within such time as, by the use of reasonable diligence and notwithstanding the defendant's default, he could have had the plans and specifications forwarded to him: *Gulf & Co. v. Loonie*, 82 Tex. 323; s. c. 18 S. W. Rep. 221.

<sup>98</sup> *Evans v. Western Union Tel. Co.*,

102 Iowa 219; s. c. 71 N. W. Rep. 219. Thus, a telegram announcing the birth of a child to the daughter of the addressee and urging the latter to "come at once," shows upon its face the necessity for prompt delivery: *Western Union Tel. Co. v. Lavender* (Tex. Civ. App.), 40 S. W. Rep. 1035 (no off. rep.). So held in the case of a telegram, "Come at once, bring father to secure my bond," even though it does not state expressly that the sender is in jail: *Western Union Tel. Co. v. Gossett*, 15 Tex. Civ. App. 52; s. c. 38 S. W. Rep. 536. There was a similar holding as to a telegram reading, "Have work; come at once." *Western Union Tel. Co. v. Hines*, 96 Ga. 688; s. c. 23 S. E. Rep. 845. And so with a message reading, "One dollar fifty, freight thirteen cents. Answer quick." *Dixon v. Western Union Tel. Co.*, 3 App. Div. 60; s. c. 38 N. Y. Supp. 1056. Where a telegram stated that the person signing it would give a stated price for cattle and directed the addressee to get all he could, this was notice to the company that it referred to a business transaction and required prompt delivery: *Western Union Tel. Co. v. Carver*, 15 Tex. Civ. App. 547; s. c. 39 S. W. Rep. 1021. But a telegram stating that a certain person is very sick, and directing the addressee to come home at once, did not charge the telegraph company with notice that the sender, who was the wife of the sick man, sent the message to summon the addressee, who was her daughter, to attend her in her dis-



the telegraph company is not bound to anticipate that its default will result in *improbable, contingent, or remote damages*: illustrating the rule, elsewhere stated, that *proximate cause* is *probable cause*, and that *remote cause* is *improbable cause*.<sup>99</sup>

§ 2472. **Rule in Case of Cipher or Unintelligible Messages.**—The weight of authority, and especially the decisions in England and the commercial States of the American Union, is to the effect that, where a message is delivered to a telegraph company in cipher, or in language which is not sufficient to disclose its import to the agent of the company who receives it for transmission, and who is not otherwise advised of its import, or of any special circumstances which will entail loss in case it is not correctly and seasonably delivered, the company will be liable, in case of default in transmitting and delivering it promptly and correctly, to pay *nominal damages* only, or, at most, *the sum paid by the sender for the service*.<sup>100</sup> On the con-

tress, so as to make the company liable for *mental anguish* caused by a delay in the delivery of the message: *Western Union Tel. Co. v. Luck*, 91 Tex. 178; s. c. 41 S. W. Rep. 496; rev'g 40 S. W. Rep. 753.

<sup>99</sup> Vol. I, § 50. This is also well illustrated by a case where a telegram was sent to a merchant, stating that his clerk had gone to a certain place to recover a gold watch given a man by mistake, and that the store was closed. No further facts or suspicions were communicated to the receiving agent of the company. It was held that this was not sufficient to suggest to the company that, through its failure to transmit and deliver the dispatch promptly, damages might accrue to the addressee, through the absconding of the clerk named therein with goods stolen from the store of the addressee. Such damages were not deemed to have been within the contemplation of the parties under the rule of *Hadley v. Baxendale*, already considered: *Western Union Tel. Co. v. Cornwell*, 2 Colo. App. 491; s. c. 31 Pac. Rep. 393; 32 Am. L. Reg. 542.

<sup>100</sup> *Western Union Tel. Co. v. Martin*, 9 Ill. App. 587; *Beaupre v. Pacific & C. Tel. Co.*, 21 Minn. 155; *Mackay v. Western Union Tel. Co.*, 16 Nev. 222; *Daniel v. Western Union Tel. Co.*, 61 Tex. 452; s. c. 48 Am. Rep. 305; *Candee v. Western Union*

*Tel. Co.*, 34 Wis. 471; s. c. 17 Am. Rep. 452; *Cannon v. Western Union Tel. Co.*, 100 N. C. 300; s. c. 6 Am. St. Rep. 590; *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554; *Baldwin v. Western Union Tel. Co.*, 45 N. Y. 744; reversing s. c. 54 Barb. (N. Y.) 505; 6 Abb. Pr. (N. S.) 405; 1 Lans. (N. Y.) 125; *Belun v. Western Union Tel. Co.*, 7 Reporter 710; s. c. 8 Cent. L. J. 445; 11 Ch. Leg. N. 276; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530; *Kinghorne v. Montreal Tel. Co.*, 18 Up. Can. Q. B. 60; *Shields v. Washington Tel. Co.*, 9 West. L. J. 5 (*nisi prius* case); *United States Tel. Co. v. Gildersleve*, 29 Md. 232; s. c. 96 Am. Dec. 519; *Horne v. Midland R. Co.*, L. R. 7 C. P. 583 (commented on in *Wood's Mayne on Damages*, § 34); *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217; s. c. 13 S. W. Rep. 70; *McColl v. Western Union Tel. Co.*, 7 Abb. N. Cas. (N. Y.) 151; *Behm v. Western Union Tel. Co.*, 8 Biss. (U. S.) 131; *Houston & C. Tel. Co. v. Davidson*, 15 Tex. Civ. App. 334; s. c. 39 S. W. Rep. 605. Cases illustrating this rule are set out and explained at length in *Thomp. Elect.*, §§ 361, 362, 363. In *Sanders v. Stuart*, 1 C. P. Div. 326; s. c. *sub nom. Saunders v. Stewart*, 35 L. T. (N. S.) 370, it was held that the rule did not apply to a mere collector of messages.



trary, there is a limited class of American cases which hold that a telegraph company is liable in damages for the non-delivery or for *unreasonable delay* in the delivery, of a cipher dispatch, and that the recovery in such a case is not limited to nominal damages, or to the mere sum paid for the transmission of the message, although the company did not otherwise have knowledge of the special circumstances making the message important.<sup>101</sup> It must be borne in mind that the rule first stated is applicable to unintelligible messages of every kind, and is not merely confined to what are called cipher dispatches. It was applied where the message read, "Sell fifty gold;"<sup>102</sup> where it read, "Do accept your offer; ship to-morrow fifteen or twenty hundred;"<sup>103</sup> where it read, "Get ten thousand dollars of the Mail Company."<sup>104</sup> A stipulation in a message blank which exonerates the company from liability for errors in transmitting cipher dispatches unless they are repeated, is reasonable and valid.<sup>105</sup> Whether a stipulation exonerating the company from liability for errors in transmitting such a message, without reference to its being repeated, would be upheld, is more doubtful.<sup>106</sup>

<sup>101</sup> *Western Union Tel. Co. v. Fatman*, 73 Ga. 285; s. c. 54 Am. Rep. 877; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; s. c. 46 Am. Rep. 715 (Lewis, P., dissenting); *Daughtery v. American Union Tel. Co.*, 75 Ala. 168; s. c. 51 Am. Rep. 435; *Western Union Tel. Co. v. Way*, 83 Ala. 542 (Somerville, J., dissenting); *Western Union Tel. Co. v. Hyer*, 22 Fla. 637; s. c. 1 Am. St. Rep. 222; 1 South. Rep. 129 (Raney, J., dissenting); *Rittenhouse v. Independent Line*, 1 Daly (N. Y.) 474 (*semble*); *Bowen v. Lake Erie Tel. Co.*, 1 Am. L. Reg. 685 (*nisi prius* case); *American Union Tel. Co. v. Daughtery*, 89 Ala. 191; s. c. *sub nom.* *American Union Tel. Co. v. Daughtery* (Ala.), 7 South. Rep. 660 (Somerville, J., dissenting); *Strasburger v. Western Union Tel. Co.* (cited Sedgw. Dam., 6th ed., p. 441, note). See *McColl v. Western Union Tel. Co.*, 7 Abb. N. Cas. (N. Y.) 151, 154, and note. Measure of damages under this rule where cipher dispatch directs the *sale of goods*: *Daughtery v. American Union Tel. Co.*, 75 Ala. 168; s. c. 51 Am. Rep. 435. Immaterial what cipher is used, if in the English alphabet: *Western Union Tel. Co. v. Hyer*, 22 Fla. 637.

<sup>102</sup> *United States Tel. Co. v. Gildersleeve*, 29 Md. 232; s. c. 96 Am. Dec.

519, 527. This case was not well decided.

<sup>103</sup> *Kinghorne v. Montreal Tel. Co.*, 18 Up. Can. Q. B. 60. American courts would probably hold that this language was sufficiently specific.

<sup>104</sup> *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530.

<sup>105</sup> *Cannon v. Western Union Tel. Co.*, 100 N. C. 311; s. c. 6 Am. St. Rep. 590 (in the absence of *gross* and *inexcusable* negligence of the company). But this distinction as to degrees of negligence was abandoned by the same court in *Brown v. Western Union Tel. Co.*, 111 N. C. 187.

<sup>106</sup> See note to *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 742; *Thomp. Elect.*, § 370. - That *exemplary damages* can not be recovered for the non-delivery of a cipher dispatch in the absence of evidence of *negligence*, *wanton* or *willful*, or so gross as to evince an entire want of care and disregard of its public duties,—see *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c. 4 South. Rep. 844. That *parol evidence* is admissible, in an action for the non-delivery of an unintelligible message, to explain, for the purposes of the issue, the meaning of the words employed therein,—see *Western Union Tel. Co. v. Collins*, 45 Kan. 88; s. c. 25 Pac. Rep. 187.



§ 2473. **What Language Sufficiently Intelligible within this Rule.**—On the other hand, the following language has been held *sufficient* for the purpose of this rule:—"Sell one hundred Western Union, answer price;"<sup>107</sup> "Will you give one fifty for twenty-five hundred;"<sup>108</sup> "Please buy in addition two thousand August one thousand cheapest month;"<sup>109</sup> "You had better come and attend to your claim at once;"<sup>110</sup> "Buy fifty North-Western, fifty Prairie du Chien; limit forty-five."<sup>111</sup>

§ 2474. **Ordinary Commercial Abbreviations Permitted by this Rule.**—It must be borne in mind that the mere fact that ordinary commercial abbreviations are used in telegraphic messages, such as are presumptively understood by the agents of the company, do not bring them within the category of cipher or unintelligible dispatches, within the meaning of the rule under consideration.<sup>112</sup>

### ARTICLE III. DAMAGES FOR INJURIES TO THE FEELINGS.

#### SECTION

2476. Damages for injury to the feelings alone.  
2477. Reasons in support of this rule of damage.  
2478. Cases denying or qualifying this rule.  
2479. Doctrine that such damages are not recoverable unless accompanied with physical injury.

#### SECTION

2480. Doctrine that such damages not recoverable unless accompanied with some other actual damage.  
2481. Disclosure of the relationship of the parties not necessary to such damages.  
2482. When addressee may recover damages for injury to the feelings.

<sup>107</sup> Tyler v. Western Union Tel. Co., 60 Ill. 434; s. c. 14 Am. Rep. 38.

<sup>108</sup> Western Union Tel. Co. v. Griswold, 37 Ohio St. 301; s. c. 41 Am. Rep. 500.

<sup>109</sup> Postal Telegraph Cable Co. v. Lathrop, 131 Ill. 575; s. c. 7 L. R. A. 474; 30 Cent. L. J. 112; 23 N. E. Rep. 583 (sufficiently explicit to charge the telegraph company for a loss resulting from an inexcusable mistake in transmitting it).

<sup>110</sup> Western Union Tel. Co. v. Sheffield, 71 Tex. 570; s. c. 10 Am. St. Rep. 790.

<sup>111</sup> United States Tel. Co. v. Wenger, 55 Pa. St. 262; s. c. 93 Am. Dec. 751.

<sup>112</sup> Pepper v. Western Union Tel. Co., 87 Tenn. 554; s. c. 10 Am. St.

Rep. 699; 11 S. W. Rep. 783; 40 Alb. L. J. 45; 22 Week. L. Bul. 115; 4 L. R. A. 660; 25 Am. & Eng. Corp. Cas. 542. In this case a produce dealer, in response to an inquiry for prices, telegraphed, "Car cribs six sixty c. a. f. prompt." The word "cribs" meant in the meat trade clear ribs, and "c. a. f." meant cost and freight. These terms were well understood by the trade and by the telegraph company. The dispatch as delivered by the company read "thirty" instead of "sixty." In consequence of the mistake the dealer lost \$75 on a sale. It was held, that the telegraph company must bear the loss, and that it could not contend that the dispatch was a cipher dispatch.



## SECTION

2483. Elements of damage in cases where the feelings are hurt.

2484. Quantum of damages for injuries to the feelings.

## SECTION

2485. Exemplary damages against telegraph companies.

§ 2476. **Damages for Injury to the Feelings Alone.**<sup>113</sup>—Several courts have recently taken the view that damages may be given, in an action against a telegraph company, for the failure to transmit and deliver a message, where the only element of damage consists in *injury to the feelings*, and where there is *no element of physical suffering or pecuniary loss*.<sup>114</sup> The cases in which such damages have been given have generally been cases where the message advised the addressee of the *sickness or death of a near relative*, and where, through the failure of the company seasonably to deliver the message the addressee was prevented from being present at the *funeral*.<sup>115</sup>

<sup>113</sup> This section is cited in §§ 2470, 2492, 2497.

<sup>114</sup> *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; reaffirmed in *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c. 10 Am. St. Rep. 772; 9 S. W. Rep. 598; 1 L. R. A. 728; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; s. c. 10 S. W. Rep. 734; *Western Union Tel. Co. v. Simpson*, 73 Tex. 423; s. c. 11 S. W. Rep. 385; *Western Union Tel. Co. v. Adams*, 75 Tex. 531; s. c. 6 L. R. A. 844; 12 S. W. Rep. 857; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; s. c. 6 Am. St. Rep. 864; 8 S. W. Rep. 574; *Reese v. Western Union Tel. Co.*, 123 Ind. 294; s. c. 24 N. E. Rep. 163; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c. 7 South. Rep. 419; *Thompson v. Western Union Tel. Co.*, 106 N. C. 549; s. c. 11 S. E. Rep. 269; *Chapman v. Western Union Tel. Co.*, 90 Ky. 265; s. c. 12 Ky. L. Rep. 265; 13 S. W. Rep. 880; *Young v. Western Union Tel. Co.*, 107 N. C. 370; s. c. 11 S. E. Rep. 1044; 9 L. R. A. 669; 42 Alb. L. J. 518; *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; s. c. 12 S. E. Rep. 427; *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406; s. c. 16 S. W. Rep. 25; *Western Union Tel. Co. v. Briscoe*, 18 Ind. App. 22; s. c. 47 N. E. Rep. 473; *Cashion v. Western Union Tel. Co.*, 123 N. C. 267; s. c. 31 S. E. Rep. 493; *Logan v. Western Union Tel. Co.*, 84 Ill. 468 (at least

nominal damages, including the cost of the message); *So Relle v. Western Union Tel. Co.*, 55 Tex. 308; s. c. 40 Am. Rep. 805; *Reese v. Western Union Tel. Co.*, 123 Ind. 294; s. c. 7 L. R. A. 583; *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752; s. c. 28 L. R. A. 72; *Lyne v. Western Union Tel. Co.*, 123 N. C. 129; s. c. 5 Am. Neg. Rep. 85; 31 S. E. Rep. 350; *Western Union Tel. Co. v. Erwin*, (Tex.), 19 S. W. Rep. 1002; *Western Union Tel. Co. v. Beringer*, 84 Tex. 38; s. c. 19 S. W. Rep. 336; *Western Union Tel. Co. v. Nations*, 82 Tex. 539; s. c. 18 S. W. Rep. 790; *Gulf & C. Tel. Co. v. Richardson*, 79 Tex. 649; s. c. 15 S. W. Rep. 639; *Western Union Tel. Co. v. Teague* (Tex. Civ. App.), 36 S. W. Rep. 301 (no off. rep.); *Western Union Tel. Co. v. Warren* (Tex. Civ. App.), 36 S. W. Rep. 314 (no off. rep.).

<sup>115</sup> Cases illustrating this rule of damages are given in *Thomp. Elect.*, §§ 380, 383. See also *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 409; s. c. 25 S. W. Rep. 1036; affirming on rehearing 6 Tex. Civ. App. 403; 25 S. W. Rep. 168; *Western Union Tel. Co. v. Wisdom*, 85 Tex. 261; s. c. 20 S. W. Rep. 56; *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406; s. c. 16 S. W. Rep. 25; *Western Union Tel. Co. v. Van Cleave* (Ky.), 54 S. W. Rep. 827. In Kentucky, *mental anguish alone* will furnish a ground of recovery for delay in delivering a message to a father announcing the sickness of



§ 2477. **Reasons in Support of this Rule of Damage.**—The reasons adduced in support of the propriety of this rule of damage are, briefly: 1. That, by the terms of the message the company is advised, in a general way, of its importance to the addressee and of the consequences which may inure to him from its failure promptly to transmit and deliver it, so as to bring the case within the rule of *Hadley v. Baxendale*, already considered.<sup>116</sup> 2. That the principles of the common law award damages predicated upon an injury to the feelings in other cases, such as an assault and battery, the unlawful expulsion of a passenger from the vehicle of a common carrier, the seduction of a daughter, etc.,—thus proving that there is no principle in the law that injury to the feelings can not be admeasured by a pecuniary standard. 3. That a rule which denies the recovery of damages predicated on injury to the feelings in the case of the default of a telegraph company in the discharge of its public duties, and which at the same time renders it liable where pecuniary loss has directly or proximately resulted from such a default, places mere business communications above those relating to the most intimate and the most sacred relations of life and touching the deepest and tenderest feelings of the human heart. It is justly argued that, under the rule which denies such damages and makes the company liable merely for the fee which has been paid for the duty which it has assumed in receiving the message, it may prefer commercial messages to messages announcing the sickness or death of near relatives, throw the latter into the waste basket, and, when a demand is made for reclamation, merely hand back the fee which it has received for sending the message; in other words, that the practical effect of the rule is that the company receives this class of messages subject to its mere right of rescission of its undertaking to transmit them; and that it may refuse to transmit them in any case where its wires are bur-

his child: *Western Union Tel. Co. v. Fisher*, 21 Ky. L. Rep. 1293; s. c. 54 S. W. Rep. 830. Applying the doctrine of the text, it has been held that a recovery may be had for *mental anguish*, caused by a delay of three days in delivering a message announcing to the addressee that his brother in a distant State was insane and requesting his presence: *Western Union Tel. Co. v. McIlvoy*, 21 Ky. L. Rep. 1393; s. c. 55 S. W. Rep. 428. By a father for delay in the delivery of a message whereby a minister did not reach his daughter until after her death, where he was telegraphed for, because of her desire for bap-

tism and union with the Church, even if complete membership with the Church could not have been consummated during her life: *Western Union Tel. Co. v. Robinson*, 97 Tenn. 638; s. c. 34 L. R. A. 431; 37 S. W. Rep. 545. By the addressee of a telegram sent by his sister, which, when deposited with the company, read, "Mother started at nine to-night," but which read when delivered, "Mother died at nine to-night." Nor was it any defense to the action, that the mother in fact was not dead: *Western Union Tel. Co. v. Hines*, 22 Tex. Civ. App. 315; s. c. 54 S. W. Rep. 627.

<sup>116</sup> *Ante*, § 2455.



dened by commercial or other messages, or even at its mere caprice, without being liable to pay any damages for the breach of its contract; because the return of the fee which it has received for the service which it afterwards failed or refused to perform, is not the payment of damages, but is the mere act of rescinding its obligation without curing the suffering which it has inflicted by not performing it.<sup>117</sup>

§ 2478. **Cases Denying or Qualifying this Rule.**<sup>118</sup>—There is a line of cases which hold, in opposition to the above rule, that damages for mental suffering can not be recovered against a telegraph company for negligent delay or failure to deliver a message announcing the sickness, death, or recovery of a relative,<sup>119</sup> or can not be recovered under particular circumstances. This is held to be especially true when there is *no blood relationship* between the parties, and no presumption accordingly of such affection as might otherwise authorize such a recovery.<sup>120</sup> So, it is held that a wife can not recover for mental anguish for a failure to deliver, or a negligent delay in delivering, a message to her husband, when there is nothing to put the telegraph company on inquiry as to the wife's interest in the message.<sup>121</sup> Nor is a telegraph company liable in damages for personal discomfort and humiliation suffered by the sender of a telegram, unless the message charges the company with notice that such damages are likely to result.<sup>122</sup> It has been held that the sender of a telegram announc-

<sup>117</sup> See an article in 29 Am. Law Rev. 209 by Mr. W. C. Rodgers, of Arkansas, where this reasoning is very forcibly developed. See also the reasoning of the court in *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, quoted with approval in *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c. 10 Am. St. Rep. 772. Also in *Chapman v. Western Union Tel. Co.*, 90 Ky. 265; s. c. 12 Ky. L. Rep. 265; 13 S. W. Rep. 880; 30 Am. & Eng. Corp. Cas. 626; quoted with approval in *Young v. Western Union Tel. Co.*, 107 N. C. 370; s. c. 11 S. E. Rep. 1044; 42 Alb. L. J. 518.

<sup>118</sup> This section is cited in § 2481.

<sup>119</sup> *Davidson v. Western Union Tel. Co.*, 21 Ky. L. Rep. 1251; s. c. 54 S. W. Rep. 830 (not to be off. rep.); *Western Union Tel. Co. v. Giffin*, 93 Tex. 530; s. c. 56 S. W. Rep. 744; *McCarthy v. Western Union Tel. Co.* (Tex. Civ. App.), 56 S. W. Rep. 568; *Taliferro v. Western Union Tel. Co.*, 21 Ky. L. Rep. 1290; s. c. 54 S. W. Rep. 825; *Giddens v. Western Union Tel. Co.*, 111 Ga. 824; s. c. 35 S.

E. Rep. 638; *Kennon v. Western Union Tel. Co.*, 126 N. C. 232; s. c. 35 S. E. Rep. 468 (where there is nothing in the message to indicate the importance of prompt delivery).

<sup>120</sup> *Western Union Tel. Co. v. Steenberg*, 21 Ky. L. Rep. 1289; s. c. 54 S. W. Rep. 829; *Davidson v. Western Union Tel. Co.*, 21 Ky. L. Rep. 1251; s. c. 54 S. W. Rep. 830.

<sup>121</sup> *Southwestern Tel. & Co. v. Gotcher*, 93 Tex. 114; s. c. 53 S. W. Rep. 686; *Western Union Tel. Co. v. Luck*, 91 Tex. 178; s. c. 41 S. W. Rep. 469; rev'g 40 S. W. Rep. 753; *Morrow v. Western Union Tel. Co.*, 21 Ky. L. Rep. 1263; s. c. 54 S. W. Rep. 853.

<sup>122</sup> *Western Union Tel. Co. v. Bryant*, 17 Ind. App. 70; s. c. 46 N. E. Rep. 358. So, where the plaintiff sent a message to her sister announcing that she would arrive in the city in which the sister lived on a certain train, and the operator was informed, when the message was delivered to him, that the sender's mother, who lived with her sister, was on her death-bed, and



ing to his brother the serious illness of their mother, and requesting the brother to come and go with him to her home, can not recover for mental suffering arising from want of the brother's companionship and comfort that would result therefrom to him on the journey, because of the failure to deliver the telegram.<sup>123</sup>

§ 2479. **Doctrine that such Damages are not Recoverable unless Accompanied with Physical Injury.**<sup>124</sup>—Other courts take the view that no damages can be recovered for such a default predicated upon a mere injury to the feelings, unless,—and such a case can hardly be conceived—the default has resulted in some *physical suffering*, which is the proximate cause of the mental suffering.<sup>125</sup> Those courts which

the sender wanted the message “rushed,”—it was held that the plaintiff could not recover for mental distress and nervous prostration caused by a failure to deliver the message, whereby there was no one at the depot to meet her, as such a result could not have been fairly and reasonably considered as arising naturally from breach of the contract to deliver the message, or as having been in contemplation of the parties when they made the contract, as the probable result of its breach: *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14; s. c. 54 N. E. Rep. 775.

<sup>123</sup> *Western Union Tel. Co. v. Birchfield*, 14 Tex. Civ. App. 664; s. c. 38 S. W. Rep. 635. The failure of a telegraph company promptly to deliver a message announcing the time when the sender will reach home, sent to his wife in answer to a message stating the serious illness of her mother, will not render the company liable for the anguish and distress of mind of the wife arising from her failure to hear from him, although such anguish is entirely separate from the grief caused by her mother's death: *Johnson v. Western Union Tel. Co.*, 14 Tex. Civ. App. 536; s. c. 38 S. W. Rep. 64. A *mother-in-law* can not recover for mental suffering resulting from being prevented from attending her *son-in-law's* funeral because of negligent delay in the delivery of a telegram, in the absence of *notice* to the company of *special relations of affection* between the deceased and herself: *Western Union Tel. Co. v. Gibson* (Tex. Civ. App.), 39 S. W. Rep. 198 (no off. rep.). A husband can not recover damages of a telegraph company for loss of the com-

fort and consolation of being with his wife during her last hours, by its delay in delivering a telegram, where the wife was conscious after his arrival at her bedside, and was able to converse with him, in the absence of any claim based on the shortened period of such comfort and consolation: *Western Union Tel. Co. v. Stacy* (Tex.), 41 S. W. Rep. 100 (no off. rep.). Damages recoverable by a widow for mental anguish caused by the negligent failure of a telegraph company promptly to deliver to her *brother-in-law* a telegram announcing her husband's death, and requesting him to “come at once,” can not exceed the amount paid for sending the message, unless such *mental anguish* on her part, arising from the failure of her *brother-in-law* sooner to arrive, is *specifically proved*, since the relation between the parties is not such as to presume its existence: *Cashion v. Western Union Tel. Co.*, 123 N. C. 267; s. c. 31 S. E. Rep. 493 (citing *Western Union Tel. Co. v. Coffin*, 88 Tex. 94; s. c. 30 S. W. Rep. 896).

<sup>124</sup> This section is cited in § 2485.

<sup>125</sup> *Russell v. Western Union Tel. Co.*, 3 Dak. 315; *West v. Western Union Tel. Co.*, 39 Kan. 93; s. c. 9 Am. St. Rep. 530; 17 Pac. Rep. 807; *Chase v. Western Union Tel. Co.*, 44 Fed. Rep. 554; *Lewis v. Western Union Tel. Co.*, 57 S. C. 325; s. c. 35 S. E. Rep. 556; *Western Union Tel. Co. v. Preston* (Tex. Civ. App.), 54 S. W. Rep. 650; *Peay v. Western Union Tel. Co.*, 64 Ark. 538; s. c. 43 S. W. Rep. 965; 39 L. R. A. 463 (under law of Arkansas) (citing *Chapman v. Western Union Tel. Co.*, 88 Ga. 763; s. c. 17 L. R. A. 430; *Western Union Tel. Co. v.*



suppose that such damages may be given where the injury is accompanied with *physical pain* and suffering have evidently confused the

Rogers, 68 Miss. 748; s. c. 13 L. R. A. 859; Francis v. Western Union Tel. Co., 58 Minn. 252; s. c. 25 L. R. A. 406; 59 N. W. Rep. 1078; Connell v. Western Union Tel. Co., 116 Mo. 34; s. c. 20 L. R. A. 172; West v. Western Union Tel. Co., 39 Kan. 93; Russell v. Western Union Tel. Co., 3 Dak. 315; Butner v. Western Union Tel. Co., 2 Okla. 234; s. c. 4 Inters. Com. Rep. 770; 37 Pac. Rep. 1087; Summerfield v. Western Union Tel. Co., 87 Wis. 1; s. c. 57 N. W. Rep. 973; Curtin v. Western Union Tel. Co., 13 App. Div. (N. Y.) 253; s. c. 42 N. Y. Supp. 1100; Lynch v. Knight, 9 H. L. Cas. 598; Allsop v. Allsop, 5 Hurl. & N. 534; Victorian R. Comrs. v. Coultas, L. R. 13 App. Cas. 22; Little Rock & C. R. Co. v. Barker, 33 Ark. 350; s. c. 34 Am. Rep. 44; Western Union Tel. Co. v. Wood, 13 U. S. App. 317; s. c. 6 C. C. A. 432; 57 Fed. Rep. 471; 21 L. R. A. 706; Chase v. Western Union Tel. Co., 44 Fed. Rep. 554; s. c. 10 L. R. A. 464; Crawford v. Western Union Tel. Co., 47 Fed. Rep. 544; Tyler v. Western Union Tel. Co., 54 Fed. Rep. 634; Kester v. Western Union Tel. Co., 55 Fed. Rep. 603; Gahan v. Western Union Tel. Co., 59 Fed. Rep. 433; disapproving So Relle v. Western Union Tel. Co., 55 Tex. 308; s. c. 40 Am. Rep. 805; Beasley v. Western Union Tel. Co., 39 Fed. Rep. 181; Chapman v. Western Union Tel. Co., 90 Ky. 265; s. c. 13 S. W. Rep. 880; Young v. Western Union Tel. Co., 107 N. C. 370; s. c. 9 L. R. A. 669; Wadsworth v. Western Union Tel. Co., 86 Tenn. 695; Western Union Tel. Co. v. Henderson, 89 Ala. 510; Reese v. Western Union Tel. Co., 123 Ind. 294; s. c. 7 L. R. A. 583; Mentzer v. Western Union Tel. Co., 93 Iowa 752; s. c. 28 L. R. A. 72; 62 N. W. Rep. 1; Western Union Tel. Co. v. Haltom, 71 Ill. App. 63; West v. Western Union Tel. Co., 39 Kan. 93; s. c. 9 Am. St. Rep. 530. "Such damages," it is said, "can only enter into and become a part of the recovery where the mental suffering is the natural, legitimate and proximate consequence of the physical injury." Salina v. Trosper, 27 Kan. 544. Again, it is said that, "No damages can be recovered for a

shock and injury to the feelings and sensibilities, or for mental distress and anguish caused by a breach of a contract, except a marriage contract;" Russell v. Western Union Tel. Co., 3 Dak. 315. In So Relle v. Western Union Tel. Co., 55 Tex. 308; s. c. 40 Am. Rep. 805, it was held that a telegraph company is liable for injury to the feelings of a son caused by its neglect to deliver to him a message announcing the death of his mother, whereby he is prevented from attending her funeral. But this decision, which was pronounced by a commission of appeals, was overruled by the Supreme Court of the same State in the subsequent case of Gulf & C. R. Co. v. Levy, 59 Tex. 563; s. c. 46 Am. Rep. 278. This last decision seems to be overruled and the former reinstated by the later case of Stuart v. Western Union Tel. Co., 66 Tex. 580; s. c. 59 Am. Rep. 623, although the court say that the two cases are in conflict only on the single point that injury to the feelings alone would sustain such an action. In Logan v. Western Union Tel. Co., 84 Ill. 468, which was an action by a father against a telegraph company for negligence in failing to deliver a telegram sent by him to his son, summoning him to the death-bed of his mother, it was held that the plaintiff was entitled to recover at least nominal damages, including the price paid the company for sending the message,—but nothing beyond this was considered. In Wyman v. Leavitt, 71 Me. 227; s. c. 36 Am. Rep. 303, which was an action for damages for injury to real estate by blasting rock, it was held that the mental anxiety of the plaintiff for the safety of herself and family was not a proper element of damages. In Chase v. Western Union Tel. Co., 44 Fed. Rep. 554, Mr. District Judge Newman cited the following authorities as denying the right to recover damages for mental suffering unmixed with any other element of damage: Russell v. Western Union Tel. Co., 3 Dak. 315; s. c. 19 N. W. Rep. 408; West v. Western Union Tel. Co., 39 Kan. 93; s. c. 17 Pac. Rep. 807; Gulf & C. R. Co. v. Levy,



special damages for injury to the feelings with *exemplary damages*, having in mind the well-known rule that exemplary damages can not be recovered in any case where no actual damages have been sustained. But damages on the ground of injury to the feelings are not given in these cases as exemplary damages, but as *compensatory damages*; <sup>126</sup> and in such cases *exemplary damages* may be given or withheld in addition, according to the presence or absence of circumstances of *malice, fraud, oppression, or gross negligence*. <sup>127</sup>

§ 2480. **Doctrine that such Damages not Recoverable unless Accompanied with some Other Actual Damage.**—There are also cases which allow a recovery on the footing of injury to the feelings where other actual damages have been sustained through the default of the company. Negatively stated, this rule is that no damages can be recovered from a telegraph company for delay in delivering a message grounded on mental anguish alone, when unmixed with other

59 Tex. 542, 563; Wyman v. Leavitt, 71 Me. 227; Johnson v. Wells, 6 Nev. 224; Nagel v. Railway Co., 75 Mo. 653; Railway Co. v. Stables, 62 Ill. 313; Freese v. Tripp, 70 Ill. 496; Meidel v. Anthis, 71 Ill. 241; Joch v. Dankwardt, 85 Ill. 331; Porter v. Railway Co., 71 Mo. 83; Fenelon v. Butts, 53 Wis. 344; s. c. 10 N. W. Rep. 501; Ferguson v. Davis Co., 57 Iowa 601; s. c. 10 N. W. Rep. 906; Stewart v. Ripon, 38 Wis. 584; Masters v. Warren, 27 Conn. 293; Blake v. Railway Co., 10 Eng. Law & Eq. 442; Lynch v. Knight, 9 H. L. Cas. 577; Burke v. Railway Co., 10 Cent. L. J. 48; Rowell v. Western Union Tel. Co., 75 Tex. 26; s. c. 12 S. W. Rep. 534; Thompson v. Western Union Tel. Co., 106 N. C. 549; s. c. 11 S. E. Rep. 269; 30 Am. & Eng. Corp. Cas. 634.

<sup>126</sup> Beasley v. Western Union Tel. Co., 39 Fed. Rep. 181.

<sup>127</sup> Post, § 2485; Stuart v. Western Union Tel. Co., 66 Tex. 580; s. c. 59 Am. Rep. 623; distinguishing on this point, Gulf & C. R. Co. v. Levy, 59 Tex. 542; s. c. 46 Am. Rep. 269. In this last case there was no contract relation between him and the company, so the court held that in the failure to deliver the message, the company was only guilty of a tort, and in such a case *actual damage* must be shown, to let in *exemplary damages* or damages to the feelings. In the Stuart case, *supra*, there was a contract relation, and the court

held that the two cases were thus distinguishable. A person was allowed to recover damages for *pain* and *suffering*, which he experienced by reason of the negligent delay in the delivery of a message calling for medical aid, which he would not have suffered had the message been promptly delivered to the physician: Western Union Tel. Co. v. McCall, 9 Kan. App. 886; s. c. 58 Pac. Rep. 797. But this was entirely *physical* pain and suffering. So, in the case of a woman who, while travelling, lost her money, and had to stay in a strange city until she could get assistance from her uncle, and who sent a message to this uncle, stating her loss and directing him to wire the agent instructions to furnish her a ticket, it was held that she was entitled to recover, by reason of negligent delay in the delivery of the message, for her *mental* and *physical* suffering, between the time when she should reasonably have received a reply to her message, had it been promptly delivered, and the time when she should have reasonably received a reply thereto after it was actually delivered, and not later than the receipt by her of a message stating that the ticket was at the office for her, but which ticket she never received: Western Union Tel. Co. v. Burgess (Tex. Civ. App.), 56 S. W. Rep. 237.



injury,<sup>128</sup> probably meaning *physical* injury; or, when unmixed with other injury, and in the absence of such gross negligence as to indicate a *wanton* or *malicious purpose* warranting an award of exemplary damages.<sup>129</sup> This rule, it will be observed, will generally operate to prevent a recovery *by the addressee* for injury to the feelings—who is generally the person sustaining such injury—and will allow a recovery by the sender merely because he has been damaged in the loss of the trifling fee which he has paid the telegraph company for its undertaking.<sup>130</sup> But it must be apparent, on a little reflection, that no process of reasoning can vindicate a rule of damage which gives or withholds an element of compensatory damage accordingly as some other ground of compensatory damage is or is not disclosed by the pleadings and evidence. Surely it can not be more difficult for a jury to admeasure the compensatory damages which a person ought to receive for injury to his feelings caused by a failure to perform a public duty, than where the injury is also accompanied with a slight battery, as in the case of the expulsion of a passenger from a railway train.

**§ 2481. Disclosure of the Relationship of the Parties not Necessary to such Damages.**—It should be added that, in the State of Texas, where this doctrine was first applied in respect of telegraph companies, it was at one time held that such damages were not recoverable, unless the message was such as to disclose on its face the relationship of the parties, or at least the relationship subsisting between the person named in the message as being sick or dead, and the plaintiff in the action.<sup>131</sup> But, after some wavering in the decisions in that State on this subject,<sup>132</sup> the court took the more reasonable view that a message which, on its face, apprises the company that it is sent to advise the addressee that some one is very sick or is dead, sufficiently discloses its importance for the purpose of the rule in *Hadley v. Bax-*

<sup>128</sup> *Chase v. Western Union Tel. Co.*, 44 Fed. Rep. 554; 10 L. R. A. 464 (in this case, by the *sender* of a message).

<sup>129</sup> *Crawson v. Western Union Tel. Co.*, 47 Fed. Rep. 544.

<sup>130</sup> *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c. 7 South. Rep. 419. So held in *Reese v. Western Union Tel. Co.*, 123 Ind. 224; *Thompson v. Western Union Tel. Co.*, 106 N. C. 549; s. c. 11 S. E. Rep. 269; 30 Am. & Eng. Corp. Cas. 634. On the second appeal in this case the distinction was abandoned: 107 N. C. 449.

<sup>131</sup> *Western Union Tel. Co. v. Brown*, 71 Tex. 723; s. c. 10 S. W. Rep. 323; 2 L. R. A. 776. As to non-disclosure of the *degree of affection* subsisting between them,—see *ante*, § 2478.

<sup>132</sup> Compare *Western Union Tel. Co. v. Moore*, 76 Tex. 66; s. c. 12 S. W. Rep. 949, with *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217; s. c. 13 S. W. Rep. 70, as explained in *Thomp. Elect.*, § 386. It should be added that, under the Texas procedure, an action is properly brought by the husband alone for injury to his wife.



*endale*,<sup>133</sup> although it does not explain the relationship of the parties, or enter into details as to the attending circumstances;<sup>134</sup> and the same view has been taken in other jurisdictions.<sup>135</sup>

§ 2482. **When Addressee may Recover Damages for Injury to the Feelings.**—When, therefore, the plaintiff left his sister in charge of his house while he was visiting his father at a distant place, and his sister delivered to a telegraph company a message to be transmitted to the father, requesting him to tell the plaintiff of the illness of one of his children, and the company failed to deliver the message, whereby the plaintiff was unable to be with the child in her last hours, it was held a case for damages. The language of the message was construed as notifying the company that the addressee was the “real party in interest” within the provisions of a code relating to parties plaintiff in civil actions; so that the addressee could maintain an action for two reasons: 1. The company had notice from the face of the message that the addressee was the real party in interest. 2. The sender of the message acted merely as the agent of the addressee in sending it.<sup>136</sup> The doctrine under consideration is especially applicable to a case where the message urges the addressee to go to the bedside of some one who is not expected to live;<sup>137</sup> and this is even more clear, where, in addition to the plain import of the message, the person delivering it for transmission advises the receiving agent of its urgency and requests him to rush it through.<sup>138</sup> It has been held *no*

<sup>133</sup> 9 Exch. 341; s. c. 26 Eng. Law & Eq. 398.

<sup>134</sup> *Western Union Tel. Co. v. Adams*, 75 Tex. 531; s. c. 6 L. R. A. 844; 12 S. W. Rep. 857; *Lyne v. Western Union Tel. Co.*, 123 N. C. 129; s. c. 5 Am. Neg. Rep. 85; 31 S. E. Rep. 350; *Western Union Tel. Co. v. Lavender* (Tex. Civ. App.), 40 S. W. Rep. 1035 (no off. rep.); *Western Union Tel. Co. v. Carter*, 85 Tex. 580; s. c. 22 S. W. Rep. 961; reversing s. c. 20 S. W. Rep. 834; overruling *Western Union Tel. Co. v. Brown*, 71 Tex. 723. See also, to the same effect, *Western Union Tel. Co. v. McLeod* (Tex. Civ. App.), 22 S. W. Rep. 988; *Western Union Tel. Co. v. Linn*, 87 Tex. 7; s. c. 26 S. W. Rep. 490; affirming s. c. 23 S. W. Rep. 895; *Western Union Tel. Co. v. Porter* (Tex. Civ. App.), 26 S. W. Rep. 866.

<sup>135</sup> *Reese v. Western Union Tel. Co.*, 123 Ind. 294; s. c. 24 N. E. Rep. 163;

7 L. R. A. 583; *Western Union Tel. Co. v. Eskridge*, 7 Ind. App. 208; s. c. 33 N. E. Rep. 238; *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527; s. c. 14 S. E. Rep. 94; *Potts v. Western Union Tel. Co.*, 82 Tex. 545; s. c. 18 S. W. Rep. 604. Compare *Kennon v. Western Union Tel. Co.*, 126 N. C. 232, and cases there cited.

<sup>136</sup> *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527; s. c. 14 S. E. Rep. 94. Compare s. c. on second appeal, 116 N. C. 654.

<sup>137</sup> *Potts v. Western Union Tel. Co.*, 82 Tex. 545; s. c. 18 S. W. Rep. 604. Here, the message, which was called by the court a “rush message,” read, “Come at once; Mr. Potts is not expected to live.”

<sup>138</sup> *Western Union Tel. Co. v. Nations*, 82 Tex. 539; s. c. 18 S. W. Rep. 709. In this case the language of the message which accompanied such a request was: “Your step-father died this morning.” The



*defense* to an action by the addressee of a message informing him of the illness of his child, where, in consequence of its non-delivery, he was prevented from being present at the death of the child,—that the person sending the message had time, after failing to receive an expected answer thereto, to go and bring the father before the death of the child took place. The plaintiff was not prevented from recovering damages on the ground of *contributory negligence*, even if that defense had been pleaded; since the plaintiff's agent, in sending the telegram, had obeyed his instructions, and both he and the plaintiff had the right to assume that the company would do its duty in transmitting and delivering it.<sup>139</sup>

§ 2483. **Elements of Damage in Cases where the Feelings are Hurt.**—The difficulty of assessing damages in such cases, that is to say, of *turning grief into money*, is shown by a holding to the effect that where the default of the telegraph company prevented the plaintiff from being present at the deathbed of his wife and punitive damages were not allowable, his damages should be assessed on the footing of the disappointment and anguish suffered by him through his failure to see his wife before her death, excluding damages for the grief naturally arising from her death.<sup>140</sup> So, the right of recovery of a father suing for damages for delay in delivering a telegraph message to a physician stating that his child is sick, and requesting him to come at once, is limited to damages for his own distress, and does not include compensation for the sufferings or death of the child.<sup>141</sup> In general, the compensation awarded by way of damages is for the grief and disappointment sustained in consequence of not being apprised of the illness or death of the near relative, so as to be able to attend at the bedside or at the funeral.<sup>142</sup> The Supreme Court of Texas, in one case, sustained a demurrer to a petition where the only damage alleged was the mental and physical suffering of the plaintiff's wife, resulting from the defendant's failure to deliver

court reasoned that this, in connection with the request to have the message rushed through, was a sufficient notice to the company that the message was sent for the benefit of the mother, who was the plaintiff in the action, and that it was in effect an invitation to her son to come to her; so that the failure of the company to deliver it would support an action by the mother for injury to her feelings, the sender having been prevented thereby from being present at the funeral, and from as-

sisting in making the necessary arrangements therefor.

<sup>139</sup> *Western Union Tel. Co. v. Wisdom*, 85 Tex. 261; s. c. 20 S. W. Rep. 56.

<sup>140</sup> *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

<sup>141</sup> *Gulf & C. Tel. Co. v. Richardson*, 79 Tex. 649; s. c. 15 S. W. Rep. 639.

<sup>142</sup> *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; s. c. 6 Am. St. Rep. 864; 8 S. W. Rep. 574 (*Lurton and Folkes, JJ., dissenting*).



a message relating to the health of the plaintiff's *mother-in-law*.<sup>143</sup> In another case, where a husband telegraphed for a doctor to *attend his wife in her confinement*, and, in consequence of the non-delivery of the message, the doctor failed to attend, damages were denied, predicated upon the grief and sorrow occasioned to the mother through the fact that the child died before birth.<sup>144</sup> But it was held that damages might have been given to the extent of the difference between any quantum of suffering endured by the wife through the failure of the doctor to attend, and that which she would have endured if he had attended; though no recovery could be had if it should be made to appear that, although the message had been promptly delivered, he could not have come anyway.<sup>145</sup> Damages predicated upon the failure of a husband to be present at the bedside of his wife during her confinement in consequence of the non-delivery of a telegram, have been held not too remote.<sup>146</sup> Upon the question of the elements of damage predicated upon mere injury to the feelings in such a case, it has been held that, where the message, which was not delivered, announced the death of a person, it could not be deemed to have been within the contemplation of the parties that the deceased would, in consequence of the failure of the addressee to receive the message, be buried in an unsuitable place, and that a re-interment would be necessary; and consequently that the addressee could not recover the *expense of such re-interment*. Nor could the mental anguish of the *wife* of the addressee, arising from the fact that the deceased (her father), in consequence of the non-delivery of the message, was buried in an unsuitable place and in unsuitable clothing, be regarded as a probable consequence of the default of the company, so as to be taken into consideration in assessing the damages.<sup>147</sup> Under this theory, damages have been given to a *mother* who is deprived of her son's consolation, advice and aid on the occasion of the death of her husband, who is the *step-father* of her son, in consequence of the negligent failure of the telegraph company to deliver a message announcing his death;<sup>148</sup> to a *son*, for mental anguish on occasion of a failure to see the remains of his deceased

<sup>143</sup> Rowell v. Western Union Tel. Co., 75 Tex. 26; s. c. 12 S. W. Rep. 534. This unsatisfactory decision attempts, but without success, to distinguish the previous decision of the same court in Stuart v. Western Union Tel. Co., 66 Tex. 580.

<sup>144</sup> Western Union Tel. Co. v. Cooper, 71 Tex. 507; s. c. 10 Am. St. Rep. 772.

<sup>145</sup> Western Union Tel. Co. v. Cooper,

71 Tex. 507; s. c. 10 Am. St. Rep. 772.

<sup>146</sup> Thompson v. Western Union Tel. Co., 107 N. C. 449; s. c. 12 S. E. Rep. 427.

<sup>147</sup> Western Union Tel. Co. v. Carter, 85 Tex. 580; s. c. 22 S. W. Rep. 961; reversing s. c. 20 S. W. Rep. 834.

<sup>148</sup> Western Union Tel. Co. v. Nations, 82 Tex. 539; s. c. 18 S. W. Rep. 790.



*father* and to be present at his *funeral*; <sup>149</sup> to a *husband and wife* for the loss of an opportunity to be present and aid in directing the *funeral* of the *wife's father*; <sup>150</sup> to the addressee of a message, in consequence of his failure to receive an announcement, which it contained, of the *death of his mother*; <sup>151</sup> to the addressee of a message announcing the *illness* of his *father*, the delay in delivering which prevented him from seeing his father before his death; <sup>152</sup> to a son, for the negligent delay of a message announcing the *death* of his *father*, although no damages can be recovered for the sorrow caused by the fact of his father's death. <sup>153</sup>

§ 2484. **Quantum of Damages for Injuries to the Feelings.**—In regard to the quantum of damages which has been awarded where the only element of damage was injury to the feelings, we find that an award of \$1,000 has been held not excessive, where the failure of a telegraph company to deliver a message prevented the plaintiff from attending the funeral of his deceased sister; <sup>154</sup> that \$875 have been awarded where the failure to deliver the message prevented the plaintiff from attending at the death of his child, no point being made as to the quantum of damages, but the judgment being affirmed with *ten per cent.* additional damages. <sup>155</sup> Another case is found where an award of \$300 was held not excessive, where a mother sent a telegram to her son, announcing the death of his step-father, and in consequence of its not being delivered, he was not present to console her and assist her in the funeral arrangements, and did not come to her for a week. It is to be noted, in this case, that the recovery was had by the sender of the message; <sup>156</sup> in nearly all these cases which have come under the notice of the author, the recovery was had by the addressee. Where the telegram announced the sending of the corpse of the plaintiff's wife, and the agent of the company who received the dispatch for transmission knew the special circumstances, and the dispatch travelled with only the customary speed of the company, in consequence of which the corpse got there first, the court held that a verdict for \$1,168 was not excessive. <sup>157</sup> Where the plaintiff

<sup>149</sup> *Western Union Tel. Co. v. Berlinger*, 84 Tex. 38; s. c. 19 S. W. Rep. 336.

<sup>150</sup> *Western Union Tel. Co. v. Erwin* (Tex.), 19 S. W. Rep. 1002.

<sup>151</sup> *Western Union Tel. Co. v. Briscoe*, 18 Ind. App. 22; s. c. 47 N. E. Rep. 473.

<sup>152</sup> *Western Union Tel. Co. v. Teague* (Tex. Civ. App.), 36 S. W. Rep. 301 (no off. rep.).

<sup>153</sup> *Western Union Tel. Co. v. War-*

*ren* (Tex. Civ. App.), 36 S. W. Rep. 314 (no off. rep.).

<sup>154</sup> *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406; s. c. 16 S. W. Rep. 25.

<sup>155</sup> *Western Union Tel. Co. v. Wisdom*, 85 Tex. 261; s. c. 20 S. W. Rep. 56.

<sup>156</sup> *Western Union Tel. Co. v. Nations*, 82 Tex. 539; s. c. 18 S. W. Rep. 709.

<sup>157</sup> *Western Union Tel. Co. v.*



iff, a widow, was far from home with the dead body of her husband, and telegraphed for a remittance of money to enable her to leave with it, but, in consequence of the delay in transmitting the message, was delayed two days,—the court refused to disturb a verdict for \$1,000.<sup>158</sup> The sum of \$500 was deemed not excessive, where the object of the telegram was to inform the addressee, the plaintiff in the action, in response to an inquiry sent by him, of the serious illness of his mother, and there was a delay in transmitting the message, whereby he was prevented from reaching her bedside until after her death, the evidence showing *gross negligence* on the part of the company, such as would authorize an award of *exemplary damages*.<sup>159</sup> An award of \$1,475 was deemed not excessive, where the company failed to deliver a message informing the plaintiff of the death of his father, whereby he failed to attend the funeral.<sup>160</sup> In another case, a jury returned a verdict of \$5,000, and half of this was remitted, and the Court of Appeals did not regard \$2,500 as excessive, it being a case where a mother was prevented, by the non-delivery of a message, from reaching the bedside of her son before his death.<sup>161</sup> The sum of \$780 has been held not excessive damages for error in transmitting a message so as falsely to state that the plaintiff's mother was dead, where he suffered great mental anguish for several days and expended \$60 in sending his brother to the funeral.<sup>162</sup> A verdict for \$300 for mental anguish suffered by the plaintiff by reason of his failure to reach his child before her death was not deemed excessive;<sup>163</sup> nor one for \$1,000 for a mistake in sending a message to a husband which informed him that his wife, who was sick, was "no better" instead of "much better;"<sup>164</sup> nor for \$1,000, where there was a delay of three days in the delivery of a telegram notifying one that his brother was sick, where the sick brother at once recognized the plaintiff when he came, and accepted food and drink from him, after which he revived, but died in a few days;<sup>165</sup> nor for \$500, where the failure to deliver the telegram resulted in the sender being confined in a *filthy and loathsome prison* for five days;<sup>166</sup> nor for

Broesche, 72 Tex. 654; s. c. 10 S. W. Rep. 734.

<sup>158</sup> Western Union Tel. Co. v. Simpson, 73 Tex. 422; s. c. 11 S. W. Rep. 385.

<sup>160</sup> Western Union Tel. Co. v. Cunningham, 99 Ala. 314.

<sup>160</sup> Western Union Tel. Co. v. Beringer, 84 Tex. 38; s. c. 19 S. W. Rep. 336.

<sup>161</sup> Western Union Tel. Co. v. Evans, 5 Tex. Civ. App. 55; s. c. 23 S. W. Rep. 998.

<sup>162</sup> Western Union Tel. Co. v.

Hines, 22 Tex. Civ. App. 315; s. c. 54 S. W. Rep. 627.

<sup>163</sup> Western Union Tel. Co. v. Fisher, 21 Ky. L. Rep. 1293; s. c. 54 S. W. Rep. 830.

<sup>164</sup> Western Union Tel. Co. v. Patton (Tex. Civ. App.), 55 S. W. Rep. 973.

<sup>165</sup> Western Union Tel. Co. v. McIlvoy, 21 Ky. L. Rep. 1393; s. c. 55 S. W. Rep. 428.

<sup>166</sup> Western Union Tel. Co. v. Gossett, 15 Tex. Civ. App. 52; s. c. 38 S. W. Rep. 536.



\$400, where the negligent delay in delivering the telegram prevented the addressee from attending the *funeral of his brother*,<sup>167</sup> nor for \$1,500, where the delay in delivering the telegram prevented the addressee from attending the *funeral of his mother*, and the telegraph company was guilty of such reckless and wanton disregard of its plain duty in failing to deliver the message as justified the imposition of punitive damages.<sup>168</sup>

§ 2485. **Exemplary Damages against Telegraph Companies.**<sup>169</sup>—Most of the State courts allow exemplary damages to be recovered from corporations, predicated upon the misconduct of their ministerial agents or servants;<sup>170</sup> but a decision of the Supreme Court of the United States establishes a different rule for the Federal courts, restricting the cases in which exemplary damages can be given against corporations to cases where *the corporation* has *authorized* the doing of the act for which the damages are given, or ratified it after it has been done.<sup>171</sup> The court does not explain what it means by “the corporation”; but it is to be inferred that it means its board of directors, and possibly its managing officer or agent. Where the rule of damages which generally prevails in the State courts obtains, exemplary damages will be given against a telegraph company for the failure to discharge the public duty which it undertakes on receiving a message for transmission, if its failure arose from *gross negligence*, *wantonness*, or *malice* on the part of its agents or servants of whatever grade.<sup>172</sup> The negligence for which alone exemplary damages can be given has been described as negligence, *wanton*, *willful*, or so *gross* as to evince entire want of care,<sup>173</sup> or an intention to inflict a wrong.<sup>174</sup> Another court has held that the negligence which alone will warrant the giving of exemplary damages against a telegraph company, must be so *gross* as to amount to *positive bad faith*.<sup>175</sup> As

<sup>167</sup> Western Union Tel. Co. v. Johnson, 16 Tex. Civ. App. 546; s. c. 41 S. W. Rep. 367.

<sup>168</sup> Western Union Tel. Co. v. Seed, 115 Ala. 670; s. c. 22 South. Rep. 474.

<sup>169</sup> This section is cited in § 2479.

<sup>170</sup> 5 Thomp. Corp., § 6383, *et seq.*

<sup>171</sup> Lake Shore & C. R. Co. v. Prentice, 147 U. S. 101. See 5 Thomp. Corp., § 6389.

<sup>172</sup> West v. Western Union Tel. Co., 39 Kan. 93; s. c. 7 Am. St. Rep. 530; 7 Pac. Rep. 807. See Scott & Jarn. Tel., §§ 417, 418; American Union Tel. Co. v. Daughtery, 89 Ala. 191; s. c. 7 South. Rep. 660; Beasley v. Western Union Tel. Co., 39 Fed. Rep.

181 (*semble*); Peterson v. Western Union Tel. Co., 72 Minn. 41; s. c. 40 L. R. A. 661; 8 Am. & Eng. Corp. Cas. (N. S.) 517; Western Union Tel. Co. v. Seed, 115 Ala. 670; s. c. 22 South. Rep. 474.

<sup>173</sup> American Union Tel. Co. v. Daughtery, 89 Ala. 191; s. c. 7 South. Rep. 660; Beasley v. Western Union Tel. Co., 39 Fed. Rep. 181.

<sup>174</sup> Western Union Tel. Co. v. Seed, 115 Ala. 670; s. c. 22 South. Rep. 474.

<sup>175</sup> Peterson v. Western Union Tel. Co., 72 Minn. 41; s. c. 40 L. R. A. 661; 8 Am. & Eng. Corp. Cas. (N. S.) 517. It has been held that a telegraph company which sends to one



already stated,<sup>176</sup> no exemplary damages can be recovered where no actual damages are shown.<sup>177</sup>

address *three* distinct messages announcing the death of the addressee's mother, and directed to him at different places within the delivery limits, is guilty of such reckless and wanton disregard of its duty as will authorize the imposition of punitive damages against it, where the addressee is thereby prevented from attending the funeral: *Western Union Tel. Co. v. Seed*, 115 Ala. 670; s. c. 22 South. Rep. 474.

<sup>176</sup> *Ante*, § 2479.

<sup>177</sup> *Shippell v. Norton*, 38 Kan. 567. Compare, as to exemplary damages, *Southern Kansas R. Co. v. Rice*, 38 Kan. 398; *Flanagan v. Womack*, 54 Tex. 45; *Freese v. Tripp*, 70 Ill. 496, 501; *Gulf & C. R. Co. v. Levy*, 59 Tex. 563; s. c. 46 Am. Rep. 278. That the plaintiff is not prejudiced or restricted as to the amount of

actual damages which he may recover by the fact that, in the *claim presented* by him to the company, he classified the amount of his damages as *actual* and *exemplary*,—see *Western Union Tel. Co. v. Morris*, 77 Tex. 173; s. c. 13 S. W. Rep. 888. For a case where exemplary damages were allowed in case of actual loss, where the telegraph company had maliciously preferred one customer over a rival,—see *Davis v. Western Union Tel. Co.*, 1 Cin. Sup. Ct. 100; *Thomp. Elect.*, § 400. In Texas, exemplary damages can not be recovered under a general allegation of gross negligence on the part of the servants and employes of a telegraph company, in failing to transmit and deliver a telegram: *Western Union Tel. Co. v. Godsey* (*Tex. App. Cas.*), 16 S. W. Rep. 789.



## CHAPTER LXXXV.

### QUESTIONS OF PROCEDURE IN ACTIONS AGAINST TELEGRAPH COMPANIES.

ART. I. Parties to such Actions, §§ 2487-2493.

ART. II. Questions of Pleading in such Actions, §§ 2495-2507.

ART. III. Questions of Evidence in such Actions, §§ 2510-2522.

ART. IV. Other Matters of Procedure, §§ 2525-2529.

### ARTICLE I. PARTIES TO SUCH ACTIONS.

| SECTION   | SECTION   |
|---|---|
| 2487. Parties to actions against telegraph companies.     | 2491. Whether any right of action in a third person.    |
| 2488. When the right of action is in the addressee.       | 2492. In whom right of action against connecting lines. |
| 2489. Further as to when right of action is in addressee. | 2493. Husband suing for wife under Texas code.          |
| 2490. When the right of action is in the sender.          |   |

§ 2487. **Parties to Actions against Telegraph Companies.**—The seeming confusion which the cases exhibit with reference to the question whether the action is to be brought by the sender or by the addressee of the message, results from failing to keep in view the fact that an action against the telegraph company may, under the American law, be brought either *ex contractu* or *ex delicto*, the same as against a common carrier. It may be brought *ex contractu* for damages for a breach of the contract which the company has made with the sender of the message, or with the addressee through the sender acting as the agent of the addressee. It may be brought *ex delicto* and predicated upon a failure of the company to perform the *public duty* which it has undertaken, or which the law has imposed upon it. In the latter case, it may be brought either upon the duty as arising at common law, or as defined and enforced by the statute law. If the action is brought *ex contractu*, then, of course, it must be brought by the party with whom the telegraph company made the contract. This party is ordinarily the sender of the message, and is always the sender where he acts for himself in sending it; but it may be the addressee, where the sender acts as his agent in sending it. If the action is brought *ex delicto* it is to be brought by the party sus-



taining the damage, whether he be the sender or the addressee; for, in such a case, the action proceeds upon the ground of malfeasance, and not on the ground of privity of contract, and it is immaterial with whom the company made the contract or undertaking which put in motion a course of wrongful action on its part, which resulted in injury to another person. By keeping in view these principles, many decisions may be reconciled, and many discrepancies in the judicial holdings may be explained. They tend in some measure to explain the English decisions, which are to the effect that the rule obtaining in that country in respect of the liability of common carriers and other bailees, applies in respect of the liability of telegraph companies,—which is that the action proceeds *ex contractu*, and that no action will consequently lie against the company by the addressee for the non-delivery, mis-delivery or error in transmission of a telegram intended for him, unless there was a contract between him and the company in respect of the telegram, which it violated, or fraud on the part of the company in respect of the duty which it assumed.<sup>1</sup> The theory of that law does not allow the addressee to recover damages from the company, even where he has been grossly misled by an error in a dispatch delivered to him by it, and although acting upon the faith of it, he has suffered great loss.<sup>2</sup> The English decisions on this question are entitled to no respect, and it would be a waste of time to explore the conceptions which underlie them.<sup>3</sup> The English judges, however, recognize the exception to the rule above stated, that where the sender of the message *acts as the agent of the addressee* in sending it, this establishes a privity of contract between the addressee and the company, which will support an action by the addressee.\*

§ 2488. When the Right of Action is in the Addressee.<sup>5</sup>—Some of the American courts follow the English doctrine which rests the right of recovery upon a privity of contract, and which consequently

<sup>1</sup> Dickson v. Reuter's Tel. Co., 2 C. P. Div. 62; s. c. 46 L. J. (C. P. Div.) 197; 35 L. T. (N. S.) 842; 25 W. R. 272; 19 Moak Eng. Rep. 313; s. c. affirmed on appeal, 37 L. T. (N. S.) 370; 26 W. R. 23; 3 C. P. Div. 1; 30 Moak Eng. Rep. 1; Playford v. United Kingdom Tel. Co., L. R. 4 Q. B. 706; s. c. 10 Best & S. 759; 38 L. J. (Q. B.) 249; 17 L. T. (N. S.) 243; 16 Week. Rep. 219; 17 Week. Rep. 968.

<sup>2</sup> Dickson v. Reuter's Tel. Co., 2 C. P. Div. 62; s. c. affirmed in Court

of Appeals, 3 C. P. Div. 1; Playford v. United Kingdom Electric Telegraph Company, 10 Best & S. 759; s. c. 21 L. T. (N. S.) 21; 17 W. R. 968; 38 L. J. (Q. B.) 249; L. R. 4 Q. B. 706. See s. c. 17 L. T. (N. S.) 243; 16 W. R. 219.

<sup>3</sup> Some of these conceptions are referred to in Thomp. Elect., § 424.

<sup>4</sup> Playford v. United Kingdom Electric Telegraph Company, L. R. 4 Q. B. 706, and as cited in preceding section.

<sup>5</sup> This section is cited in § 2495.



holds that the addressee can not maintain the action, except where the sender of the message *acted as his agent*.<sup>6</sup> Under this doctrine the right of action will be in the addressee only where the sender of the message acted as the agent of the addressee in sending it.<sup>7</sup> But a majority of the American courts hold that the addressee may maintain the action where he is the party who has sustained the injury through the default of the company, whether in transmitting the message erroneously or in failing to deliver it seasonably.<sup>8</sup> The reasons adduced by the American courts in support of this view will not be gone into at length. The conclusion is vindicated upon the principle that the right of action against a telegraph company for its failure in the performance of the duty which it has assumed of transmitting and delivering a message promptly and correctly, does not rest upon contract merely, but rests upon a failure on its part to perform a *public duty*, and that it undertakes this public duty for the benefit as well of the addressee as of the sender of the message. If this is a correct view, the addressee will have a right of action in all cases where the company has been guilty of an actionable default and the addressee has sustained damage. The question in such a case will be not with whom, in respect of mere form, the contract was made, but

<sup>6</sup> Western Union Tel. Co. v. Wilson, 93 Ala. 32; Western Union Tel. Co. v. Cunningham, 99 Ala. 314; Western Union Tel. Co. v. Adair, 115 Ala. 441; s. c. 22 South. Rep. 73; Ford v. Postal Tel. & C. Co., 124 Ala. 400; s. c. 27 South. Rep. 409.

<sup>7</sup> See, for example, Milliken v. Western Union Tel. Co., 110 N. Y. 403; s. c. 18 N. E. Rep. 251; 1 L. R. A. 281; 27 Cent. L. J. 577. See also De Rutte v. New York & C. Tel. Co., 1 Daly (N. Y.) 547; s. c. 30 How. Pr. (N. Y.) 403; Leonard v. New York & C. Tel. Co., 41 N. Y. 544; New York & C. Tel. Co. v. Dryburg, 35 Pa. St. 300; Baldwin v. United States Tel. Co., 1 Lans. (N. Y.) 128. Compare Rose v. United States Tel. Co., 3 Abb. Pr. (N. S.) (N. Y.) 408; s. c. 6 Robt. (N. Y.) 305.

<sup>8</sup> West v. Western Union Tel. Co., 39 Kan. 93; s. c. 7 Am. St. Rep. 530; Wadsworth v. Western Union Tel. Co., 86 Tenn. 695; s. c. 6 Am. St. Rep. 864; Tobin v. Western Union Tel. Co., 146 Pa. St. 375; s. c. 23 Atl. Rep. 324; Western Union Tel. Co. v. Beringer, 84 Tex. 38; s. c. 19 S. W. Rep. 336; Western Union Tel. Co. v. Jones, 81 Tex. 271; s. c. 16 S. W. Rep. 1006; Western Union Tel.

Co. v. Dubois, 128 Ill. 248; Texas Tel. & C. Co. v. Seiders (Tex. Civ. App.), 29 S. W. Rep. 258 (no off. rep.); Western Union Tel. Co. v. Hale, 11 Tex. Civ. App. 79; s. c. 32 S. W. Rep. 814; Harris v. Western Union Tel. Co., 9 Phila. (Pa.) 88; Aiken v. Telegraph Co., 5 S. C. 358; Elwood v. Western Union Tel. Co., 45 N. Y. 549; s. c. 6 Am. Rep. 140 (case of money paid in consequence of a fraudulent message); May v. Western Union Tel. Co., 112 Mass. 90; De Rutte v. New York & C. Tel. Co., 30 How. Pr. (N. Y.) 403. The doctrine was conceded in Rose v. United States Tel. Co., 3 Abb. Pr. (N. S.) (N. Y.) 408; s. c. 6 Robt. (N. Y.) 305. For illustrations of this doctrine,—see Thomp. Elect., § 429; Elwood v. Western Union Tel. Co., 45 N. Y. 549; Bank of California v. Western Union Tel. Co., 52 Cal. 280; s. c. 5 Cent. L. J. 265; Elsev v. Postal Tel. Co., 3 N. Y. Supp. 117. In Louisiana, both the sender and the addressee have a right of action against the telegraph company, *ex contractu*, and not *ex delicto*, for damages arising from its failure to deliver a message, on the ground that it is the agent of both: De La



whom in fact was to be served.<sup>9</sup> Another reason which has been adduced in support of the right of action in the addressee is that, although the action is to be deemed an action *ex contractu*, yet it is a case where the *contract* has been made between the sender and the company *for the benefit of the addressee*,—in which case, under many of the American codes of procedure, the third party, for whose benefit the contract has been made, may maintain an action thereon for its breach.<sup>10</sup>

### § 2489. Further as to when Right of Action is in Addressee.—

Outside of these considerations, if there has been a mistake in transmitting the message by which the addressee has been misled into a course of action through which he has suffered damage, he may, under the principles of the common law, recover such damages from the telegraph company in an action *ex delicto*, proceeding on the ground of its *malfeasance*.<sup>11</sup> But, unless the addressee sues on the ground that the sender was his agent in making the contract or (under the provisions of a code) on the ground that the sender and the telegraph company made the contract for his benefit,—he can not recover in contract, but must bring his action *ex delicto*, in a jurisdiction where the common law forms of action prevail, his action

Grange v. Southwestern Tel. Co., 25 La. An. 383. In the Province of Quebec a telegraph company is, by the code, responsible to the *receiver* of a telegram for damages caused to him by a negligent error in the transmission of an unrepeatable message, even where the sender writes it on a blank on which is printed a condition that the company will not be responsible for mistakes in the transmission of unrepeatable messages: Watson v. Montreal Tel. Co., 5 Mont. Leg. News 87. In Bell v. Dominion Tel. Co., 3 Mont. Leg. News 406, the action was by the person to whom the message was addressed, and the company was held liable, the court following the American doctrine. See also Delaporte v. Madden, 17 L. Can. Jur. 29, which was the case of a letter instead of a telegram, where the English cases are reviewed.

<sup>9</sup> Western Union Tel. Co. v. Adams, 75 Tex. 531; s. c. 6 L. R. A. 844; 12 S. W. Rep. 857.

<sup>10</sup> Western Union Tel. Co. v. Berlinger, 84 Tex. 38; s. c. 19 S. W. Rep. 336; Western Union Tel. Co. v. Adams, 75 Tex. 531; Smith v. Western Union Tel. Co., 84 Tex. 359; s. c.

19 S. W. Rep. 441; 11 Rail. & Corp. L. J. 299. For example, where the plaintiff left his sister in charge of his house while he was visiting his father at a distant place, and his sister delivered to the telegraph company a message to be transmitted to the father, telling the plaintiff of the illness of one of his children, and the message was not delivered, for which reason the plaintiff missed the opportunity of being with the child during its last hours,—it was held that he could maintain an action for damages against the company, on the ground that he was "the real party in interest," within the meaning of the code of procedure of North Carolina, and that the language of the message notified the company of that fact; and also upon the ground that the sender of the message acted as his agent in sending it: Sherrill v. Western Union Tel. Co., 109 N. C. 527; s. c. 14 S. E. Rep. 94.

<sup>11</sup> New York & C. Tel. Co. v. Dryburg, 35 Pa. St. 298; s. c. 78 Am. Dec. 338; Webbe v. Western Union Tel. Co., 169 Ill. 610; s. c. 61 Am. St. Rep. 207; 48 N. E. Rep. 670; rev'g s. c. 64 Ill. App. 331.



being in *tort* to recover damages for a misfeasance.<sup>12</sup> In addition to what is here said, the right of action is in the addressee under various statutes giving and regulating rights of action against telegraph companies. For example, the addressee in a message announcing the sickness or death of a near relative, which is not delivered, is the "*aggrieved party*" within the meaning of a statute of Tennessee,<sup>13</sup> relating to the liability of telegraph companies and to actions to enforce the same.<sup>14</sup> The addressee may maintain the action for damages, under the Missouri statute,<sup>15</sup> giving special damages on the footing of negligence, and also under a similar statute in Indiana,<sup>16</sup> as well as under the general principles of the common law as there understood and administered.<sup>17</sup> The same rule obtains under a statute of Mississippi giving a *penalty* in addition to other damages.<sup>18</sup>

§ 2490. **When the Right of Action is in the Sender.**—From what has preceded, it will be clear that the right of action is in the sender of the message, where he acts in his own behalf in sending it, and has suffered damage through the default of the company in not transmitting and delivering it promptly and correctly; for he is the party with whom the contract has been made, and who has sustained damages for its breach.<sup>19</sup> On the other hand, it has been held that a *broker* may maintain an action against a telegraph company in his own name for a breach of contract to transmit an order in his name

<sup>12</sup> *Western Union Tel. Co. v. Du-bois*, 128 Ill. 248; s. c. 21 N. E. Rep. 4; 15 Am. St. Rep. 109; *Postal Tel. & Co. v. Ford*, 117 Ala. 672; s. c. 23 South. Rep. 684. In Mississippi, the common law doctrine is applied that the company is liable to the sender in contract or in tort, but to the receiver it is liable only in tort: *Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030; s. c. 30 L. R. A. 444.

<sup>13</sup> *Thomp. & S. Tenn. Code*, § 1321.

<sup>14</sup> *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 605; *Railroad v. Griffin*, 92 Tenn. 694; s. c. 22 S. W. Rep. 737. But the addressee is not "any party aggrieved" within the meaning of a statute of Indiana giving an action for a *penalty*: *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; s. c. 21 Am. & Eng. Corp. Cas. 72; 15 N. E. Rep. 845; 13 West. Rep. 405; *Burns' Rev. Stat. Ind.*, § 5513. It has been held that the right of the addressee to recover damages for a failure promptly to deliver a telegram must be determined from the contract between the sender and

the company: *Russell v. Western Union Tel. Co.*, 57 Kan. 230; s. c. 45 Pac. Rep. 598.

<sup>15</sup> *Mo. Rev. Stat.* 1879, § 887; *Mo. Rev. Stat.* 1889, § 2729; *Markel v. Western Union Tel. Co.*, 19 Mo. App. 80. The Missouri statute is very similar to that in Indiana, and the Missouri court adopted the construction placed by the Supreme Court of Indiana upon their statute.

<sup>16</sup> *Burns' Ind. Rev. Stat.*, § 5513.

<sup>17</sup> *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; s. c. 14 N. E. Rep. 894; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191. But in Indiana, he can not maintain the action for the *penalty*, provided in the act of 1885, p. 151 (*Burns' Rev. Stat.*, §§ 5511, 5512, 5529), which repealed § 4176, R. S. 1881: *Western Union Tel. Co. v. Fenton*, 52 Ind. 1.

<sup>18</sup> *Miss. Acts* 1886, p. 91; *Western Union Tel. Co. v. Allen*, 66 Miss. 549; s. c. 6 South. Rep. 461.

<sup>19</sup> *Potts v. Western Union Tel. Co.*, 82 Tex. 545; s. c. 18 S. W. Rep. 604.



on behalf of his principal for the purchase of goods,—in which case he recovers as *trustee* for his principal.<sup>20</sup> In such a case, where the common law forms of pleading prevail, the action is properly brought in the name of the broker *to the use of his principal*.<sup>21</sup> The sender also has a right of action against the telegraph company where, in consequence of a mistake in transmitting a message, the addressee has been misled to his damage and has recovered such damage from the sender. The theory is that, as between the sender and the addressee in case of damages resulting from a mistake in transmitting the message, *the loss is to fall upon the party electing that mode of communication*; so that, if the addressor elected that mode of communication in the first instance, and, in consequence of a mistake of the telegraph company, is obliged to pay damages to the addressee, he may have an action over against the company.<sup>22</sup> Under statutes of Indiana, elsewhere referred to, giving penalties against telegraph companies,<sup>23</sup> the sender of the message can alone sue, and he must prove that he was the sender.<sup>24</sup> Nor did a subsequent statute giving the right of action to “any party aggrieved,” change this rule.<sup>25</sup> But under a statute of the same State giving *special damages* against such companies on the footing of negligence, the addressee may recover if damaged specially, although no relation of contract exists between him and the company.<sup>26</sup>

<sup>20</sup> United States Tel. Co. v. Gildersleeve, 29 Md. 232; s. c. 96 Am. Dec. 519.

<sup>21</sup> American Union Tel. Co. v. Daughtery, 89 Ala. 191; s. c. *sub nom.* American Union Tel. Co. v. Daughtry, 7 South. Rep. 660.

<sup>22</sup> Ayer v. Western Union Tel. Co., 79 Me. 493. This seems perfectly clear; and yet there is a decision holding that, where the sender of a message has been obliged, under the *judgment of a court of another State*, to pay damages to the addressee in consequence of an error in its transmission, the sender can not maintain an *action over* against the telegraph company: Pegram v. Western Union Tel. Co., 100 N. C. 28. It has been held that a mistake in a telegram directing an agent to sell property, in reliance upon which the agent makes a contract in his own name, which is not binding on his principal, will not give a right of action to the latter, who voluntarily, after notice of the mistake, carries out the contract to protect the agent, instead of leaving him to his remedy against the telegraph

company: Shingleur v. Western Union Tel. Co., 72 Miss. 1030; s. c. 48 Am. St. Rep. 604; 12 Am. Rail. & Corp. Rep. 648; 18 South. Rep. 425.

<sup>23</sup> *Ante*, § 2404, *et seq.*

<sup>24</sup> Western Union Tel. Co. v. Pendleton, 95 Ind. 12; s. c. 48 Am. Rep. 692; Western Union Tel. Co. v. Meek, 49 Ind. 53; Western Union Tel. Co. v. Hopkins, 49 Ind. 223; Western Union Tel. Co. v. Kinney, 106 Ind. 468; Western Union Tel. Co. v. Brown, 108 Ind. 538. The plaintiff does not prove that he was the sender of the message by showing merely that he delivered a message to the company, signed by the name of another and paid for by himself: Western Union Tel. Co. v. Brown, 108 Ind. 538.

<sup>25</sup> Hadley v. Western Union Tel. Co., 115 Ind. 191; s. c. 21 Am. & Eng. Corp. Cas. 72; 15 N. E. Rep. 845; 13 West. Rep. 405; Burns' Rev. Stat. Ind., § 5513.

<sup>26</sup> Western Union Tel. Co. v. McKibben, 114 Ind. 511; s. c. 14 N. E. Rep. 894; Hadley v. Western Union Tel. Co., 115 Ind. 191.



§ 2491. **Whether any Right of Action in a Third Person.**—The general rule no doubt is that a telegraph company is not liable to a stranger,—that is, to one who is neither the sender nor the addressee of the message, for a mere mistake in transmitting it, whereby the stranger, acting upon the faith of it as transmitted, has suffered damage.<sup>27</sup> An exception to this rule possibly exists in cases where it is understood by the telegraph company that the information contained in the message is to regulate the conduct of a third person, and where the company intends that it shall have this effect; and where the statute law is construed as giving such an action.<sup>28</sup> Nor is there any reason why this principle should not be extended so as to charge the telegraph company with responsibility in damages for sending a false report intended to deceive the public generally,—as to “rig the market” in a particular commodity, in favor of any one who is caught and deceived by the report.<sup>29</sup> But for mere errors or mistakes, without any malicious or fraudulent intent, whereby erroneous statements or reports are given out to the public,—let us say, for example, by means of the well-known stock “ticker”,—there is

<sup>27</sup> *McCormick v. Western Union Tel. Co.*, 49 U. S. App. 116; s. c. 79 Fed. Rep. 449. Thus, a banker who cashed a draft upon the faith of a telegram from the drawee, purporting to authorize the drawer to make such draft, where a mistake as to the amount was made in transmitting the message, was not allowed to recover from the company damages for such mistake, since the company can not be held liable to a stranger for a mistake in a message who has acted upon it to his injury: *McCormick v. Western Union Tel. Co.*, 49 U. S. App. 116; s. c. 79 Fed. Rep. 449.

<sup>28</sup> One for whose benefit a telegram is sent, who is named in the message, or of whose interest therein notice is given the company at the time, may, in Texas, sue upon it in case of injury through the negligence of the telegraph company with respect to it: *Western Union Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435; s. c. 47 S. W. Rep. 676; 1 J. A. 55; *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527. Under *Mill & V. Tenn. Code*, § 1542, one who, upon the face of a telegram, is the beneficiary of it though it is addressed to another, may recover for a failure to deliver it, the statute providing that the company shall be

*liable to the party who is aggrieved by its failure to deliver a message*: *Western Union Tel. Co. v. Mellon*, 96 Tenn. 66; s. c. 33 S. W. Rep. 725. In Texas, the failure of a telegraph company to deliver a message renders it liable to a person named therein, for whose benefit it was sent, *although the sender was not acting under instructions from him in sending it*: *Western Union Tel. Co. v. Morrison* (Tex. Civ. App.), 33 S. W. Rep. 1025 (no off. rep.); *Western Union Tel. Co. v. Hale*, 11 Tex. Civ. App. 79; s. c. 32 S. W. Rep. 814; *Western Union Tel. Co. v. Clark*, 14 Tex. Civ. App. 563; s. c. 38 S. W. Rep. 225. To the same effect, *Western Union Tel. Co. v. Gahan*, 17 Tex. Civ. App. 657; s. c. 44 S. W. Rep. 933; *Chapman v. Western Union Tel. Co.*, 90 Ky. 265; s. c. 12 Ky. L. Rep. 265; 30 Am. & Eng. Corp. Cas. 626; 13 S. W. Rep. 880.

<sup>29</sup> See, for an analogy, *Ayre's Case*, 25 Beav. 513; *dicta* in *Cross v. Sackett*, 2 Bosw. (N. Y.) 617; *Wontner v. Shairp*, 4 C. B. 404; *Bartholomew v. Bentley*, 15 Ohio St. 659; *Cazeaux v. Mali*, 25 Barb. (N. Y.) 578, 583; *Clarke v. Dickson*, 6 C. B. (N. S.) 453; *Morgan v. Skiddy*, 62 N. Y. 319. See also *Davidson v. Tulloch*, 3 Macq. H. L. (Sc.) 783.



no principle on which the telegraph company incurs liability to strangers, any more than the publisher of a newspaper would for making a mistake, not libelous, in the publication of an item of news. It has been held that an *undisclosed principal* for whose benefit a message has been sent by his agent, can recover for a negligent delay in its delivery.<sup>30</sup>

§ 2492. In whom Right of Action against Connecting Lines.—

Where an action is given by statute against a company operating a connecting telegraph line, for neglecting or refusing to transmit a dispatch received from another company, the company tendering the dispatch for transmittal is the proper party to bring the action for the penalty;<sup>31</sup> but this does not exclude a right of action in the *sender* of the message.<sup>32</sup> Such a right of action exists independently of any statute.<sup>33</sup> A telegraph company may be equally liable to the sender of a message for the *statutory penalty* for delay in delivering it, where it receives it from a connecting company to be further transmitted, as where it receives it from the sender in the first instance.<sup>34</sup> If, on the other hand, the company operating the connecting line undertakes the duty of transmitting and delivering the message, then it enters into a contractual relation with the sender of the message and assumes a public duty in behalf of the addressee, and for its default in the performance of that undertaking, the action may be brought by the principal of either, where either is acting as agent, under principles already considered. Under the recent doctrine, which gives a right of action to the addressee for *injury to his feelings* through the failure to deliver a message announcing the sickness or death of a near relative,<sup>35</sup> if the default is that of a connecting line which has received the message for transmittal and delivery, the addressee may maintain the action against the connecting line.<sup>36</sup>

<sup>30</sup> Harkness v. Western Union Tel. Co., 73 Iowa 190. In the above case the plaintiff had a law suit pending in Nebraska. She hired a lawyer there, and also one at her place of residence in Iowa. The attorney in Nebraska sent a message to the attorney in Iowa that the case was postponed, and was not to come up on a certain appointed day. Owing to a delay in the delivery of the message, the plaintiff, her attorney and her witnesses' went to Nebraska, which incurred much expense to plaintiff.

<sup>31</sup> United States Tel. Co. v. Western

Union Tel. Co., 56 Barb. (N. Y.) 46.

<sup>32</sup> Baldwin v. United States Tel. Co., 54 Barb. (N. Y.) 505; Thurn v. Alta California Tel. Co., 15 Cal. 472; Leonard v. New York & C. Tel. Co., 41 N. Y. 544; Squire v. Western Union Tel. Co., 98 Mass. 232.

<sup>33</sup> Leonard v. New York & C. Tel. Co., 41 N. Y. 544; Squire v. Western Union Tel. Co., 98 Mass. 232.

<sup>34</sup> Conyers v. Postal Tel. Co., 92 Ga. 619; s. c. 19 S. E. Rep. 253.

<sup>35</sup> *Ante*, § 2476, *et seq.*

<sup>36</sup> Martin v. Western Union Tel. Co., 1 Tex. Civ. App. 143; s. c. 20 S. W. Rep. 860.



Where the rule of the forum is that the addressee can maintain an action against a telegraph company for failing to deliver a dispatch which, on its face, shows that it is intended for the benefit of the addressee, the same rule will be applied to a connecting telegraph line which receives a dispatch from another company to be transmitted to its destination.<sup>37</sup> On the other hand, as in the case of a common carrier, a telegraph company may contract with the sender for a through transit, and thereby make itself liable for the default of any connecting line which it may employ to complete the transit. Thus, it has been held that where such a company has received full payment for the transmission of a message to a place beyond its own line, without making a contract with the sender limiting its liability to its own line, it is liable for the failure of a connecting line which it employs to deliver the message.<sup>38</sup> So, where a telegraph company employed a telephone company to transmit a message beyond the end of its own line, it was deemed to make the latter company its agent, so as to render itself liable for its negligence.<sup>39</sup>

§ 2493. **Husband Suing for Wife under Texas Code.**—Under the Texas Code of Civil Procedure, an action for damages may be maintained by a *husband alone*, for the negligent failure of a telegraph company to transmit and deliver a message to his wife;<sup>40</sup> and the fact that the company had no notice that she was the plaintiff's wife, or that the contract was made for her benefit, is immaterial.<sup>41</sup> He is the proper party to sue for the failure to deliver a message summoning a physician to attend his wife, and she is not a necessary party.<sup>42</sup> This will explain peculiar holdings in that State where the action is brought by the husband alone to recover *damages for the injured feelings of his wife*,—as where the telegraph company fails to deliver a message notifying her of the illness of her son, whereby she loses the opportunity of attending at his bedside before his death.<sup>43</sup> This

<sup>37</sup> *Martin v. Western Union Tel. Co.*, 1 Tex. Civ. App. 143; s. c. 20 S. W. Rep. 860. It is reasoned in this case that a telegraph company, receiving a message from another such company for transmission, is under an implied obligation to discharge the duty with the same diligence and expedition as if it had expressly agreed with the sender to transmit it.

<sup>38</sup> *Western Union Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429; s. c. 21 S. W. Rep. 109.

<sup>39</sup> *Western Union Tel. Co. v. McLeod* (Tex. Civ. App.), 22 S. W. Rep.

988; denying rehearing in 24 S. W. Rep. 815.

<sup>40</sup> *Loper v. Western Union Tel. Co.*, 70 Tex. 689; s. c. 8 S. W. Rep. 600.

<sup>41</sup> *Western Union Tel. Co. v. Adams*, 75 Tex. 531; s. c. 12 S. W. Rep. 857; 6 L. R. A. 844; *Western Union Tel. Co. v. Feegles*, 75 Tex. 537.

<sup>42</sup> *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c. 9 S. W. Rep. 598.

<sup>43</sup> *Martin v. Western Union Tel. Co.*, 1 Tex. Civ. App. 143; s. c. 20 S. W. Rep. 860.



does not exclude a right of action in the wife for the failure of the company to deliver a message sent to her brother notifying him that her husband is not expected to live. In such a case if the husband dies, the right of action does not pass to his estate, but remains in his widow; and this conclusion is stronger where her petition discloses no other heir to her husband's estate than herself.<sup>44</sup>

## ARTICLE II. QUESTIONS OF PLEADING IN SUCH ACTIONS.

| SECTION  | SECTION   |
|--|---|
| 2495. Form of action: contract or tort.                                  | 2502. Examples of complaints that have been assailed on various grounds, and held sufficient. |
| 2496. What the plaintiff must aver and prove.                            |   |
| 2497. What the plaintiff must aver as to his damages.                    | 2503. Example of a petition bad because damages too remote.                                   |
| 2498. Complaints or petitions in actions to recover statutory penalties. | 2504. Uniting claim for statutory penalty with claim for damages.                             |
| 2499. What allegations are unnecessary.                                  | 2505. Variance between allegations and proofs.  |
| 2500. Allegations with regard to giving company notice of claim.         | 2506. What must be pleaded by way of special defense, and how.                                |
| 2501. Examples of good declarations or complaints.                       | 2507. Interpretation of complaints in these actions.  |

§ 2495. **Form of Action: Contract or Tort.**—In jurisdictions where the forms of actions are so far kept up that a distinction is made between actions of contract and actions of tort, if the action is brought by the *receiver* of the message, it must be in *tort*, since there is no contract relation between him and the sender.<sup>45</sup> But this rule would not apply where the sender of the message acted merely as the *agent* of the receiver.<sup>46</sup>

§ 2496. **What the Plaintiff must Aver and Prove.**—It has been ruled that, in an action against a telegraph company for damages for failing to transmit a message, the plaintiff must aver in his complaint and prove on the trial, that the defendant has a line of wires wholly or partly within the State; that it is engaged in tele-

<sup>44</sup> Potts v. Western Union Tel. Co., 82 Tex. 545; s. c. 18 S. W. Rep. 604. But it is held that a notice to the company of damages to a woman by its failure to send a message summoning a physician to give her medical attendance, will not authorize her husband to sue the company

for damages sustained by him: Swain v. Western Union Tel. Co., 12 Tex. Civ. App. 385; s. c. 34 S. W. Rep. 783.

<sup>45</sup> Western Union Tel. Co. v. Du-bois, 128 Ill. 248; s. c. 21 N. E. Rep. 4.

<sup>46</sup> Ante, § 2488.



graphing for the public, and that the particular message was placed in the hands of its agent for transmission.<sup>47</sup> Under the New York statute, a telegraph company is required to transmit dispatches on payment of charges. Hence, it is held in that State that the complaint in an action for damages for failure to deliver a message is bad on demurrer if it neither alleges *payment* nor *tender* of the charges, or facts showing a *waiver*, or a special contract.<sup>48</sup> So, in Indiana, the complaint must aver that the sender paid or tendered the usual charges.<sup>49</sup>

§ 2497. **What the Plaintiff must Aver as to his Damages.**—Here, as in other cases, where the plaintiff seeks to recover special or consequential damages, he must proceed under the well-known rule that such damages must be both alleged and proved; otherwise he can recover no more than the cost of sending the message,<sup>50</sup> except where he sues under a statute, or upon a contract which liquidates the damages. If, for instance, he seeks to recover damages for *mental anguish*, under the rule of some courts already considered,<sup>51</sup> he must, it has been said, both allege and prove the special circumstances rendering a prompt performance by the company of the duty assumed of more than ordinary importance to the plaintiff,—as where the message merely asked for a remittance of money.<sup>52</sup> An averment in a complaint in an action by the addressee of a message, that, by reason of the gross negligence of a telegraph company in failing to deliver within a reasonable time a message summoning the plaintiff to the deathbed of his mother, the plaintiff has suffered great damage both in body and in mind, stating a certain amount, has been held broad enough to embrace any damage to which the plaintiff is in law entitled.<sup>53</sup> In Texas the petition should state whether *exemplary* or *actual* damages are claimed.<sup>54</sup>

<sup>47</sup> *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495.

<sup>48</sup> *Macpherson v. Western Union Tel. Co.*, 52 N. Y. Super. 232.

<sup>49</sup> *Western Union Tel. Co. v. Mossler*, 95 Ind. 29. A genius for refinement has resulted in the conclusion that an allegation in a petition against a telegraph company for delay in delivering a message announcing the death of plaintiff's mother, that by reason of such delay he was deprived of the privilege of being present at the burial of his mother, and that by "reason of his inability to attend the funeral," he suffered mental anguish, *does not allege that there was a funeral*, so as to require defendant to deny that there was one: *Graddy v. Western Union Tel.*

*Co.*, 19 Ky. L. Rep. 1455; s. c. 43 S. W. Rep. 468 (no off. rep.).

<sup>50</sup> *Cutts v. Western Union Tel. Co.*, 71 Wis. 46; s. c. 36 N. W. Rep. 627 (special damages alleged, but not proved). But special damages need not be specially pleaded, to warrant their recovery, in an action before a justice of the peace: *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375.

<sup>51</sup> *Ante*, § 2476, *et seq.*

<sup>52</sup> *Western Union Tel. Co. v. Simpson*, 73 Tex. 423; s. c. 11 S. W. Rep. 385.

<sup>53</sup> *Haverner v. Western Union Tel. Co.*, 117 N. C. 540; s. c. 23 S. E. Rep. 457.

<sup>54</sup> *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; s. c. 7 S. W. Rep. 715.



§ 2498. **Complaints or Petitions in Actions to Recover Statutory Penalties.**—Two successive statutes have existed in Indiana allowing the recovery of the sum of \$100 for the violation by telegraph companies of the duties prescribed by the statute.<sup>55</sup> These statutes have always been construed by the Supreme Court of that State as *giving a penalty*, and not as giving merely *liquidated damages*.<sup>56</sup> It is a familiar rule that a party bringing an action upon a penal statute must bring himself strictly within the terms of the statute: it is at once strictly *construed* and *pursued*. In keeping with this rule, we find that it has been held in that State, that, in an action under the statute of 1885,<sup>57</sup> for failure to transmit and deliver a message with impartiality, and without discrimination, the *complaint must allege* that the person to whom the message was addressed resided *within one mile of the station, or within the city or town wherein the same is situated*.<sup>58</sup> So, in an action under the same statute, to recover the penalty given for failing to transmit a telegram, where the plaintiff alleges that the contract was made on *Sunday*, he must plead facts showing a reasonable *necessity* for making the contract on that day, and that the defendant *knew* of this necessity.<sup>59</sup> In an

<sup>55</sup> *Ante*, § 2404.

<sup>56</sup> *Western Union Tel. Co. v. Ax-tell*, 69 Ind. 199; *Western Union Tel. Co. v. Mossler*, 95 Ind. 29; *Western Union Tel. Co. v. Kinney*, 106 Ind. 468; *Western Union Tel. Co. v. Harding*, 103 Ind. 505; *Western Union Tel. Co. v. Steele*, 108 Ind. 163; *Western Union Tel. Co. v. Wilson*, 108 Ind. 308; *Western Union Tel. Co. v. Brown*, 108 Ind. 538.

<sup>57</sup> *Burns' Rev. Stat. Ind.*, §§ 5511, 5512, 5529.

<sup>58</sup> *Reese v. Western Union Tel. Co.*, 123 Ind. 294; s. c. 24 N. E. Rep. 163.

<sup>59</sup> *Western Union Tel. Co. v. Yopst*, 118 Ind. 348; s. c. 3 L. R. A. 224; 20 N. E. Rep. 222. A declaration is defective as not setting forth a sufficient cause of action in a suit to recover the statutory penalty under Georgia Act 1887, for failure to deliver a telegram, which does not allege that the dispatch was delivered for transmission, or by what line it was to be transmitted, or that it ever came into the hands of the defendant company, or that the defendant company was guilty of any breach of duty: *Greenberg v. Western Union Tel. Co.*, 89 Ga. 754; s. c. 15 S. E. Rep. 651. In the same State, a declaration against a telegraph company to recover the statutory

penalty for *delay* in delivering a telegram, which describes the delivery for transmission as having been made by the sender directly to the defendant at a designated point, may be amended by alleging that it was delivered at that point to another telegraph company, which transmitted it to another point named, at which it was delivered to defendant and transmitted by it to the point of destination: *Conyers v. Postal Tel. Cable Co.*, 92 Ga. 619; s. c. 19 S. E. Rep. 253. A declaration in an action under the Virginia Code (Va. Code, § 1292), providing that a telegraph company which fails to deliver a dispatch promptly to a person to whom it is addressed, after its arrival at the point to which it is to be transmitted, if the regulations of the company require such delivery, shall forfeit \$100, is fatally defective if it fails to aver *the arrival of the dispatch* at the point to which it was to be transmitted: *Western Union Tel. Co. v. Powell*, 94 Va. 268; s. c. 26 S. E. Rep. 828. A complaint in an action to recover the penalty imposed by the Indiana statute (*Burns' Rev. Stat.*, §§ 5511, 5512, 5529), for failure to transmit a message with impartiality and in good faith need not refer to the statute or state that the mes-



action seeking to recover a statutory penalty for the refusal or postponement of a message, the plaintiff must state specially every fact requisite to enable the court to judge whether or not he has a cause of action under that statute; and his failure so to do is not cured by an allegation that the refusal to transmit the message tendered was without reasonable grounds, since such allegation is not one of fact, but of a mere conclusion of law.<sup>60</sup>

§ 2499. **What Allegations are Unnecessary.**—A petition in an action by the addressee to recover damages for a negligent delay of the company in delivering the message to him, is not insufficient because it fails to allege expressly that the message was sent for the plaintiff's benefit, where it states facts which do not admit of any other conclusion.<sup>61</sup> A complaint in an action to recover damages for a failure to deliver a message need not allege that the message was in writing and such as the company was bound to accept, when it alleges its receipt and transmission by defendant.<sup>62</sup> An allegation, in substance, that, because a telegraph company, sued for delay in delivering a telegraph message, failed and refused to comply with its contract and to transmit the message with promptness and reasonable dispatch, the plaintiff was prevented from seeing his mother before her death, has been held sufficient to show that the defendant's breach of contract was the proximate cause of such failure.<sup>63</sup>

§ 2500. **Allegations with Regard to Giving Company Notice of Claim.**—Recurring to a subject which has already been considered,<sup>64</sup> it seems that where the plaintiff brings his action *upon the contract*, he must aver and prove that he presented his claim for damages or compensation within the time limited in the contract, either by averring in general terms that he complied with all the conditions of the contract on his part, or stating in special terms what he did in the way of giving such notice. If, however, he does not bring his action upon the contract embodied in the message blank, but sues for a violation of the common law duty of the defendant, he need not allege, in his petition, that he gave the defendant any notice of his claim prior to bringing the action.<sup>65</sup> Where the action is of this

sage was sent on the usual terms:  
Western Union Tel. Co. v. Griffin,  
1 Ind. App. 46; s. c. 27 N. E. Rep.  
113.

<sup>60</sup> Kirby v. Western Union Tel. Co.,  
4 S. D. 463; s. c. 57 N. W. Rep.  
202.

<sup>61</sup> Western Union Tel. Co. v.  
Thompson (Tex. Civ. App.), 41 S. W.  
Rep. 1103 (no off. rep.).

<sup>62</sup> Western Union Tel. Co. v. Wil-  
son, 93 Ala. 32; s. c. 9 South. Rep.  
414.

<sup>63</sup> Erie Telegraph & C. Co. v. Grimes,  
82 Tex. 89; s. c. 17 S. W. Rep. 831.

<sup>64</sup> *Ante*, § 2469, *et seq.*

<sup>65</sup> Western Union Tel. Co. v. Jack-  
son, 19 Tex. Civ. App. 273; s. c. 46  
S. W. Rep. 279.



character, the failure of the plaintiff to comply with the provision of the contract requiring him to present his claim for damages to the company in writing within a specified time, is *matter of defense*, which he need not allege or prove.<sup>66</sup> Another court has held that a complaint against a telegraph company for a total failure to deliver a telegram is not demurrable for failure to allege compliance with a condition requiring claims to be presented in writing within sixty days; since, in case of non-delivery, the sixty days will not begin to run until after knowledge of the non-delivery, and failure to present it within sixty days is matter of defense.<sup>67</sup>

§ 2501. **Examples of Good Declarations or Complaints.**—In an action for damages for *delay* in delivering a telegram, a declaration alleging that, if the message had been promptly delivered, plaintiffs *would have obtained*<sup>68</sup> the purchase of a lot worth \$5,000, which was offered for sale for \$3,000, and that by the delay they lost the purchase, and were damaged the difference between the price at which the lot was offered to them and its market value when the message should have been delivered, was held good on demurrer.<sup>69</sup> A complaint in an action against a telegraph company, alleged that the plaintiff's agent in France forwarded a cable message addressed to "Mentor, New York," which message was intended for the plaintiff; that the plaintiff called at the defendant's office and inquired if it had received the message, and was informed that it had not; that the plaintiff then stated that he was expecting a message from Paris, so addressed, and requested the defendant to deliver it to him at his residence, and offered to pay such service in advance, which the defendant declined to accept, but promised to deliver such message to the plaintiff when received by it; that the defendant received such message, but neglected to deliver the same as agreed, in consequence whereof the plaintiff suffered loss, etc. It was held that this stated a good cause of action, either on the contract made by the defendant with the plaintiff's agent in Paris, or upon the agreement with the plaintiff in New York.<sup>70</sup> A complaint setting out the failure of a telegraph company to deliver a message, for which pay was received in advance, to one to whom it was addressed, who resided within a mile

<sup>66</sup> *Western Union Tel. Co. v. Piner*, 9 Tex. Civ. App. 152; s. c. 29 S. W. Rep. 66.

<sup>67</sup> *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527; s. c. 14 S. E. Rep. 94. Compare *ante*, § 2438.

<sup>68</sup> Compare *ante*, § 2457, *et seq.*

<sup>69</sup> *Alexander v. Western Union Tel. Co.*, 67 Miss. 386; s. c. 5 South. Rep. 397.

<sup>70</sup> *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403; s. c. 1 L. R. A. 281; 18 N. E. Rep. 251; 18 N. Y. St. Rep. 328; reversing s. c. 53 N. Y. Super. 111.



of its receiving office, is not demurrable, as the facts entitle the sender to at least *nominal damages*.<sup>71</sup>

§ 2502. **Examples of Complaints that have been Assailed on Various Grounds, and Held Sufficient.**—A declaration alleging that the defendant held and permitted a message delivered to it for transmission to remain in the sending or receiving office for about thirty-six hours, and was grossly careless and negligent in its delivery to plaintiff, and therefore became liable to pay the statutory penalty of \$100,—sufficiently alleges a *want of due diligence* on the part of the defendant.<sup>72</sup> An allegation in a complaint predicated upon failure of the defendant to deliver a message announcing that the addressee's child is dying and requesting an answer, that he would have replied so as to delay the funeral until his arrival, and immediately started for home, and would have reached it in time for the funeral, and that the funeral would have been delayed until his arrival,—is not subject to demurrer as stating unreasonable or speculative contingencies.<sup>73</sup> An allegation in a complaint claiming damages for failing to deliver a message to inform plaintiff of the dangerous illness of her mother, that the omission of the defendant prevented plaintiff from going to see her mother, and that, had the message

<sup>71</sup> *Western Union Tel. Co. v. Bryant*, 17 Ind. App. 70; s. c. 46 N. E. Rep. 358. That a general demurrer to the whole declaration will be overruled where it is not good as to the entire relief sought,—see *Jacobs v. Postal Tel. Cable Co.*, 76 Miss. 278; s. c. 24 South. Rep. 535. The Supreme Court of Texas have held that a petition stated a good cause of action, which alleged that the plaintiff's wife's son, who was dangerously ill at M., wrote a message dated October 2, in the words: "Come immediately—I am very sick," which was delivered to the agent at M., at 4 P. M. of that date, for transmission; that the agent was informed of the relationship between the parties; that on that day the plaintiff and his wife were in W., within 600 yards of the defendant's office, as was well known by the agent at that place; that the message could have been delivered within half an hour from its receipt at M.; that, if it had been so delivered, the plaintiff's wife could, by the usual course of travel, have reached her son before his death, on the third; that, by the negligence of the defendant, the message was

not delivered until 6 P. M. on the third; that she took the next train for M., but learned at an intermediate point, that her son was dead, and that the body had been sent to E. for burial; that she started at once for E., but was unable to reach there until after the body had been interred; that she suffered great *hardship*, in being compelled to travel on a freight train a part of the way, and great *mental anguish* by not being with her son in his last moments, etc. The court reasoned that, although the allegations in regard to the death and burial of the son may have been insufficient if *specially excepted* to, yet it appearing by reasonable intendment that he died about noon of October 3, and had been buried when his mother arrived, they must be treated as sufficient on *general demurrer*: *Loper v. Western Union Tel. Co.*, 70 Tex. 689; s. c. 8 S. W. Rep. 600. As to damages grounded on mental anguish, see *ante*, § 2476, *et seq.*

<sup>72</sup> *Smith v. Western Union Tel. Co.*, 94 Ga. 441; 19 S. E. Rep. 979.

<sup>73</sup> *Western Union Tel. Co. v. Lyman*, 3 Tex. Civ. App. 460; s. c. 22 S. W. Rep. 656.



been delivered promptly, she would have been able to go, is sufficient to show an intent and desire on her part to go, had she received the message promptly.<sup>74</sup>

§ 2503. **Example of a Petition Bad because Damages too Remote.**—But where the plaintiff, after alleging in his petition that he delivered to the defendant company for transmission a message as follows: “R. [addressed] Meet me in C. Saturday night. S.”, which was not delivered to R., and further alleging that, by its negligence, he was put to expense in hiring a conveyance to go from C. to R.’s home and back again; that by loss of time he failed to meet important engagements; and that, by reason of exposure, his health was greatly impaired, the petition was held *bad on demurrer*, the *damages* being *too remote*, conjectural, and not in contemplation of the parties, in case of a breach of the contract.<sup>75</sup>

§ 2504. **Uniting Claim for Statutory Penalty with Claim for Damages.**—A declaration is not *bad on general demurrer* by reason of the fact that the pleader unites in one of the counts a claim for the statutory penalty, which claim is not actionable, because the telegraph is an interstate line;<sup>76</sup> though, no doubt, it could be reached by a special demurrer, or, under some systems, by a motion to strike out.

§ 2505. **Variance between Allegations and Proofs.**—The *allegata* and the *probata* must, of course, correspond as to essential matters; but this rule does not extend to *dates*, provided the date proved is within the statute of limitations, unless there are special circumstances making the date material. Thus, where a complaint to recover the statutory penalty for failure to transmit a telegram alleged that it was sent in *March*, it was held that it could be shown to have been sent in *January*.<sup>77</sup>

<sup>74</sup> *Western Union Tel. Co. v. Eskridge*, 7 Ind. App. 208; s. c. 33 N. E. Rep. 238. A petition in an action for delay in delivering a reply to a telegram, which admits that the first message was duly sent and delivered, is not *bad on general demurrer*, on the ground that the time of delivering the reply was less than that of delivering the message, if it is distinctly averred that the reply was negligently delayed, and the time of delivering the first message

appears only by a memorandum indorsed on the reply as an exhibit: *Western Union Tel. Co. v. Cocke* (Tex. Civ. App.), 22 S. W. Rep. 1005 (no off. rep.).

<sup>75</sup> *Western Union Tel. Co. v. Smith*, 76 Tex. 253; s. c. 13 S. W. Rep. 169. See *ante*, § 2457, *et seq.*

<sup>76</sup> *Alexander v. Western Union Tel. Co.*, 67 Miss. 386; s. c. 5 South. Rep. 397.

<sup>77</sup> *Western Union Tel. Co. v. Kilpatrick*, 97 Ind. 42.



§ 2506. **What must be Pleaded by Way of Special Defense, and How.**—The well-known rule will be recalled that where a defendant relies upon a defense which confesses and avoids the case made by the plaintiff, he must plead it specifically.<sup>78</sup> Where a telegraph company has received a message from a company operating a *connecting line*, and has failed to forward and deliver it, and is sued for damages arising from such failure, it can not claim an exemption from liability growing out of its contract with the company from which it received the message, unless it sets up the contract by appropriate pleadings.<sup>79</sup> A plea alleging that a telegram was written on a blank, and that on the back of the blank were certain stipulations, need not aver that the sender of the message was aware of the stipulations; since the averment of the writing of the message on the blank, on the back of which the stipulations were printed, sufficiently charges that he had notice of the stipulations.<sup>80</sup>

§ 2507. **Interpretation of Complaints in these Actions.**—An allegation in the complaint in such an action that the defendant “carelessly, wrongfully and negligently failed and neglected” to deliver a telegram to plaintiff, imports *ordinary* and *simple negligence* only.<sup>81</sup> Allegations that a message was delivered to defendant telegraph company for transmission, and was transmitted by it promptly to the place of destination, but was not delivered until a day after the proper time for delivery, import an acceptance of the message by defendant and an undertaking to transmit and deliver it.<sup>82</sup>

### ARTICLE III. QUESTIONS OF EVIDENCE IN SUCH ACTIONS.

#### SECTION

2510. Declarations of the company's agent.

2511. Declarations of other persons.

2512. Correspondence between telegraph operators.

2513. Evidence on the question of damages.

#### SECTION

2514. Evidence of what would have happened, been done, been realized, if, etc.

2515. Judicial notice: matters of common knowledge which need not be proved.

2516. Evidence on the subject of mental anguish, injury to the feelings, etc.

<sup>78</sup> *Western Union Tel. Co. v. Scircle*, 103 Ind. 227; s. c. 1 West. Rep. 214 (was an action upon a statute).

<sup>79</sup> *Western Union Tel. Co. v. Smith* (Tex. Civ. App.), 26 S. W. Rep. 216 (no off. rep.).

<sup>80</sup> *Harris v. Western Union Tel.*

*Co.*, 121 Ala. 519; s. c. 25 South. Rep. 910.

<sup>81</sup> *Butner v. Western Union Tel. Co.* (Okla.), 4 Inters. Com. Rep. 770; 48 Am. & Eng. Corp. Cas. 376; 37 Pac. Rep. 1087.

<sup>82</sup> *Western Union Tel. Co. v. Wilson*, 93 Ala. 32; s. c. 9 South. Rep. 414.



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### SECTION

2517. Evidence to show that a particular telegraph office was that of the defendant.

2518. Questions as to the burden of proof.

2519. Evidence with respect to making claim for indemnity.

### SECTION

2520. Admissibility of the message sent or delivered.

2521. Secondary evidence of the contents of telegrams.

2522. Other points of evidence.

§ 2510. **Declarations of the Company's Agent.**—Declarations or statements made by the agent of the company while the transaction is pending are frequently admitted in evidence against the company, under a well-known rule. Thus, in an action by the addressee of a message, for delay in delivering it, the declarations of a messenger boy sent out by the defendant to ascertain the plaintiff's whereabouts, consisting of what he said while engaged in the search, are admissible as affirmative evidence, where they tend to illustrate the degree of his diligence and the good faith of his efforts to find the plaintiff.<sup>83</sup> The rule has been carried so far as to hold that in an action for the failure to transmit and deliver a message received at the transmitting office by telephone, evidence that the defendant's operator, to whom the message was given, stated to the witness that he had no recollection of the message, but that it might have been sent, and that his memory might be at fault, is admissible to show the bad memory of such operator as to facts testified to by him in chief for defendant.<sup>84</sup> But the *subsequent declarations* of the company's agents, not connected with the sending of the message, are incompetent evidence to charge the company in an action against it, the same not being part of the *res gestae*, but in the nature of historical narratives.<sup>85</sup> So, evidence that an employé of a telegraph office stated, soon after the delivery of a message announcing the death of the addressee's mother, that a previous delay in the delivery of the message was a piece of gross negligence, is not admissible against the defendant, as it is the mere expression of an opinion by such employé.<sup>86</sup> The declarations of a receiving operator several days after the delivery of a telegram, that the reason the same was not delivered earlier was that the company would not furnish him with a messenger, and he

<sup>83</sup> *Western Union Tel. Co. v. Bennett*, 1 Tex. Civ. App. 558; s. c. 21 S. W. Rep. 699.

<sup>84</sup> *Texas Telegraph & C. Co. v. Seiders*, 9 Tex. Civ. App. 431; s. c. 29 S. W. Rep. 258.

<sup>85</sup> *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 307; *McAndrew v. Electric Tel. Co.*, 17 C. B. 3;

*United States Tel. Co. v. Gildersleeve*, 29 Md. 232; *Sweatland v. Illinois & C. Tel. Co.*, 27 Iowa 433; *Robinson v. Fitchburg & C. R. Co.*, 7 Gray (Mass.) 92.

<sup>86</sup> *Graddy v. Western Union Tel. Co.*, 19 Ky. L. Rep. 1455; s. c. 43 S. W. 468 (no off. rep.).



could not leave his business, are not admissible against the company.<sup>87</sup> Thus, the statements of such an agent are not competent, as against the company, to prove that a message was not transmitted, when not made in performance of any duty relating to its transmission.<sup>88</sup> So, where a person telegraphed for information concerning the condition of his sick mother, and he received no reply, and the agent of the company informed him that the telegram had been delivered,—these declarations were held admissible in evidence, in an action for failure to transmit and deliver the message, to explain the delay of the sender in not starting in time to see his mother before her death.<sup>89</sup>

§ 2511. **Declarations of Other Persons.**—In an action against a telegraph company to recover damages for its negligent delay in delivering a message accepting an offer of employment, it was held that evidence was inadmissible of the subsequent declarations of the person making the offer, after he had given the situation to another, to the effect that the plaintiff would have been employed by him if his message had been received, or to the effect that the plaintiff lost the situation because of the delay in delivering the message.<sup>90</sup> Where the action was for failing to deliver a message announcing the sickness of the mother of the plaintiff, evidence to the effect that the plaintiff told the witness, a day or two before the message was sent, that his mother was very sick; that he was expecting a telegram in relation to her condition, and that he requested it to be sent to the care of the witness's husband, who was to deliver it to him as soon as received, and that the witness delivered the plaintiff's request to her husband as soon as he came home on the same day,—was held admissible to show the precautionary measure taken by the plaintiff to secure prompt delivery of the message.<sup>91</sup> In an action against a telegraph company to recover damages for delay in delivering a telegram announcing the serious illness of a sister of the plaintiff, testimony to the effect that, a few minutes after her death, and while the persons present at her death were standing around her dead body, the witness heard some one state the time at which her

<sup>87</sup> *Western Union Tel. Co. v. Wofford* (Tex. Civ. App.), 42 S. W. Rep. 119 (no off. rep.). In an action for personal injuries, a statement made by defendant's general manager some months after the injury was received, that the person whose negligence caused the accident was in defendant's employ, is inadmissible against defendant: *Williams v. Southern Bell Teleph. & Co.*, 116 N. C. 558; s. c. 21 S. E. Rep. 298.

<sup>88</sup> *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c. 4 South. Rep. 844.

<sup>89</sup> *Western Union Tel. Co. v. Lydon*, 82 Tex. 364; s. c. 11 Rail. & Corp. L. J. 203; 18 S. W. Rep. 701.

<sup>90</sup> *Mondon v. Western Union Tel. Co.*, 96 Ga. 499; s. c. 23 S. E. Rep. 853.

<sup>91</sup> *Western Union Tel. Co. v. Drake*, 14 Tex. Civ. App. 601; s. c. 38 S. W. Rep. 632.



death took place,—was admissible as a part of the *res gestae*.<sup>92</sup> In an action to recover damages for delay in delivering a message, a statement made by the sender of the message to the agent at the place from which the message was sent, after being informed that the addressee could not be found at the place to which the message was sent, to the effect that it had been some time since the people of the addressee had heard from him, and that he probably was not at the place to which the message was sent, which statement was not communicated to the agent at the place of delivery, and the agent to whom it was made did not act thereon,—was held not admissible for the purpose of showing that the telegraph company was not expected to make any other effort to deliver the message.<sup>93</sup> Where the addressee of a telegram announcing the serious illness of his father, testified, in an action for damages for delay in delivering it, that there were constant communication and a high degree of affection between him and his father,—it was held that this evidence could not be contradicted by evidence of statements made by the sender of the message, more than a day after it was sent, to the effect that it had been some time since the people of the addressee had heard from him, and that he was probably not at the place to which the telegram had been sent.<sup>94</sup>

§ 2512. **Correspondence between Telegraph Operators.**—The same principle obviously applies so as to exclude the declarations of the company's agents made *to each other*, even *dum fervet opus*; when offered to prove extrinsic facts capable of being proved by the testimony of witnesses under oath. Thus, in an action for the failure of a telegraph company to deliver a message, the *correspondence* between telegraph operators of the defendant is not admissible to prove any direct fact, except the fact that such correspondence took place, if that should become material. Accordingly, such correspondence is not admissible to prove that the addressee of the message was gone to the country at the time when the message was received by the delivering office, so that it could not be delivered to him.<sup>95</sup>

§ 2513. **Evidence on the Question of Damages.**—The plaintiff must, of course, prove *damages*, or he can not recover anything for the mistake or default, other than nominal damages, or the cost of sending the message. Where the default consisted in delay in delivering the

<sup>92</sup> Western Union Tel. Co. v. Neel (Tex. Civ. App.), 25 S. W. Rep. 661 (no off. rep.).

<sup>93</sup> Western Union Tel. Co. v. Gahan, 17 Tex. Civ. App. 657; s. c. 44 S. W. Rep. 933.

<sup>94</sup> Western Union Tel. Co. v. Gahan, 17 Tex. Civ. App. 657; s. c. 44 S. W. Rep. 933.

<sup>95</sup> Western Union Tel. Co. v. Cooper, 71 Tex. 507; s. c. 10 Am. St. Rep. 772; 9 S. W. Rep. 598.



message, and there was no evidence tending to show that matters would have been different if the message had been promptly delivered, or that any loss was caused by the delay, it was held error to submit the question of the defendant's liability to the jury.<sup>96</sup> On the other hand, where the action is for a *statutory penalty*, it is not necessary for the plaintiff to prove any damages in order to recover,<sup>97</sup> and this, irrespective of the question whether the statute is regarded as giving a penalty or liquidated damages. In a jurisdiction where *mental suffering* has been held an element of damages in an action against a telegraph company for a default in failing to deliver a message, a well-known rule has been applied so as to admit evidence of the *utterances* or *expressions* indicative of pain or suffering caused by such failure.<sup>98</sup> In such an action, the *opinion* of a broker "that there was no certainty that the stock could have been purchased at the quotation prices, on the morning the telegram was received," has been held not admissible.<sup>99</sup> Evidence as to the financial condition of the telegraph company is inadmissible.<sup>100</sup> Where the action was for failure to deliver a telegram within a reasonable time,—a message to a doctor, summoning him professionally,—evidence on behalf of the telegraph company that the *doctor's charges had not been paid*, and that it was not his *custom* to make such visits without prepayment, was held inadmissible.<sup>101</sup> In an action to recover damages for failure of a telegraph company to transmit and deliver a telegraph message, in which the complaint states that because of such failure cattle were shipped to and sold in a certain market at a loss, evidence is inadmissible to show loss on other cattle sold elsewhere.<sup>102</sup> In an action against a telegraph company for erroneously transmitting a message overstating the price of watermelons at a designated place, evidence of the price of melons at the place where the dispatch is received, and of any sales which the plaintiff made or could have made at that point, is irrelevant on the question of damages.<sup>103</sup> One who brings an action against a telegraph company for an error in transmitting a message directing the addressee to draw for a designated sum, by which error he claims to have lost his land by the foreclosure of a

<sup>96</sup> *Cutts v. Western Union Tel. Co.*, 71 Wis. 46; s. c. 36 N. W. Rep. 627.

<sup>97</sup> *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; s. c. 9 Am. Rep. 744.

<sup>98</sup> *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c. 7 South. Rep. 419.

<sup>99</sup> *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; s. c. 93 Am. Dec. 751.

<sup>100</sup> *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c. 7 South. Rep. 419.

<sup>101</sup> *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c. 7 South. Rep. 419.

<sup>102</sup> *Barrett v. Western Union Tel. Co.*, 42 Mo. App. 542.

<sup>103</sup> *Hollis v. Western Union Tel. Co.*, 91 Ga. 801; s. c. 18 S. E. Rep. 287.



mortgage, must allege and prove that he was unable to obtain the necessary funds to discharge the debt from other sources.<sup>104</sup> The opinion of the plaintiff, as to the amount of damage sustained by him in the form of mental suffering caused by the failure to deliver a telegram, is not competent evidence.<sup>105</sup>

§ 2514. **Evidence of what would have Happened, been Done, been Realized, if, etc.**—We now come to a class of decisions which concern a principle relating to remote or speculative damages, already considered,<sup>106</sup> that principle which requires the sender of a telegram, or the addressee where the law of the jurisdiction gives a right of action to him, to make it reasonably certain by evidence, that the correct transmission of his telegram or its delivery with reasonable promptness to the addressee, would have brought about a condition which would have yielded to him the profit, or averted from him the loss, upon which he founds his claim to damages. If his message is obscure, he can not recover without making proof that it would have been understood in a particular way, or that some particular action would have been taken on account of it, if it had been correctly transmitted and promptly delivered.<sup>107</sup> He can not, for example, found and hold a verdict in his favor upon a mere conjecture that if his telegram had been promptly delivered, he would have realized a larger amount than he did upon an indebtedness owing to him from the sender of the message.<sup>108</sup> Nor can he, where that is material, establish the market value of two hundred head of cattle, for the purpose of fixing the damages suffered by him through a negligent delay in the delivery of a telegram, preventing the consummation of a contract for the purchase of the cattle, by the testimony of a witness who only saw about fifty head of the cattle, that he saw enough "of the cattle to close the trade," provided they all came up to the standard of those he saw, "which they did, or would have done," the latter statement being merely guess work.<sup>109</sup> Where he sues to recover damages for incorrectly transmitting a message by which he was induced to settle a claim for much less than its value, he will be allowed to testify that he would not have directed such settlement, if the telegram had been correctly transmitted, as there is no

<sup>104</sup> *Western Union Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67; s. c. 26 S. W. Rep. 478.

<sup>105</sup> *Newman v. Western Union Tel. Co.*, 54 Mo. App. 434.

<sup>106</sup> *Ante*, §§ 2458, 2464, note.

<sup>107</sup> *Western Union Tel. Co. v. Coggin*, 68 Fed. Rep. 137.

<sup>108</sup> *Hartstein v. Western Union Tel. Co.*, 89 Wis. 531; s. c. 62 N. W. Rep. 412.

<sup>109</sup> *Brewster v. Western Union Tel. Co.*, 65 Ark. 537; s. c. 47 S. W. Rep. 560.



other way of proving such a fact.<sup>110</sup> Nor will it be presumed, in the absence of evidence to that effect, for the purpose of sustaining an action against a telegraph company for negligent delay in the delivery of a telegram, claimed to have resulted in the loss of a contract for the purchase of cattle, that the condition annexed to the contract, that the cattle should come up to a certain grade, would have been performed if the telegram had been delivered in time.<sup>111</sup> In an action against a telegraph company for damages due to the death of a horse, caused by a mistake in transmitting a message asking to have a horse doctor sent, evidence tending to show that a delay of thirteen hours was caused thereby, and that a veterinarian would have had a better chance to save the horse if he had been there at the earlier hour, but showing that it was only a chance,—has been held not sufficient to sustain a judgment for plaintiff.<sup>112</sup>

**§ 2515. Judicial Notice: Matters of Common Knowledge which need not be Proved.**—It is a matter of common knowledge that telegraph messages must be written.<sup>113</sup> But a court can not take judicial notice of the existence or operation of the telegraph lines of a company outside of the territorial jurisdiction of the court.<sup>114</sup> So, the distance between the place to which a telegram is addressed and the place to which the addressee was summoned thereby, the means of travel, and the time it would require to make the trip, are not matters of such common knowledge that the jury can determine the issue whether the delay in delivery prevented the addressee from reaching his father before the latter's death, without evidence thereof.<sup>115</sup>

<sup>110</sup> *Hasbrouck v. Western Union Tel. Co.*, 107 Iowa 160; s. c. 77 N. W. Rep. 1034. The court cite, as authority on this rule of evidence: *Insurance Co. v. Jamison*, 79 Iowa 245; *Western Union Tel. Co. v. Mitchell*, 91 Tex. 454; s. c. 44 S. W. Rep. 274.

<sup>111</sup> *Brewster v. Western Union Tel. Co.*, 65 Ark. 537; s. c. 47 S. W. Rep. 560.

<sup>112</sup> *Duncan v. Western Union Tel. Co.*, 87 Wis. 173; s. c. 58 N. W. Rep. 75. So, it has been held that evidence by the plaintiff that if a message announcing the impossibility of his mother's recovery had been delivered to him without delay, he would have started at once for her home and would have reached it about noon the next day, twenty-four hours before her death, and that whenever he wished to leave, he had to notify his roadmaster and obtain

leave of absence before he could go, sufficiently shows that such leave would have been obtained if the message had been delivered: *Western Union Tel. Co. v. Drake*, 14 Tex. Civ. App. 601; s. c. 38 S. W. Rep. 632.

<sup>113</sup> *People v. Western Union Tel. Co.*, 166 Ill. 15; s. c. 36 L. R. A. 637; 46 N. E. Rep. 731.

<sup>114</sup> *People v. Terney*, 57 Hun (N. Y.) 357; s. c. 32 N. Y. St. Rep. 605; 10 N. Y. Supp. 940; *People v. Terney* (Sup. Ct.), 32 N. Y. St. Rep. 608; s. c. 10 N. Y. Supp. 948.

<sup>115</sup> *Western Union Tel. Co. v. Smith*, 88 Tex. 9; s. c. 30 S. W. Rep. 549. A jury in Dallas county, Texas, are not warranted in reaching a conclusion, without evidence as to the length of time it would take to go from Dallas to Waxahachie, from the common knowledge of the location of the two cities, the distance between them, which is about thirty



§ 2516. **Evidence on the Subject of Mental Anguish, Injury to the Feelings, etc.**—Mental anguish can not be inferred as a result of the failure of a telegraph company to deliver a telegram announcing the death of the *brother-in-law* of the addressee, from the mere fact of relationship, or without proof of the existence of tender ties between them.<sup>116</sup> In an action against a telegraph company for failure to deliver to plaintiff a message announcing the death of her father, evidence of her *exhibition of grief* upon learning that the message had not been delivered in time for her to be present at the funeral, has been held admissible.<sup>117</sup>

§ 2517. **Evidence to Show that a Particular Telegraph Office was that of the Defendant.**—Evidence to the effect that a particular telegraph office had the sign of the defendant telegraph company over the door, and that the operator at that point paid over all the receipts to the treasurer of that company, has been held sufficient, *prima facie*, to show that the office was that of the defendant.<sup>118</sup>

§ 2518. **Questions as to the Burden of Proof.**—In an action to recover damages for the death of a valuable horse alleged to have been due to the defendant's delay in delivering a telegram, the burden of proof is on the plaintiff to show, by a preponderance of the evidence, that, in all reasonable probability, the cause of the death of the horse was the failure to deliver the message in due time.<sup>119</sup> Where a telegraph company sets up, as a defense to an action for damages for delay in delivering a telegram, that the delay was caused by the fact of its wires being out of working order without fault or want of care on its part,—it assumes the burden of showing what caused them to be out of order, where it is within its power to do so.<sup>120</sup> In an action by the addressee of a telegram to recover damages for delay in delivering it to him, where the defendant showed that the plaintiff was not in town on the day when the message arrived at the office of its destination, the burden was shifted to the plaintiff to show his whereabouts on that day, it being a fact peculiarly within his

miles, and the means of transportation by railroad from one to the other: *Western Union Tel. Co. v. Smith*, 88 Tex. 9; s. c. 30 S. W. Rep. 549.

<sup>116</sup> *Western Union Tel. Co. v. Coffin*, 88 Tex. 94; s. c. 30 S. W. Rep. 896.

<sup>117</sup> *Western Union Tel. Co. v. Carter* (Tex. Civ. App.), 20 S. W. Rep. 834; s. c. rev'd on other grounds in

85 Tex. 580; s. c. 22 S. W. Rep. 961.

<sup>118</sup> *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; s. c. 12 S. E. Rep. 427.

<sup>119</sup> *Hendershot v. Western Union Tel. Co.*, 106 Iowa 529; s. c. 76 N. W. Rep. 828.

<sup>120</sup> *Western Union Tel. Co. v. Boots*, 10 Tex. Civ. App. 540; s. c. 31 S. W. Rep. 825.



own knowledge.<sup>121</sup> Evidence showing that a telegram was received at the company's office at the place to which it was addressed, at a time when, if delivered promptly, the addressee could have reached his father in his lifetime, imposes upon the company the burden of showing facts which will excuse the failure to deliver in proper time.<sup>122</sup> A telegraph company receiving a prepaid telegram in Georgia for transmission to a point in another State, which was never delivered to the addressee, has the burden of showing that it was transmitted from the Georgia office with due diligence, and that non-delivery was due to default or some other cause arising beyond the limits of the State, in order to escape liability for the statutory penalty for negligence in transmission.<sup>123</sup>

### § 2519. Evidence with Respect to Making Claim for Indemnity.—

If the plaintiff introduces in evidence the telegram, and it is found to contain a provision requiring a claim in writing to be presented within sixty days after the message is filed for transmission, and if his action was not commenced within the sixty days, he proves himself out of court, and can not recover.<sup>124</sup> In another jurisdiction the failure of one claiming damages against a telegraph company for negligent delay in the transmission of a dispatch to present a written claim to the company within the time required by the contract of transmission is an affirmative defense, and must be proved by the company if relied upon.<sup>125</sup> It has been held that, where a person, who

<sup>121</sup> *Western Union Tel. Co. v. Bennett*, 1 Tex. Civ. App. 558; s. c. 22 S. W. Rep. 699.

<sup>122</sup> *Western Union Tel. Co. v. Smith*, 88 Tex. 9; s. c. 30 S. W. Rep. 549.

<sup>123</sup> *Western Union Tel. Co. v. Howell*, 95 Ga. 194; s. c. 22 S. E. Rep. 286. It has been held that, in an action against a telegraph company for delay in delivering a telegram announcing the dangerous illness of the plaintiff's father, after the plaintiff has shown that the message was received at the terminal office in time for him to have reached his father before his death if the message had been promptly delivered, and that it was not so delivered, the defendant has the burden of showing the reason for its failure to deliver, and that it used such diligence to deliver as an ordinarily prudent person would have used considering the information contained in the message: *Western*

*Union Tel. Co. v. Smith*, 88 Tex. 9; s. c. 30 S. W. Rep. 937.

<sup>124</sup> *Lewis v. Western Union Tel. Co.*, 117 N. C. 436; s. c. 23 S. E. Rep. 319.

<sup>125</sup> *Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192. Compare *ante*, § 2429, *et seq.* A sender of a telegram complained to the operator of a mistake that had been made in its transmission, and was directed to the principal office of the company, where he was informed by the clerk in charge that the office manager was busy, and was requested to make his business known to the clerk, who would take the complaint down in writing. The complaint was accordingly taken down in writing, and in the presence of the sender handed to a person represented to be the attorney of the company, who said he would investigate the matter, and who subsequently wrote the sender, on a letter form of the company, that



has suffered loss by the neglect of a telegraph company to deliver a message, serves upon the agent of the company a written demand for damages, and gives the agent a copy thereof, but keeps the original, on which the agent accepts service in writing, he may *prove the contents thereof by parol*, where the loss of the original is shown.<sup>126</sup>

§ 2520. **Admissibility of the Message Sent or Delivered.**—In an action for damages for delay in delivering a telegram, the telegram which was sent is, of course, competent evidence.<sup>127</sup>

§ 2521. **Secondary Evidence of the Contents of Telegrams.**—As in cases of other writings, proof of the loss of a telegram is a necessary foundation to the admission of parol evidence of its contents.<sup>128</sup> It has been held that the testimony of the operator in charge of the defendant's office from which a telegram was sent, that he sent away all the papers found there shortly after the telegram was sent, and that he has been informed that they were destroyed, is not competent to show the destruction of the telegram for the purpose of admitting parol evidence of its contents.<sup>129</sup> The reason of the rule is thus stated by Mr. Justice Clopton, citing the authorities in the margin: "Ordinarily the declarations of the person who last had possession of a writing are not receivable as evidence of its loss if he be alive, and in the jurisdiction of the court. There are cases in which the declarations of a person to whom it was last traced, to the effect that he did not have the instrument, or to whom he had delivered it, have been received for the purpose of showing that the party had prosecuted a diligent search.<sup>130</sup> Though, as the sufficiency of the preliminary proof is for the court, it may not be necessary to preserve the strict rule between direct and hearsay evidence, it is not so far relaxed as to admit hearsay evidence to show the fact of search, or the destruction of the writing by the declarant."<sup>131</sup> It was, therefore, held not proper to allow a witness, who had been a telegraph operator of the defendant, to testify, not from his own knowledge, but from information

his claim for compensation was rejected. It was held, in an action against the company, that there was sufficient evidence *prima facie* to establish the fact that the complaint reached the defendant, and that the persons dealing with the sender were authorized to act and speak for it: *Bennett v. Western Union Tel. Co.*, 18 N. Y. St. Rep. 777; s. c. 2 N. Y. Supp. 365.

<sup>126</sup> *Western Union Tel. Co. v. Col-*

*lins*, 45 Kan. 88; s. c. 25 Pac. Rep. 187.

<sup>127</sup> *Western Union Tel. Co. v. Smith* (Tex. Civ. App.), 26 S. W. Rep. 216 (no off. rep.).

<sup>128</sup> *Whilden v. Bank*, 64 Ala. 1.

<sup>129</sup> *American Union Tel. Co. v. Daughtry*, 89 Ala. 191; s. c. *sub nom.* *American Union Tel. Co. v. Daughtry*, 7 South. Rep. 600.

<sup>130</sup> *Reg. v. Kenilworth*, 53 E. C. L. 642.

<sup>131</sup> *Whart. Ev.*, § 150.



received from others, that the papers of the telegraph company had been sent from Mobile to New York and sold to a paper mill,—for the purpose of letting in parol evidence of the contents of a telegram.<sup>132</sup> In an action against a telegraph company for failure to deliver a message, it has been held not error to admit a copy of the message, properly identified, fourteen months after its receipt for transmission by the company, where it is first shown by the manager at the receiving office that the original is not in his office, nor under his control, and that, by the rules of the company, original messages are retained in the office where received for six months, and are then sent to Chicago and destroyed.<sup>133</sup> The testimony of the sender of a telegram, as to its contents, is admissible upon proof that the original is beyond the jurisdiction of the court.<sup>134</sup> Where the question is as to the contents of a telegraph message which was delayed in delivery, the message which was delivered is admissible in evidence without producing the message which was sent for that purpose.<sup>135</sup>

§ 2522. **Other Points of Evidence.**—In an action against a telegraph company for negligence in the transmission of a message, evidence is inadmissible against the company, that, because of the alleged negligence, one of its officers made a *deduction from the pay* of one of its operators.<sup>136</sup> Where the action is brought by the addressee of the message who seeks to recover damages for a mistake in transmitting it, whereby he was induced to make certain purchases which he otherwise would not have made,—he may, it has been held, show *how he understood it*, and may testify that, on the faith of his understanding of it he made the purchases.<sup>137</sup> But, in such an action, the declarations of the plaintiff's brokers as to the *reason* why they did not buy stock, on the receipt of a *letter* ordering its purchase, are not admissible in favor of their principal, not being a part of the *res gestae* in regard to the contract with the telegraph company to send the message.<sup>138</sup> In an action for damages for delay in delivering a telegram, evidence of the sending of, and delay in deliver-

<sup>132</sup> American Western Union Tel. Co. v. Daughtery, 89 Ala. 191; s. c. 7 South. Rep. 660.

<sup>133</sup> Western Union Tel. Co. v. Collins, 45 Kan. 88; s. c. 25 Pac. Rep. 187.

<sup>134</sup> Western Union Tel. Co. v. Smith (Tex. Civ. App.), 26 S. W. Rep. 216 (no. off. rep.).

<sup>135</sup> Conyers v. Postal Tel. Cable Co., 92 Ga. 619; s. c. 19 S. E. Rep. 253.

<sup>136</sup> Grinnell v. Western Union Tel.

Co., 113 Mass. 299; s. c. 18 Am. Rep. 485.

<sup>137</sup> Aiken v. Western Union Tel. Co., 69 Iowa 31.

<sup>138</sup> United States Tel. Co. v. Wenger, 55 Pa. St. 262; s. c. 93 Am. Dec. 751. Conflicting evidence on which a jury were justified in finding that an application was made to the defendant company for the transfer of money to L., and not to S.: Western Union Tel. Co. v. Simpson, Tex. 423; s. c. 11 S. W. Rep. 335.



ing, a *prior telegram* upon which the suit is in part based, has been held admissible, although plaintiff fails to show a right to recover growing out of that telegram.<sup>139</sup> In an action to recover damages for delay in delivering a telegram, where the defense was that the wires of the defendant were down, it was held admissible to prove a *custom* of the defendant of entrusting its messages to another company for transmission under such circumstances,—for the purpose of showing that it was not impossible for the defendant to transmit the message, even if its wires were down.<sup>140</sup> Where the action is for an error in transmitting a message, evidence of the *habits and reputation* of the defendant's agent, to whom the message was delivered and read, has been held admissible, although he himself did not transmit it.<sup>141</sup> For the purpose of showing damages for failure to deliver a telegram to an attorney in another State, testimony that, by the laws of that State, he would have been able to have saved a debt by attachment, can not be excluded on the ground that the statutes of that State are not pleaded.<sup>142</sup>

#### ARTICLE IV. OTHER MATTERS OF PROCEDURE.

##### SECTION

2525. Service of process on telegraph companies.

2526. Questions of law and fact.

2527. Instructions to juries in these cases.

##### SECTION

2528. Rulings on requests for instructions.

2529. Immaterial special findings.

<sup>139</sup> *Western Union Tel. Co. v. Bennett*, 1 Tex. Civ. App. 558; s. c. 21 S. W. Rep. 699.

<sup>140</sup> *Pacific Postal Tel. Co. v. Fleischer*, 66 Fed. Rep. 899.

<sup>141</sup> *Western Union Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67; s. c. 26 S. W. Rep. 478.

<sup>142</sup> *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246; s. c. 34 N. E. Rep. 581. Non-delivery of a telegram addressed to a husband and wife is not proved by testimony of the wife alone that *she* never received it: *Western Union Tel. Co. v. Barnes*, 95 Tenn. 271; s. c. 32 S. W. Rep. 207. In an action by the addressee of a telegram, informing him that his father had been fatally hurt, and urging him to come home to his father if possible,—the telegram itself sufficiently shows that the addressee was the beneficiary of it, so as to entitle him to maintain the action under the Texas

practice, and no other evidence is necessary for that purpose: *Western Union Tel. Co. v. Randles* (Tex. Civ. App.), 34 S. W. Rep. 447 (no off. rep.). Evidence of the authority of a messenger boy, who presents a bill, to collect for a message other than one delivered by him, is necessary where it is sought to subject the company to a penalty for delay in delivering the message, under the Georgia statute providing that a company shall not be liable for any omission on its part until payment or tender of the toll for sending a message: *Western Union Tel. Co. v. Power*, 93 Ga. 543; s. c. 21 S. E. Rep. 51. Inadmissibility of a letter written by an attorney of a telegraph company containing only an offer of *amicable settlement* or *compromise*: *Western Union Tel. Co. v. Thomas*, 7 Tex. Civ. App. 105; s. c. 26 S. W. Rep. 117.



§ 2525. **Service of Process on Telegraph Companies.**—The manner of serving judicial process upon telegraph companies is governed by statutes, in all the States (it may be assumed), which statutes do not relate specially to telegraph companies, but to corporations generally; though there are many relating specially to the service of process upon railroad corporations, and possibly some relating specially to the service of process upon telegraph corporations.<sup>143</sup> Service of summons, in an action against a telephone and telegraph company, on its general superintendent, an officer having general charge of one of its departments, is a service on a “managing agent,” within the meaning of a statute<sup>144</sup> providing that service of a summons upon a domestic corporation must be made by delivering a copy thereof, within the State, “to the president or other head of the corporation, \* \* \* or a director or managing agent.”<sup>145</sup>

§ 2526. **Questions of Law and Fact.**—It is sometimes said in judicial opinions that, upon an undisputed state of facts, the question whether a party was guilty of negligence is a question *for the court*.<sup>146</sup> But this is not true in all cases, and it is perhaps not true in a majority of cases. It is true only in those cases where not only are the facts undisputed, but where the inferences to be drawn from those facts are unequivocal, so that fair-minded men, applying their average experience, ought not to differ as to the conclusion to be reached.<sup>147</sup> On the other hand, judicial statements are sometimes met with, to the effect that negligence is a question for the jury, where there is *any* evidence tending to show it.<sup>148</sup> There is no principle of American remedial justice that can be stated in such general terms. There must be something more than a bare scintilla of evidence tending to show negligence. The evidence must be reasonably sufficient to warrant the jury in coming to the conclusion, and to warrant the court in sustaining their verdict upon a motion for a new trial. There is no doubt, however, that in those American jurisdictions where the independence of juries is upheld, the question whether there has been due diligence in delivering a telegram, is generally a question of fact for the jury.<sup>149</sup> We find that it has been held a question for the

<sup>143</sup> For a detailed examination of the subject of the service of process on corporations, see 6 Thomp. Corp., § 7502, *et seq.*

<sup>144</sup> N. Y. Code Civ. Proc., § 431.

<sup>145</sup> Barrett v. American Telephone & Co., 10 N. Y. Supp. 138.

<sup>146</sup> Western Union Tel. Co. v. McDaniel, 103 Ind. 294; s. c. 1 West. Rep. 273.

<sup>147</sup> Wabash R. Co. v. Brown, 152 Ill. 484; s. c. 39 N. E. Rep. 273.

<sup>148</sup> Western Union Tel. Co. v. Thorn, 64 Fed. Rep. 287; s. c. 12 C. C. A. 104; 48 Am. & Eng. Corp. Cas. 411.

<sup>149</sup> Western Union Tel. Co. v. Mitchell, 91 Tex. 454; s. c. 44 S. W. Rep. 274; 40 L. R. A. 209.



jury:—Whether the delivery of a telegram the next morning after its receipt at a small town where the company kept no messenger, and where its agent usually employed an expressman or a liveryman to deliver the message,—was effected without unreasonable delay;<sup>150</sup> whether the agent of a telegraph company exercised reasonable diligence in attempting to deliver a message, where he testified that he rapped loudly and repeatedly upon the door of the addressee and received no response, and where the daughter of the addressee testified that she was in the house and had not retired at the time, and heard no noise at the door, and where the addressee and his wife testified that they were in the house and heard no noise, and that they would have been likely to have heard it had there been any;<sup>151</sup> whether the telegraph company used reasonable diligence to deliver a message, where the evidence was to the effect that its messenger boy, to whom the telegram had been intrusted for delivery, went to the general delivery window of the postoffice, which was closed, and saw no light in the postoffice, but might have learned the residence of the addressee if he had gone to the back door of the postoffice to inquire, as was customary among messengers of the company when the delivery window was closed;<sup>152</sup> whether the duty of a telegraph company promptly to deliver an urgent message was discharged, where the evidence showed that its messenger, immediately on receipt of a message, at 6 o'clock in the evening, started out to find the addressee, and continued his search until long after the end of the office hours, but the length of his search was not shown;<sup>153</sup> whether a son, after learning of his mother's dangerous illness, was guilty of negligence in failing to take the first train to the place where she was, instead of waiting for an answer to a telegram sent by him saying that he would go at once if she was no better, to which he had no reply, in consequence of which he did not go in time to see her before her death;<sup>154</sup> whether the addressee of a telegram had knowledge of a *condition printed thereon*, requiring all *claims for damages* to be presented to the company within sixty days, where the evidence showed that he had used the blanks of the company containing such condition, for a number of years, but he testified that he

<sup>150</sup> *Wittmore v. Western Union Tel. Co.*, 71 Fed. Rep. 651.

<sup>151</sup> *McPeck v. Western Union Tel. Co.*, 107 Iowa 356; s. c. 78 N. W. Rep. 63; 43 L. R. A. 214; 5 Am. Neg. Rep. 314.

<sup>152</sup> *Lyne v. Western Union Tel. Co.*,

123 N. C. 129; s. c. 5 Am. Neg. Rep. 85; 31 S. E. Rep. 350.

<sup>153</sup> *Western Union Tel. Co. v. Eskridge*, 7 Ind. App. 208; s. c. 33 N. E. Rep. 258.

<sup>154</sup> *Western Union Tel. Co. v. Lydon*, 82 Tex. 364; s. c. 11 Rail. & Corp. L. J. 203; 18 S. W. Rep. 701.



never read the conditions and did not know what they were.<sup>155</sup> But whether a regulation of a telegraph company closing its office for the night delivery of messages, is a *reasonable regulation*, is a question for the court, not for the jury.<sup>156</sup>

§ 2527. **Instructions to Juries in these Cases.**—Where the negligence specifically charged in the petition is *failure to find* the address of the message after the message has been transmitted, and the petition states that the messenger was promptly sent to the place of final delivery, the defendant is entitled to an instruction explaining to the jury that there is no question about *delay* in transmitting the message over the wire.<sup>157</sup> Where it was shown that there was the sign of the defendant company over the door of the office where the message was received, and the operator testified that he paid over all receipts to the treasurer of said company, it was held not error to charge that the office is, *prima facie*, an office of the defendant.<sup>158</sup> An instruction authorizing the jury to find a verdict for the plaintiff, a woman, awarding damages for any mental suffering occasioned by being deprived of the privilege of attending the burial of her sister, is proper, although there is no express evidence of mental suffering, as that may be inferred from the fact that she was deprived of such privilege.<sup>159</sup> An instruction to the effect that the plaintiff, a woman, may recover such sum as will compensate her for any physical suffering occasioned by being deprived of the privilege of attending the burial of her sister, is erroneous where there is no evidence to show physical suffering, as it can not be inferred from the mere fact that she was denied such privilege.<sup>160</sup> Where the plaintiff, who was the addressee of the message, had, about two months before the message was sent, moved to a different locality in the same town, distant from one-fourth to one-half a mile from the place to which the telegram was addressed,—an instruction to the effect that if the defendant telegraph company received the message, as claimed by the plaintiff, and did not deliver it within a reasonable time, the burden of proving diligence was on the defendant, and that the defendant must prove, by a preponderance of the testimony, that it used such care, caution and means as a prudent person would have exercised, in order to find the plaintiff and deliver the message,—was held erroneous. There was

<sup>155</sup> *Webbe v. Western Union Tel. Co.*, 169 Ill. 610; s. c. 48 N. E. Rep. 670; 61 Am. St. Rep. 207; rev'g s. c. 64 Ill. App. 331.

<sup>156</sup> *Western Union Tel. Co. v. Cridder*, 21 Ky. L. Rep. 1336; s. c. 54 S. W. Rep. 963.

<sup>157</sup> *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c. 10 Am. St. Rep. 772.

<sup>158</sup> *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; s. c. 12 S. E. Rep. 427.

<sup>159</sup> *Western Union Tel. Co. v. Thompson*, 18 Tex. Civ. App. 609; s. c. 45 S. W. Rep. 422.

<sup>160</sup> *Western Union Tel. Co. v. Thompson*, 18 Tex. Civ. App. 609; s. c. 45 S. W. Rep. 429.



evidence that *some* effort had been made to deliver the telegram. The court held that it was error to give such a charge without some explanation as to when the burden of proof would shift.<sup>161</sup>

§ 2528. **Rulings on Requests for Instructions.**—In an action against a telegraph company for delay in delivering a message announcing the serious illness of the mother of the plaintiff, an instruction to the effect that the company is not liable for the plaintiff's mental suffering and distress of mind caused by the fact of his mother's death, but only to the extent that such suffering was augmented by the delay preventing his presence at her death and funeral,—should be given.<sup>162</sup> An instruction that a contract to send a telegraph message must have been made with a mutual understanding that the addressee lived outside the free delivery limits of the place of delivery, to entitle the plaintiff to recover for delay in delivering the same, was held to have been properly refused, where the evidence showed that both the sender and the telegraph agent knew the addressee's post-office address, but did not know whether he lived in the town or outside of it, and the sender made arrangements to have the message delivered, agreeing to pay any necessary expense.<sup>163</sup>

§ 2529. **Immaterial Special Findings.**—In such an action, the appellate court will not reverse the judgment of the trial court because of an incorrect finding to the effect that "defendant's telegraph line was not in good, perfect order," where there is other evidence of negligence.<sup>164</sup>

<sup>161</sup> Western Union Tel. Co. v. Smith (Tex. Civ. App.), 26 S. W. Rep. 216.

<sup>162</sup> Western Union Tel. Co. v. Wingate, 6 Tex. Civ. App. 394; s. c. 25 S. W. Rep. 439.

<sup>163</sup> Western Union Tel. Co. v. Warren (Tex. Civ. App.), 36 S. W. Rep. 314 (no off. rep.). In an action for nondelivery of a telegraphic message, the addressee of which was well known and for three years had resided in the place, an instruction that if the messenger boy made numerous and repeated inquiries in the place as to the whereabouts of the addressee, and that such inquiries of the merchants in the place and other persons likely to have knowledge of the whereabouts of the addressee were prosecuted from day to day, and if these efforts were such as a reasonably prudent person would have made,—the defendant was not liable, was properly refused, for the reason that it specified too particularly the acts of diligence relied upon, and as hence being a charge upon the

weight of evidence: Western Union Tel. Co. v. Karr, 5 Tex. Civ. App. 60; s. c. 24 S. W. Rep. 302. If the hypothesis of facts embraced in this instruction was presented by the evidence, then the only ground on which the refusal of the instruction could be upheld, would be the danger of its misleading the jury in a correct result. - - An instruction submitting to the jury the issue as to free delivery limits for telegrams is properly refused in an action for negligent failure to deliver a message, where the evidence does not show that there was any provision in the contract that messages would not be delivered beyond such limits without special compensation, and the only issue on which there is a conflict in the evidence is as to the delivery of the message to the company for transmission: Western Union Tel. Co. v. Lyles (Tex. Civ. App.), 42 S. W. Rep. 636 (no off. rep.).

<sup>164</sup> Turner v. Hawkeye Tel. Co., 41 Iowa 458; s. c. 20 Am. Rep. 605, 608.



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